Appeal No. 20-3114

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee

and

KEVIN B. DUFF, RECEIVER,
Court-Appointed Receiver-Appellee

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION and CITIBANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., MULTIFAMILY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-SB48,
Appellants

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Z. Lee
1:18-cv-5587

RECEIVER'S MOTION TO DISMISS APPEAL

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INTRODUCTION

Receiver-Appellee Kevin B. Duff, by and through his attorneys, hereby moves to dismiss this appeal for lack of jurisdiction. The Appellants, Fannie Mae and Citibank, are two receivership claimants who filed a notice of appeal of an interlocutory decision of the District Court approving the Receiver's sale of two real estate properties that are part of the Receivership Estate. (*See* Dkt. No. 825 (attached hereto as Ex. 1)) The Appellants and other lender claimants submitted competing, purportedly secured claims relative to the two properties that the District Court approved for sale. The claims process to adjudicate their claims is under consideration by the District Court and has not yet been completed. There is no final judgment from which to appeal. Instead, the Appellants allege that jurisdiction for this interlocutory appeal exists under 28 U.S.C. § 1292(a)(2) on the basis that the District Court's order approving these two property sales is a refusal to wind-up the receivership. But Section 1292(a)(2) does not provide jurisdiction to this Court over this appeal. Controlling authority from the Seventh Circuit and the language of the statute show that an interlocutory order approving the sale of properties for the purpose of preserving funds for distribution to receivership claimants is not appealable under Section 1292(a)(2). For these reasons, those set forth herein, and those reflected in the record, the Receiver now moves for dismissal of this appeal.

BACKGROUND AND PROCEDURAL HISTORY

Father and son, Jerome Cohen and Shaun Cohen, were the owners and operators of EquityBuild, Inc., EquityBuild Finance, LLC and numerous affiliated entities which owned and operated various real estate holdings, principally on the southside of Chicago. (Dkt. No. 1, at 1) The Cohens claimed that they had a method to locate undervalued property and solicited loans and investments with the promises of large returns. (*Id.* at 1-2) But the business was a massive fraud. (*Id.*) The Cohens were operating a Ponzi scheme and violating federal securities laws which involved, *inter alia,* over-inflating the values of properties to make them attractive to lenders and investors, creating multiple secured interests in the same properties, and taking various other actions to ensure they received fresh monies to pay the obligations to various lenders and investors needed to keep the scheme alive. (*Id.*)

The United States Securities and Exchange Commission commenced this action on August 15, 2018 to stop the Defendants' scheme and securities violations. (*Id.* at 3) A consent judgment was entered a short time thereafter. (Dkt. No. 40) The SEC sought and the District Court appointed a receiver to take charge of EquityBuild's business and assets. (Dkt. No. 16)

The receivership is complex and substantial, involving 116 real estate properties, more than 1,600 units, over 2,000 claims submitted by about 900 claimants, and in excess of $100,000,000 received by the Cohens. (*See, e.g.,* Dkt. No. 638, at 8, 18-20; Dkt. No. 720, at 1; Dkt. No. 107, at 10) Maintenance, preservation,

and orderly disposition of the properties has been a primary and substantial focus of the Receiver. (*See, e.g.,* Status Reports, Dkt. Nos. 107, 258, 348, 467, 567, 624, 698, 757, 839) Most of the properties are multi-family residential buildings in various states of repair and disrepair. (*See, e.g.,* Dkt. No. 107, at 21-22; Dkt. No. 348, at 9-12; Dkt. No. 638, at 3) The COVID-19 pandemic and its impact on the economy in general, and rental income and risk to the real estate market in particular, has heightened the challenges of maintaining and preserving these properties and created an even greater impetus to sell them expeditiously. (*See, e.g.,* Dkt. No. 699, at 4)

EquityBuild's records, debts, and the assertions of its lienholders have shown that central to the Cohens' fraud was purposeful confusion and obfuscation of secured interests and the use of inflated property values. (*See, e.g.,* Dkt. No. 348, at 19; Dkt. No. 720, at 1; Dkt. No. 749, at 3) The Cohens would, for example, offer the same lending opportunity twice, telling each lender they were in first position. (*E.g.,* Dkt. No. 638, at 4) The Cohens' scheme resulted in mortgages on properties that in the aggregate were sometimes multiples of the actual value of the properties. (*Id.*) The Cohens created a labyrinthian network of over 158 separate corporate entities as cover for their activities. (*See* Dkt. No. 241, at 3) And at the heart of this complexity are competing, purportedly secured claims asserted by both institutional lender claimants and investor lender claimants against properties in the estate. (*See* Dkt. No. 757, Exhibit 8; *see also* Dkt. No. 693, Exhibit 1 (claims organized by property))

The Receiver has followed a deliberate and orderly plan to market and sell the properties, consistently approved by the District Court. (Dkt. No. 166; *see also* Dkt. No. 790, at 11 (and record citations therein)) The Receiver also has requested and the District Court has ordered that the proceeds from the sales of properties with competing liens be segregated in separate accounts with liens attaching to the proceeds in the same priority as existed against the property until distribution of the proceeds can be determined in accordance with the claims process and approved as part of a distribution plan. (Dkt. No. 749, at 41-42)

In addition, since early 2019, the Receiver has sought to implement a claims process, including with respect to the Appellants' claims. (*E.g.,* Dkt. Nos. 241, 638) The amended claims bar date was December 31, 2019. (Dkt. No. 574) The District Court has not yet fully resolved all matters relating to the claims process, but has said that all issues with regard to each of the properties will be addressed and adjudicated during the claims process. (Dkt. No. 863 (identifying remaining issues to be resolved); Dkt. No. 825, at 5; Docket No. 806, at 2-4, 7/15/2020 Tr., at 45:8-13)

The two properties that are the subject of this appeal are also the subject of competing claims submitted to the Receiver. (*See* Dkt. No. 757, Exhibit 8; *see also* Dkt. No. 693, Exhibit 1) The District Court has repeatedly said that all claims will be addressed and resolved through the claims process that it is overseeing and the Receiver will administer. (*See, e.g.,* Dkt. No. 825, at 5) Fannie Mae and eleven (11) investor claimants submitted purportedly secured claims against 1131-41 E. 79th Place. (*See* Dkt. No. 757, Exhibit 8; *see also* Dkt. No. 693, Exhibit 1) Similarly,

Citibank and twenty-five (25) investor claimants submitted purportedly secured interest claims against 6250 S. Mozart. (*Id.*) In addition to the competing mortgages and other claims on the two properties at issue, other issues regarding Appellants' liens remain to be resolved during the claims resolution process, including without limitation the alleged balance due on the loan, the propriety of all of the component amounts of the claims asserted, whether the asserted lien should be subordinated to an unsecured position, and the amount of the Receiver's administrative lien which the District Court has allowed on the properties. (Dkt. No. 825, at 5)

On October 26, 2020, the District Court entered the order that is the subject of this appeal, which granted the Receiver's ninth's motion for approval of sale of the two properties in which the Appellants and other claimants claim a secured interest. (Dkt. No. 825, at 4-6) On October 27, 2020, the Appellants filed a notice of appeal, asserting Section 1292(a)(2) as the jurisdictional basis for this Court's review of that interlocutory order. (Docket No. 831) The Appellants' docketing statement also identifies Section 1292(a)(2) as the jurisdictional basis for this appeal. The Receiver moves to dismiss this appeal on the ground there is no jurisdiction.

ARGUMENT

"In analyzing its appellate jurisdiction, an appellate court looks first to the final judgment rule. Then, if the appealed order does not qualify as a final decision, the court must determine whether any statutory exceptions or other bases of jurisdiction support appellate jurisdiction." *Wingerter v. Chester Quarry Co.*, 185

F.3d 657 (7th Cir. 1998). Here, there is no final judgment; nor do the Appellants suggest otherwise. Thus, the sole inquiry is whether there is a statutory basis for appellate jurisdiction. The Appellants, Fannie Mae and Citibank, have asserted 28 U.S.C. § 1292(a)(2) as the basis for this Court's jurisdiction over their appeal of an interlocutory order of the District Court.

Section 1292(a) provides federal appellate courts with limited jurisdiction over certain interlocutory orders. Specifically, Section 1292(a)(2), provides for appellate jurisdiction of appeals from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property…." 28 U.S.C. § 1292(a)(2). To that end, the Appellants assert in their docketing statement that jurisdiction purportedly exists here because:

> By overruling the Appellants' Objection and granting the Ninth Sale Motion, the District Court has refused to take the steps necessary to accomplish the "wind up" of this estate. In other words, the order granting the Ninth Sale Motion and denying the Mortgagees' Objection is a "refusing order[]" to take steps to accomplish the purpose of the wind up of the estate. 28 U.S.C. §1292(a)(2).

(Appeal Dkt. No. 2, at 4)

The strained effort by Appellants to characterize an order approving the sale of estate property as a refusal to wind up the estate in order to create jurisdiction is belied by face of the order itself and has already been rejected by this Court (and other circuits). Instead, the jurisdiction provided under Section 1292(a)(2) has been interpreted narrowly and limited to its literal meaning.

In *U.S. v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014), a receiver was appointed by the district court. The actions of the receiver and related court orders led to numerous appeals being filed, including an appeal from an order of the district court approving of certain property sales. The Seventh Circuit held that an "appeal … challenging the district court's approval of property sales by the receiver … is not within our jurisdiction" despite the fact that "an interlocutory order appointing a receiver is appealable, as is an interlocutory order 'refusing to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.'" *Antiques,* 760 F.3d at 671 (citing 28 U.S.C. § 1292(a)(2)). The Court explained:

> Parties in other cases have argued that this additional statutory language authorizes appeals from orders en route to winding up the receivership, which could include the sale order in the collection phase of this case. But that would both strain the statutory language and make anything the receiver did appealable immediately, which could flood the courts of appeals with interlocutory appeals. We therefore agree with the courts that have held that appellate jurisdiction over interlocutory orders involving receivers is limited to the three types of order specified in section 1292(a)(2): orders appointing a receiver, orders refusing to wind up a receivership, and orders refusing to take steps to accomplish the purposes for winding up a receivership.

Antiques, 760 F.3d at 671-72.

The Court's analysis and reasoning in *Antiques* is equally applicable here. Relabeling the District Court's order approving the sale of properties as an order refusing to wind up a receivership "strain[s] the statutory language and [would] make anything the receiver did appealable immediately." *Antiques*, 760 F.3d at 672.

Should the Court find jurisdiction in a situation like this one, the Court will open itself to a flood of appeals from these and other claimants on the basis that the District Court is refusing to rule its way and/or provide it immediate relief. There are nearly 900 claimants in this action alone. This Court's narrow and careful interpretation of Section 1292(a)(2) reflects the conclusion that Congress did not want to burden the U.S. Courts of Appeal with ongoing supervision of every action a district court or receiver might take. But that is precisely what the Appellants seek here through their contorted characterization of the District Court's order and Section 1292(a)(2). Other circuits considering the scope of Section 1292(a)(2) have also narrowly interpreted the statute and "restrict[ed] it to orders *refusing* to direct actions." *SEC v. Am. Principals Holdings, Inc.,* 817 F.2d 1349, 1350 (9th Cir. 1987) (emphasis supplied).

A narrow reading of Section 1292(a)(2) in the context of federal equity receiverships is consistent with a district court's broad judicial discretion to manage a complex receivership and determine the appropriate path to take in addressing and resolving claims against the assets of the estate, in accordance with due process and judicial economy. *See, e.g., SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010); *SEC v. Enterprise Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *SEC v. Huber*, 702 F.3d 903, 908 (7th Cir. 2012); *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 841 (7th Cir. 2015)*; SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986) ("[A] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the

receivership is extremely broad."); *SEC v. Quan*, 870 F.3d 754, 760 (8th Cir. 2017) (noting the "broad discretionary power" of a district court overseeing a receivership).

This Court's *Antiques* decision also recognized that other circuits follow the same interpretation and reject the type of expansive jurisdictional argument advanced here by the Appellants. *See, e.g., State Street Bank & Trust Co. v. Brockrim, Inc.,* 87 F.3d 1487, 1490-91 (1st Cir. 1996); *Commodity Futures Trading Comm'n v. Walsh,* 618 F.3d 218, 225 n.3 (2d Cir. 2010); *SEC v. Black,* 163 F.3d 188, 194-95 (3d Cir. 1998); *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015); *Plata v. Schwarzenegger,* 603 F.3d 1088, 1099 (9th Cir. 2010).

For example, a similar analysis was utilized by the First Circuit facing an assertion of jurisdiction on an appeal arising from the district court's approval of the sale of certain properties, which the First Circuit recognized did not fall within Section 1292(a)(2). The First Circuit, like this Court, noted that the such an order approving the sale "in no way represents a refusal to wind up the receivership or to take steps to accomplish the purposes thereof, § 1292(a)(2) does not apply." *State Street Bank & Trust Co.* at 1490-91.

Similarly, in *Plata v. Schwarzenegger,* the district court appointed a receiver over the California Department of Corrections and Rehabilitation to improve prisoner health care. The Receiver created a construction plan for additional hospital beds (a plan that would cost 8 billion dollars over time). The state of California filed a motion terminate the plan, which the district court denied. An appeal was taken under Section 1292(a)(2), but the Ninth Circuit found it lacked

jurisdiction, stating that "the district court's refusal to block the Receiver's construction plan (or to deny the Receiver the power to plan, as the State now presents it) is not a refusal to terminate the receivership, nor is it a refusal to take a step to accomplish the winding up of the receivership. *Plata*, 603 F.3d at 1099 (citing *Am. Principals Holdings, Inc.,* at 1350-51 (interpreting § 1292(a)(2)'s "take steps to accomplish the purposes thereof" to apply only to orders refusing to take steps to wind up a receivership)).

The Tenth Circuit also has noted, in a decision not addressing jurisdiction under Section 1292(a)(2), that a party's perfected security interests are not impacted or invalidated where the receiver was authorized to sell property with liens attaching to the proceeds and determinations as to validity and priority were to occur at a later date. *See SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). Here, the Receiver has taken steps to ensure that any putative perfected security interests of the Appellants and other lender claimants would attach to the proceeds of the sales of the properties in question precisely because the District Court has made clear that validity and priority determinations will be addressed within its claims resolution process. (*See, e.g.,* Dkt. No. 806, at 4, 7/15/2020 Tr., at 45:8-13); Dkt. No. 749, at 41-42 ("Pending the completion of the claims process and a to-be-approved distribution plan, the proceeds from the sales of the properties subject to this motion will be held in separate subaccounts established by the Receiver.…"); Dkt. No. 825, at 5 ("The Court also has ruled that an orderly claims process is the most efficient and equitable method to resolve competing claims of investors and

institutional lenders … and that a claims process is appropriate even for properties where a Lender has a recorded mortgage but the investors do not.") (citations omitted))

The Appellants' reliance upon *SEC v. Janvey*, 404 F. App'x 912 (5th Cir. 2010) is of no moment. As an initial matter, *Janvey* cannot supplant controlling Seventh Circuit authority. But *Janvey* is not even persuasive because it provides no substantive analysis of the issue. It only accepted that it had jurisdiction on the basis of *U.S. v. "A" Mfg. Co.*, 541 F.2d 504, 506 (5th Cir. 1976), a decision which is also relied upon by Appellants here (Docket 832, at 3). But *"A" Mfg.* is not controlling authority in the Fifth Circuit and is viewed as an aberration outside the Fifth Circuit, as shown below. Nor has *Janvey* been cited by any other court for the point the Appellants offer it here. And, even if *Janvey* had weight when it was issued (it does not), the Fifth Circuit's subsequent *published* decision in *Netsphere,* expressly rejected *"A" Mfg.* as binding precedent on the reach of Section 1292(a)(2). In *Netsphere*, the Fifth Circuit expressly embraced contrary authority in its own and sister circuits, including the Seventh Circuit's decision in *Antiques*. *Id.* at 332-33 & nn. 19-20, 25, 22, 28-29.

The *Netsphere* court first found that the "*A" Mfg.* court's entire treatment of Section 1292(a)(2) was non-precedential dicta. *Id.* at 333. The Fifth Circuit explained that the decision in *"A" Mfg.* was "relying more on cases interpreting the final-judgment doctrine" (which the Appellants' have not invoked here) in addressing "the question of whether an order by a receiver confirming a sale after

the fact is appealable under section 1292(a)(2)." *Id.* at 333. Because the *"A" Mfg.* court's holding was based on a different jurisprudential line, "[its] discussion of Section 1292(a)(2) could be removed without hindering the analytical basis of its conclusion." *Id.* at 333-34. The *Netsphere* court went on to find that, even assuming *"A" Mfg.'s* treatment of section 1292(a)(2) was a holding, and not *dicta*, that holding conflicted with an earlier line of Fifth Circuit precedent finding that interlocutory orders which take steps to accomplish the purpose of receiverships are *not* appealable under section 1292(a)(2), and thus the *Netsphere* court was bound to follow the previous precedent and not *"A" Mfg. Id.* at 334.

Accordingly, *Netsphere* confirmed that the Fifth Circuit has "refused to find jurisdiction over other orders issued in the course of a receivership, such as authorizing the execution of a lease by a receiver. So have our sister circuits." *Id.* at 332. The court explained:

> [A]s a matter of policy, this interpretation makes good sense. As we recognized in *Warren v. Bergeron*, the imposition of a receivership visits significant consequences: "To put a corporation or other entity into receivership is to wrest management and control from those entrusted by the owners, replacing them with a court-appointed trustee under court supervision. Because this action may cause great harm, Congress decided to make interlocutory orders appointing receivers appealable." *Orders entered in the normal course of a receivership do not visit such consequences. Moreover, to conclude otherwise would mean that "virtually any order of the receiver within the scope of its jurisdiction would be potentially appealable." Such a piecemeal approach to the appellate process would be disruptive and costly, both to the parties and the courts.*

Id. at 332-33 (footnotes omitted) (emphasis added).

The Appellants' attempt to get around this Court's binding decision in *Antiques* and the great weight of persuasive authority in other circuits by relabeling what is clearly a non-appealable interlocutory order *en route* to winding up a receivership as an order *refusing* to wind-up the receivership represents a legal and factual failure and a public policy nightmare. Through that lens, any action – or prioritization of actions – taken by a receiver or approved by a district court with which a claimant disagrees could be appealable under Section 1292(a)(2). Such an interpretation is contrary to the express language of 1292(a)(2), and is the antithesis of the narrow and strict statutory interpretation that this Court and its sister circuits have applied.

But the argument also ignores the extensive record below, which shows the District Court and Receiver taking active and numerous steps relative to the disposition of the properties and claims against them – including those subject to the order at issue. In fact, the District Court is in the midst of implementing a comprehensive process for addressing and resolving disputes (including priority) between claimants, steps which are the opposite of refusing to wind-up the receivership. (*See, e.g.,* Dkt. No. 825, at 5; *see also* Dkt. Nos. 574, 652, 726, 745) The District Court has made clear that all issues relating to the properties and their claims (including that of the Appellants) will be addressed in the claims process that is being implemented. (Dkt. No. 825, at 5; Dkt, No. 806, at 4, 7/15/2020 Tr., at 45:8-13) ("all issues with regard to a property should be resolved during the claims process, including any issues with regard to fraudulent transfer, inquiry notice.

Whatever issues there are, I want it all resolved when the property is up for adjudication during this claims process.")

The Appellants' true complaints are that the District Court has not yet resolved their claims[1] and that they simply disagree with the manner in which the Court and the Receiver are attempting to wind-up the receivership – an area in which the District Court enjoys broad discretion. (*See supra* at 8-9 (authorities confirming the District Court's broad discretion); *see also* Dkt. No. 718, at 5) Paradoxically, it is the recurring efforts of the Appellants to stop and slow the Receiver's progress on liquidating asserts and implementing a claims process that have delayed winding-up the Receivership.

CONCLUSION

For the reasons set forth herein, there is no appellate jurisdiction under Section 1292(a)(2) for this Court to undertake review of the District Court's interlocutory order. The Receiver respectfully requests that his motion to dismiss the appeal be granted.

[1] The Appellants submitted claims to the Receiver in connection with the claims process approved by the District Court. In connection with submitted their proof of claim forms, the Appellants submitted to the jurisdiction of the District Court and to the District Court's resolution of their claims. (Dkt. No. 241, Ex. 3, at 2; *see also id.* Section 10(a); Dkt. No. 349)

Dated: November 16, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael Rachlis

EXHIBIT 1

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

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	**Case No. 18 C 5587**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, And SHAUN D. COHEN,	)	**Judge John Z. Lee**
Defendants.	)	

ORDER

Before the Court are the Receiver's eighth and ninth motions to confirm the sale of certain real estate and for the avoidance of certain mortgages, liens, claims, and encumbrances [712] [749]; and the Receiver's second motion for restoration of funds expended for the benefit of other properties [749]. For the following reasons, these motions are granted.

STATEMENT

I. The Receiver's Eighth Motion to Confirm the Sale of Certain Real Estate [712]

The Receiver moves to confirm the sale of three apartment buildings in Chicago, located at 6949-59 South Merrill Avenue; 7600-10 South Kingston Avenue; and 7656-58 South Kingston Avenue. Eighth Mot. Confirm Sales at 3, ECF No. 712. Ventus Holdings, LLC ("Ventus") objects on the basis that it is willing to pay higher prices for the apartment buildings than those agreed to by

the Receiver and the proposed buyers. *See* Ventus's Obj., ECF No. 721; Ventus's Reply, ECF No. 746; Ventus's Supplemental Reply, ECF No. 763; *see also* Liberty EBCP, LLC's Obj., ECF No. 728 (objecting on the same basis); Thorofare Asset Based Lending REIT Fund IV, LLC's Obj., ECF No. 730 (objecting on the same basis).

In October and December 2019, the Receiver accepted contracts to sell the buildings at issue to Ventus for a total of $4,315,200, and the Court confirmed those sales in February and April 2020. *See* Feb. 21, 2020 Order, ECF No. 633; Apr. 1, 2020 Order, ECF No. 680. Ventus tendered ten percent of that amount—$431,520.00—as an earnest money deposit. Ventus's Obj. at 3. On April 20, 2020, however, Ventus informed the Receiver that it was unable to secure acquisition financing, that it could no longer raise the required equity from its investors, and that it "[could not] proceed with the acquisition of [the] properties." Apr. 20, 2020 Letter from Ventus to Receiver, ECF No. 739 at 13. Ventus added that it was "quite unfortunate that we could not complete these transactions." *Id.*

From there, the Receiver solicited and accepted the next best bids, ultimately signing contracts to sell the three properties for a total of $945,200 less than Ventus had agreed to pay for them. Reply Supp. Eighth Mot. Confirm Sales at 3, 6, ECF No. 739. On June 11, 2020, the Receiver moved to confirm the sales. Ventus subsequently objected, seeking to reinstate its old contracts in light of new financing it was pursuing. Ventus Obj. at 3 ("Ventus is in the process of securing alternative financing and has received, and approved, term sheets from a new

lender."). Ventus did not indicate that it could honor the earlier sale terms until two months after it backed out of the earlier deal, and over six weeks after the Receiver had found new purchasers for the buildings.

As the Receiver notes, Courts have consistently warned against setting aside transactions and disrupting the reasonable expectation of bidders, given the impairment of public confidence in the sales process that ensues from a lack of finality. *See, e.g.*, *In re Gil-Bern Indus., Inc.*, 526 F.2d 627, 628–29 (1st Cir. 1975) (reversing the decision to set aside a sale merely because a higher offer was received after the bidding deadline because, in the long run, this practice would be "penny wise and pound foolish" as creditors would suffer if "unpredictability discouraged bidders altogether" or at least "encourage[d] low formal bids."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 565 (8th Cir. 1997).

After Ventus stated unequivocally in April that it was backing out of the sale for the three apartment buildings, the Receiver acted reasonably in soliciting and accepting new, competitive bids. Given the need to maintain public confidence in the sales process relating to the Receivership Estate—to say nothing of continuing uncertainty that Ventus could go through with a sale this time around, *see* Pioneer Acquisitions' Mem. Supp. Eighth Mot. Confirm Sales at 2, ECF No. 748—the objections to the Receiver's eighth motion to confirm sales are overruled.[1] The motion is granted.

[1] Southside Property Group, LLC and Pioneer Acquisitions, LLC filed a joint motion requesting that the Court either strike Ventus's supplemental reply in opposition to the eighth motion to confirm sales, ECF No. 763, or else entertain Southside and Pioneer's arguments in response to that supplemental reply. Southside and Pioneer's Joint Motion

With that said, Ventus is granted leave to file a motion for return of its earnest money deposit within two weeks from the date of this order. *See* Ventus Obj. at 6. Responses to the motion will be due two weeks after that.

II. The Receiver's Ninth Motion to Confirm the Sale of Certain Real Estate [749]

Objections were filed against two of the fourteen properties contained in the Receiver's ninth motion for confirmation of sales.[2] *See* Obj. Ninth Mot. Confirm Sales at 6, ECF No. 769 (objecting to the sales of 1131-41 E. 79th Place and 6250 S. Mozart Avenue in Chicago). Here too, the Court finds the Lenders' objections unpersuasive and, therefore, grants the motion.

Most of the arguments by the two objecting Lenders, Citibank and Fannie Mae, were previously rejected by the Court. For instance, in the face of nearly identical challenges, the Court already approved the Receiver's credit bidding procedures, Oct. 4, 2019 Order at 4–6, ECF No. 540; approved the sales of properties for prices amounting to less than the mortgages securing them, Mar. 31, 2020 Order at 7, ECF No. 676; approved the sales of properties free and clear of any liens or encumbrances provided that those liens attach to the ultimate sales proceeds of the properties, Dec. 12, 2019 Minute Entry, ECF No. 601; and

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at 3, ECF No. 772. The joint motion is granted to the extent that the Court considered the substantive arguments contained therein before ruling on the Receiver's eighth motion to confirm sales.

[2] On September 14, 2020, the Court entered an order granting the motion as to the the twelve properties to which no objection was filed. Order Partially Granting Receiver's Ninth Mot. Confirm Sales, ECF No. 789.

permitted the Receiver's property managers to bid for properties, Oct. 4, 2019 Order at 4–5.

The Court also has ruled that an orderly claims process is the most efficient and equitable method to resolve competing claims of investors and institutional lenders, *id.* at 5; Mar. 31, 2020 Order at 6; and that a claims process is appropriate even for properties where a Lender has a recorded mortgage but the investors do not. *Id.* 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.'" (citation omitted)). The objectors have raised nothing that would change this conclusion.

While Citibank and Fannie Mae additionally object that the Receiver's sales have not "generated the true and proper value of the properties," Obj. Ninth Mot. Confirm Sales at 25–28, they offer no evidence that the bid process the Receiver employed resulted in properties being sold for less than their true value. *Cf.* Mar. 31, 2020 Order at 7 ("The Court is not persuaded that [the sales] amount is 'grossly inadequate,' . . . nor is it persuaded by UBS's vague contention that a better marketing and sales process would have fetched a higher price."). Indeed, the proposed sales prices for 1131-41 E. 79th Place and 6250 S. Mozart Avenue

represent 92% and 109% of their list prices, respectively. Receiver's Reply Supp. Ninth Mot. Confirm Sales at 12, ECF No. 790.

Finally, Citibank and Fannie Mae offer no legal authority to support their novel argument that the sale of the two properties here would invoke the Fifth Amendment's Takings Clause. Obj. Ninth Mot. Confirm Sales at 20–22. Their failure to provide apposite legal support is unsurprising, as 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).

For the foregoing reasons, the entirety of the Receiver's ninth motion to confirm sales is granted.

III. The Receiver's Second Motion for Restoration of Funds Expended for the Benefit of Other Properties [749]

Finally, objections were filed against two of the twenty-four properties contained in the Receiver's second motion for restoration of funds.[3] *See* Obj. Second Mot. Restoration at 1, ECF No. 764 (objecting to using proceeds from the sales of 5450-52 S. Indiana Avenue and 7749-59 S. Yates (the "Indiana/Yates properties") to restore funds those properties received from other properties or the Receiver's account). The arguments made by the objecting Mortgagees are overruled.

[3] On September 21, 2020, the Court entered an order granting the motion as to the twenty-two properties to which no objection was filed. Order Partially Granting Receiver's Second Mot. Restoration, ECF No. 796.

First, the Receiver's request is not inconsistent with Magistrate Judge Kim's February 13, 2019 order, which stated, *inter alia*, that the Receiver should use the rent from each property solely for the benefit of that particular property. *See* Obj. Second Mot. Restoration at 1; Feb. 13, 2019 Mem. Op. and Order at 9, ECF No. 223. It is undisputed that the Receiver has only used rents from the Indiana and Yates properties for the benefit of those properties, and the funds that are the subject of the Receiver's restoration motion either came from the rents of other properties prior to the February 13, 2019 order, or else came from the Receiver's account. Receiver's Reply Supp. Second Mot. Restoration at 4, ECF No. 791.

Second, the Mortgagees argue that the Receiver failed to request Court approval to expend funds for the benefit of the Indiana and Yates properties. *See* Obj. Second Mot. Restoration Funds at 1, 2. But the Court appointed the Receiver to preserve the properties in the Receivership Estate, and the Receiver subsequently reported over the course of two years that he was using funds from the Receivership account for the benefit of underperforming properties. *See, e.g.*, Receiver's Oct. 31, 2019 Status Report at 2–4, ECF No. 567. The Mortgagees never objected to the Receiver using funds from the Receiver's account to preserve, maintain, and improve the Indiana/Yates properties, despite receiving monthly reports detailing these activities and stating that the Receiver intended to restore the funds. *See* Exs. to Second Mot. Restoration at 39, 49, ECF No. 749–1. Moreover, the Court, including when approving a previous restoration motion, has

not required the Receiver to seek approval before expending funds on a given property. *See* Aug. 27, 2019 Order, ECF No. 494.

Finally, the Mortgagees argue that the Receiver's spreadsheets regarding the costs incurred for the Indiana/Yates properties are "merely summaries with no backup or justification of necessity of an expenditure." Obj. Second Mot. Restoration Funds at 1–2. It is undisputed, however, that those spreadsheets collect and recite expense information that was previously produced to the Mortgagees. *See* Receiver's Reply Supp. Second Mot. Restoration at 5–6; Exs. to Second Mot. Restoration at 14–15. The Mortgagees have not objected to the monthly reports for the Indiana/Yates properties, which reflect operating expenses and the accumulated restoration amount due. *Id.*

For these reasons, the Receiver's second motion for restoration of funds is granted in its entirety.

IT IS SO ORDERED.

ENTERED: 10/26/20

John Z. Lee
United States District Judge