

UNITED STATES DISTRICT COURT
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. 1:18-cv-5587

Hon. John Z. Lee

Magistrate Judge Young B. Kim

REPLY IN SUPPORT OF FED. R. CIV. P. 72 OBJECTIONS

The following mortgagees (collectively, “Movants”, and each individually a “Mortgagee”) respectfully file this reply in support of the Fed. R. Civ. P. 72 Objections Dkt 359¹, 362, and 455 (collectively, the “Objections”) to Memorandum Opinion and Order Dated May 2, 2019 [Dkt 352] (“May 2 Order”) and the Order dated July 9, 2019 [Dkt 447] (“July 9 Order”): (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.

¹ Certain Movants joined this objection. See Dkt 363. Liberty filed a *Notification of Liberty EBCP, LLC Regarding Notification of Docket Entry (R. 458) Setting Hearing on Pending Objections to May 2, 2019 and May 22, 2019 Orders* [Dkt 463] indicating the First May 2 Order Objection was moot as to Liberty because Liberty apparently reached an agreement with the Receiver on credit bid procedures. The First May 2 Order Objection is **not** moot as to the certain Movants that joined and has not be resolved as to those Movants.

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 (“Fannie Mae”); (7) Federal Home Loan Mortgage Corporation (“Freddie Mac”); (8) UBS AG; (9) BMO Harris Bank N.A.; (10) Midland Loan Services, a Division of PNC Bank, National Association; and (11) BC57, LLC. In support of the Objections, the Movants state as follows:

INTRODUCTION

Recent developments in this case highlight the exigent circumstances that necessitate sustaining the Movants’ Objections. Despite the pending Objections, the Receiver moved forward with listing for sale certain of the Movants’ properties that are the subject of the Receiver’s Second Motion for Court Approval of the Process for Public Sale of Real Property by Seal Bid [Dkt 228] (“Second Sale Motion”) and the Receiver’s Fifth Motion for Court Approval of the Process of Public Sale of Real Property by Sealed Bid [Dkt 329] (“Fifth Sale Motion”). The call for bid date for third party bidders to submit their offers was August 14, 2019. Beginning after 5:00 p.m. on Thursday, August 15, 2019, the Receiver’s real estate broker began contacting certain Movants to advise them of the highest bid received on their respective properties and requesting Movants respond with their credit bid offer within less than 24-hours by close of business on Friday, August 16, 2019.

Certain Movants attempted to negotiate a reasonable extension of this arbitrary and unreasonable deadline. After it was clear no mutual agreement would occur, certain Movants filed an Emergency Motion for Extension of Deadline to Submit Credit Bids Set by Receiver's Real

Estate Broker [Dkt 478]. Another lender, Liberty EBCP, LLC (“Liberty”), also filed a motion and objection to the credit bid deadline [Dkt 481] (collectively, the “Credit Bid Motions”). Hearing on the Credit Bid Motions was held on August 19, 2019 before Magistrate Judge Kim and the emergency motion was granted giving all lenders until August 30, 2019 to submit credit bids. [Dkt 438] The Receiver was also ordered to provide the Movants an estimate of closing costs by noon on August 21. *Id.* The Receiver was unable to meet the August 21 deadline and requested an extension, despite previously requesting the Movants provide a credit bid within less than 24 hours. The Credit Bid Motions and the oral arguments on the motions highlight the uncertainty as to how the sales process, specifically credit bidding, should be conducted. The Objections seek to eliminate this uncertainty by tailoring the credit bid process to established law. *See* Movants’ Consolidated Motion to Amend May 2, 2019 Memorandum Opinion and Order [Dkt 418] (“Motion to Amend”).

The SEC’s Response to Institutional Lenders’ Objections [Dkt 474] (“SEC Response”) and the Receiver’s Response and Opposition to Institutional Lenders’ Objections (Docket Nos. 359, 362, 398 & 445) [Dkt 476] (“Receiver’s Response”, together with the SEC Response, the “Responses”) do nothing to dispel the lack of certainty and transparency related to credit bidding set forth in the May 2 Order and July 9 Order and do nothing to “maximize” value. Moreover, the Responses do not rebut the procedural issues related to the current credit bid procedures, specifically, the lack of lien priority determination, the lack of prior determination of the amount due each Mortgagee and any other secured lien claimant, and the lack of terms and conditions related to the posting of an irrevocable letter of credit as well as associated costs sought to be surcharged by the Receiver. The Responses simply attempt to summarily dismiss these issues by three simple arguments: (1) Movants have no right to credit bid; (2) Movants have waived the right

to or are barred from proposing terms and procedures for credit bidding; and (3) credit bid procedures have been approved and set by this Court. All three arguments fail as a matter of law.

ARGUMENTS

I. THE MOVANTS UNEQUIVOCALLY HAVE THE RIGHT TO CREDIT BID.

The Court granted the Movants' objections to the Second Sale Motion in the May 2 Order and affirmed the Movants' right to credit bid, stating "the court agrees that *all lenders have a right to make a credit bid* of their lien on a Property that the Receiver proposes to sell." May 2 Order, p. 7 (emphasis added). The Court relied on its prior rulings, which held neither the Court nor the Receiver have the ability to extinguish the Movants' preexisting state law security interest. *See generally*, Dkt 232, 352. The Movants request this Court overrule the July 9 Order and grant the Motion to Amend because the credit bid protocol currently proposed by the Receiver and now required by the July 9 Order is inconsistent with Illinois law and the Movants *right* to credit bid.

A. Equity Does Not Grant the Court Unlimited Power to Modify the Movants' Right to Credit Bid.

The Responses mistakenly rely on three non-binding bankruptcy cases² to support the argument that the Court has broad discretion to modify the Movants' right to credit bid. *See* SEC Response, p. 5; Receiver's Response, p. 5. As more fully set forth in the objection to the July 9 Order, Section 363(k) of the Bankruptcy Code grants a secured party the right to credit bid "unless the court *for cause* orders otherwise." 11 U.S.C. § 363(k) (emphasis added). Each of the three cases cited analyze this "for cause" exception. As set forth in the objection to the July 9 Order and herein, none of the cases support a finding of "cause" in the present case.

² *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55 (D. Del. 2014); *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010); and *In re River Road Hotel Partners, LLC* 2010 WL 6634603 (Bankr. N.D. Ill. Oct. 5, 2010).

Moreover, creditors in bankruptcy are granted certain statutory protections, such as adequate protection payments and “indubitable equivalent.” *See* 11 U.S.C. § 361; 11 U.S.C. §1129. Therefore, if a secured creditor’s credit bid rights are modified for cause, there are other procedural safeguards to ensure its overall rights are protected. *Philadelphia Newspapers* illustrates this point providing that if a secured creditor is denied the right to credit bid, then it must be given other protections. *Philadelphia Newspapers*, 599 F.3d at 313. No such safeguards have been provided the Movants or any other secured parties entitled to credit bid. In fact, the current credit bid structure and sales process eviscerates the Movants’ rights by allowing the Receiver to force the Movants to take a discounted payoff and to sell properties free and clear of the Movants’ liens without adequate protection. In fact, many of the properties are declining in value with no adequate protection to the Movants, which is a fundamental property right. *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 547–48 (7th Cir. 2003) (when a property is sold free and clear of a party’s interest, any interested party may request the court to “prohibit or condition such ... sale ... as is necessary to provide adequate protection of such interest.” (internal citations omitted); *Illinois Dep’t of Revenue v. Hanmi Bank*, 895 F.3d 465, 473 (7th Cir. 2018), *reh’g denied* (Aug. 24, 2018) (same).

Moreover, *In re River Road Hotel Partners, LLC*, a case cited by the Receiver, illustrates just how important it is that “cause” be shown before courts modify a secured creditor’s right to credit bid. In *In re River Road Hotel Partners, LLC*, the court held an evidentiary hearing to determine whether cause existed to warrant restriction of the secured creditor’s credit bid right. *In re River Road Hotel Partners, LLC*, 2010 WL 6634603, at *1. No evidentiary hearings have been held in this case to show cause to warrant restriction of the Movants’ credit bid rights. In fact, the only basis for the restrictions on the Movants’ right to credit bid is the unfounded, unproven, and

conclusory statement by the Receiver that there may be secured liens senior to the Movants' security interests. The Receiver has made this statement for over one year without producing a single piece of evidence to support it. Such basis for "cause" falls gravely short of an evidentiary hearing.

Consistent with *In re River Road Hotel Partners, LLC*, the Movants request an evidentiary hearing take place to determine lien priority and the amount due each lien claimant. This will also allow the Court an opportunity to properly determine if there is "cause" to warrant restriction of the Movants' right to credit bid (which the Movants vehemently deny exists), rather than relying on the Receiver's unsupported assertions. An evidentiary hearing will also ensure all secured lien claimants are afforded an opportunity to present their lien claim and have it adjudicated by the Court. Contrary to the SEC's argument, the Movants' proposal is not an attempt to subordinate EquityBuild investors, but rather an attempt to resolve priority on a level playing field. Any other outcome other than an evidentiary hearing to determine lien priority, the amount due each lien claimant, and whether cause exists, is an improper and unfair restriction on the Movants' right to credit bid.

II. THERE IS NO COURT ORDER GOVERNING THE ENTIRE CREDIT BID PROCESS.

It is simply not true that this Court previously ruled on when and how lien priority and lien amounts should be determined for credit bidding purposes. The Movants were only granted the right to credit bid on May 2. Both Responses rely on Court orders and hearings that occurred well before May 2. *See* SEC Response, p. 3; Receiver Response, p. 4-5. In addition, each of the hearings and orders cited by the SEC and Receiver involve issues unrelated to the May 2 Order and July 9 Order credit bid procedures. There is no law of the case as to when and how lien priority and lien amounts should be determined for credit bidding purposes.

Additionally, the Credit Bid Motions and the resulting oral arguments evidence there is uncertainty between the Movants, the Receiver, and the Court as to what process governs the *entire* credit bid process. The Responses both state that the credit bid procedures agreed upon by Liberty and the Receiver [Dkt 415] (“Liberty Credit Bid Procedures”) govern credit bidding in this case. The Responses also rely heavily on the Liberty Credit Bid Procedures to argue a workable credit bid process has been approved by the Court. This argument is belied by the fact that certain Movants and Liberty were forced to file motions and seek court intervention the moment the Receiver attempted to implement credit bidding. Moreover, during the hearing on the Credit Bid Motions, Magistrate Kim acknowledged there was uncertainty regarding the credit bid process and even found it necessary to correct the May 2 Order regarding the timing of the letter of credit. *See* August 19 Minute Order, Dkt 483. Attached as **Exhibit 1** is a copy of the August 19 Hearing Transcript. *See* Transcript, pp. 37-45. There is no logical basis for the SEC or the Receiver to believe the credit bid procedures are settled.

B. The Liberty Credit Bid Procedures Don’t Comply With the Purpose of Credit Bidding.

The SEC’s response highlights how the Liberty Credit Bid Procedures undercut the stated purpose of credit bidding. The SEC argues the Movants are “large financial institutions, with substantial resources” that are “more than able to either obtain letters of credit per Magistrate Judge Kim’s procedures, or (if they win the bidding) to simply pay cash.” Such an argument is illogical as it results in the Movants having to pay twice for the same piece of property and runs afoul of the purpose of credit bidding. As set forth in the Objections, the purpose of credit bidding is to avoid the inefficiencies of requiring a lender to tender cash that would immediately be returned back to the lender. *FDIC v. Chicago Title Ins. Co.*, No. 12-CV-05198, 2015 WL 5276346, at *4 (N.D. Ill. Sept. 9, 2015); *FDIC v. Meyer*, 781 F.2d 1260, 1265 (7th Cir. 1986). Under Illinois

law, a mortgagee is entitled to credit bid the amount of its debt. *Chicago Title Ins. Co.*, 2015 WL 5276346, at *4. The Movants are mortgagees. Requiring the Movants to pay cash for properties on which the Movants have a secured interest is entirely contrary to the purpose of credit bidding.

Similarly, the argument that the Movants do not have a right to credit bid because this case is not a foreclosure or bankruptcy misses the mark. Under both Illinois law and bankruptcy law, a secured party is entitled to credit bid its secured debt. Even the U.S. Supreme Court has acknowledged this. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012); *Chicago Title Ins. Co.*, 2015 WL 5276346, at *4; *Meyer*, 781 F.2d at 1265. This right arises both via the security interest and established law. As this Court has properly held time and again, both the Court and the Receiver lack the authority to extinguish the Movants' security interests and the Receiver takes all property subject to the Movants' security interests. Because it is the security interest that gives the Movants the right to credit bid, both the Receiver and the Court must preserve this right and ensure they take no steps to extinguish it, such as imposing restrictions on the right or failing to satisfy conditions precedent to allow the Movants to exercise this right.

III. THE MOVANTS HAVE NOT WAIVED THE RIGHT TO AND ARE NOT BARRED FROM PROPOSING MODIFICATIONS TO THE MAY 2 ORDER AND JULY 9 ORDER.

The Movants have not waived any right to request the credit bid procedures be modified to conform with law, and in fact, were instructed by Magistrate Judge Kim to propose modifications to the credit bid procedures. Magistrate Judge Kim's May 22 order [Dkt 382] ("May 22 Order") acknowledged that the parties were working together to resolve issues related to the credit bid procedures. The May 22 Order instructed the Movants to file a "a joint motion to amend [the May 2 Order] to establish procedures for submitting credit bids" if the Movants were unable to reach an agreement with the Receiver on the manner, timing, and methodology for placing credit bids. May 22 Order, p. 5 (emphasis added). The Movants and the Receiver were unable to reach an

agreement. The Movants filed the Motion to Amend, as instructed by Magistrate Judge Kim, requesting certain credit bid protocol be adopted so the procedures conform with law. The Motion to Amend was denied and the Movants filed their Rule 72 Objection. [Dkt 455] There is simply no logical basis to argue the Movants have waived any right. In fact, the Credit Bid Motions and the resulting hearing demonstrate the credit bid procedures are ripe for modification. It is in the best interest of all parties for this Court to resolve all issues related to credit bidding now, rather than continuing to cobble together procedures at a later date, which would entail substantial costs to all involved, including the receivership estate.

IV. THE RECEIVER POSSESSES THE KNOWLEDGE AND INFORMATION NECESSARY TO ALLOW THE MOVANTS' CREDIT BID PROTOCOL TO RUN IN TANDEM WITH THE CLAIMS PROCESS.

The claims bar date for submission of claims was July 1, 2019. All claimants were required to submit to the Receiver evidence of their claim and an indication whether the claimant asserts a secured interest in any of the receivership property. The Receiver's Second Status Report on Claims identifies all properties of the estate and whether secured claims have been asserted on each property by EquityBuild investors, institutional lenders, or both. [Dkt. 477] Going even further, the Receiver identified at least two properties (6751-57 S Merrill Avenue and 7110 S Cornell Avenue) where there are no secured claims by EquityBuild affiliates. The Second Status Report shows the Receiver possesses the requisite information and knowledge necessary to allow this Court to make a determination on lien priority and lien amount. There is simply no reason to prevent the Movants' proposed credit bid procedures from proceeding in tandem with the Receiver's overall claims process.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Objections, the Movants respectfully request that this Court grant the relief requested in the Motion to Amend and Objections, or such other relief this court deems equitable and just.

Dated: August _____, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jill L. Nicholson, hereby certify that on August 28, 2019, I caused the *Reply in Support of Fed. R. Civ. P. 72 Objections* to be electronically filed using the Court's CM/ECF system on all counsel of record.

/s/ Jill L. Nicholson
Jill L. Nicholson

EXHIBIT 1

1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

4 UNITED STATES SECURITIES AND EXCHANGE)
5 COMMISSION,)
6 Plaintiff,)
7 vs.) No. 18 C 5587
8 EQUITYBUILD, INC., et al,) Chicago, Illinois
9 Defendants.) August 19, 2019
) 11:01 A.M.

10 TRANSCRIPT OF PROCEEDINGS - Motion
11 BEFORE THE HONORABLE YOUNG B. KIM, Magistrate Judge

12 APPEARANCES:

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15 BY: MR. BENJAMIN J. HANAUER

16 For the Receiver: RACHLIS DUFF ADLER PEEL & KAPLAN LLC
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19 BY: MR. MICHAEL RACHLIS
20 MR. KEVIN B. DUFF

21 PAMELA S. WARREN, CSR, RPR
22 Official Court Reporter
23 219 South Dearborn Street
24 Room 2342
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21 **NOTE: Please notify of correct speaker identification.**
22 **FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS**
23 **UNINTELLIGIBLE.**

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9 27777 Franklin Road
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10 BY: MR. JAY L. WELFORD
(Appearing telephonically)

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1 (Proceedings held in open court:)

2 THE CLERK: 18 C 5587, United States Securities and
3 Exchange Commission versus Equitybuild, Inc., et al.

4 THE COURT: Good morning.

5 MR. HANAUER: Good morning, your Honor. Ben Hanauer
6 for the SEC.

7 MR. RACHLIS: Good morning, your Honor. Michael
8 Rachlis on behalf of the receiver and the receivership.

9 With me is Kevin Duff.

10 MR. DUFF: Good morning, your Honor.

11 MR. McCLAIN: Good morning, your Honor. Andrew
12 McClain on behalf of the movants.

13 THE COURT: Do we have anyone on behalf of Liberty?
14 Mr. Welford?

15 MR. HANAUER: He is not in the courtroom, your Honor.

16 THE COURT: I thought he was going to be on the line.

17 THE CLERK: He did state he would be calling in. I
18 dialed in, but no one joined.

19 THE COURT: Okay. But then while we wait for
20 Mr. Welford, we can deal with the other mortgagees's motion.

21 Let me ask you, Mr. Rachlis, any objection to the
22 motions?

23 MR. RACHLIS: Yes.

24 THE COURT: Okay.

25 MR. RACHLIS: We do. There are, I guess, several

1 grounds that we have for purposes of the objection --

2 THE COURT: I'm sorry. Give me one second.

3 MR. RACHLIS: Sure.

4 THE COURT: Mr. Welford?

5 MR. WELFORD: Yes. I'm sorry I'm late, your Honor.

6 THE COURT: Your full name?

7 MR. WELFORD: I'm sorry. Jay Welford appearing on
8 behalf of Liberty, EBCP, LLC.

9 THE COURT: Thank you.

10 I'm sorry. Mr. Rachlis, go ahead.

11 MR. RACHLIS: Sure. Your Honor, so that the record is
12 clear, we have granted an extension already. I will put this
13 in context as well, but just so that your Honor knows, these
14 call for offers were well advertised, well known. I think a
15 request for an extension was made late last week, and we have
16 given this -- this moving lender here until tomorrow to make
17 its credit bid.

18 So the context of the motion is seeking extended time
19 beyond, well beyond, that to -- to some unknown date. They are
20 looking for at least ten days beyond that, which we do object
21 to. And I think it is important -- if you don't mind, I have a
22 few things I would like to put -- I would like your Honor to be
23 aware of and to respond directly to your question if that's
24 okay.

25 THE COURT: Okay. Just so we're clear -- so then

1 Mr. Welford can catch up, we're only dealing with the motion
2 filed by the other mortgagees, Document Number 478.

3 Go ahead.

4 MR. RACHLIS: Okay. So, your Honor, this is -- this
5 is not an emergency. You knows, that's the first issue that I
6 think is important here. And I think that by explaining why
7 this is not an emergency, we also can explain why the motion
8 itself is meritless.

9 The lenders have been aware of the issues associated
10 with the sale of these properties since February of this year.
11 That's almost seven months.

12 And I know your Honor has seen us and are very
13 familiar with the docket, but it is important, I think, to
14 recognize that there has been months of activity they have
15 initiated about this issue, about credit bidding. And the
16 motion to extend that's in front of you suggest that they are
17 not prepared to do the credit bid, which seems outrageous when
18 one looks back at what transpired.

19 Let's look back. Just a few points. February 15 of
20 this year we filed our motion for the approval for the second
21 set of properties.

22 February 19th, four days later, this lender and others
23 come to the Court and say, we need credit bidding. It has to
24 be part of that. So that issue, your Honor will recall, came
25 up well before that. But we'll give them credit for not even

1 raising that until February 19th.

2 But during the Thanksgiving hearings before your
3 Honor, that issue came up as well. So this issue is not
4 unknown and specifically here it is not unknown. February 19th
5 they filed their motion. Two motions were filed. One by
6 Bloomfield Capital and one joined in by these lenders.

7 March 18th, we have a lengthy hearing before your
8 Honor, it is probably two to three hours of hearing, dealing
9 with this and other issues.

10 Your Honor issues an order on February -- I'm sorry --
11 on May 2nd dealing with the credit bidding issues and other
12 issues associated with the sale process.

13 5-16, May 16, '19, a host of objections begin to be
14 filed. Docket Numbers 359, 360, 362, 363, 364, 365, 367. More
15 filings on 5-29, 384, 386. More filings on June 3rd, 394, 396,
16 398, 499 (sic), 400. All deal with the issues of credit
17 (unintelligible) they want this opportunity or more
18 clarification from your Honor on credit bidding.

19 Six -- on 6-7-19, June 7th, '19, a more formal -- a
20 longer document is filed by this lender and others asking to
21 amend the May 2nd order. That was withdrawn based on ongoing
22 discussions and then refiled on June 17th of this year -- of
23 the past couple months.

24 On June 28th another motion, a joinder is filed. And
25 on 7-2, on July 2nd, we're here before your Honor again for

1 another important hearing dealing with these issues where in
2 fact we're told by counsel here that the point of all of this
3 is to just stop the sales process. That is they need it
4 stopped because they want lien priority and other issues
5 ongoing. Your Honor rejects that, as your Honor and Judge Lee
6 have done before, and issues an order on July 19th -- I'm sorry
7 -- on July 9th that deals with this issue.

8 More objections are filed subsequently to that on July
9 22nd.

10 It is hard to believe, it is just -- it is
11 unimaginable that somehow this is an emergency when all along
12 they have been asking for and dealing with this issue of credit
13 bidding. So the idea that this is an emergency based on the
14 chronology alone is baseless.

15 It is also baseless based on the activity that's been
16 going on. It is not in their motion. But in July, just a
17 couple weeks ago, they started engaging in the process for
18 credit bidding. We get notices from Mr. McClain -- our broker
19 is here, Mr. Bash (phonetic) is in the -- is here just in case
20 there are questions that your Honor may have.

21 In July four letters from this lender are sent to SVN,
22 the broker, which sets -- state that they intend -- that they
23 want the highest bid. They want it -- information on the
24 highest bid so that they can consider that for purposes of
25 credit bidding.

1 What are the -- what have they been doing for all of
2 this time one may ask. They ask in July -- it is July 19th and
3 July 24th, they want -- they specifically request, pursuant to
4 the terms and conditions for credit bidding, the highest offer
5 for purposes of making a determination as to whether or not to
6 credit bid. So they have had -- they have known about this
7 since February, giving them the benefit of the doubt, all the
8 way now through July.

9 What else has been going on? Well, they have been
10 doing inspections. They have been doing their own due
11 diligence. We know for a fact that they have been doing
12 inspections or -- and related issues because our office has
13 arranged and worked with Mr. McClain to arrange those
14 inspections during this time period.

15 So there has to have been either they knew or should
16 have been doing work in order to go and deal with the credit
17 bids because they knew that the call for offers was going to be
18 last Thursday.

19 When -- I'm sorry, Wednesday, the 12th. I apologize.
20 Wednesday the 12th was known that that was the day for call for
21 offers.

22 They then, the next day, got emails from our -- from
23 our -- you know, working with our broker, our professional,
24 that notified them of the highest bidder. They should have
25 been on top of all of that. They have had months. And if you

1 don't want to count of the filings that were -- put them on
2 direct notice of all this, they have had weeks in order to do
3 this.

4 Now they come before your Honor on an emergency basis,
5 which is non existent, and suggest that they are not prepared
6 to do that based on nebulous non-attached agreements for --
7 none of us to review to see whether there is any factual basis
8 for them, creating -- they don't provide any of the information
9 that I have just given your Honor, which I think is important
10 to put in context. They don't tell the Court that time is of
11 the essence on these types of sales. That's part of the terms
12 and conditions for the credit bids. And it is logical when
13 you're dealing with the sale of properties.

14 In particular the sale here, where your Honor is well
15 aware that there is properties that are not generating as much
16 income as we had hoped, there is -- there are issues with --
17 about conditions of the properties. Your Honor may recall that
18 it was -- I believe it was in March when we were here dealing
19 with this same issue that we were here and the city was here
20 discussing a fire that occurred at one of the properties that
21 had actually been subject to a motion for approval of the sale
22 of that property.

23 So the longer this goes on, there is more risk
24 associated with holding that. But even that -- that's almost
25 tangential to the point that the fact is is that this is an

1 auction process approved multiple times. And here in that
2 auction process, not only should they be prepared, but the
3 folks that have submitted their business are waiting. There is
4 a momentum. There is a market that is worked on and created.
5 And they are directly interfering with that as this process is
6 extended, un- completely unnecessarily.

7 So that's at least some basis for the lack of the
8 emergency and the lack of substance to the motion itself.

9 (Brief interruption.)

10 MR. RACHLIS: A few other points, your Honor. We have
11 attempted -- the idea that's being put forward, your Honor, is
12 that somehow we're precluding the credit bid from occurring
13 here. That's not true. In fact it is -- that's -- there is no
14 credit bid that has even been made. They're just saying
15 somehow here that they are not able to process or to do the
16 work they need to do in the timely fashion to make that credit
17 bid.

18 So the idea somehow that they have been precluded from
19 a credit bid is inaccurate. And certainly they have had ample,
20 ample time, including an extension that we have given them in
21 conjunction with talking with our professionals too, in order
22 to allow that -- as much time, consistent with the terms and
23 conditions, consistent with the seal bid auction process,
24 consistent with the market, and the buyers that have already,
25 much like these -- this potential purchaser themselves have

1 been out there evaluating the pros and cons and coming up with
2 the pricing on this property.

3 They suggest to your Honor that somehow 24 hours is
4 not ample amount of time. And they were never aware that they
5 could -- that that was a requirement. Your Honor, that's a red
6 herring. They were -- knew the time was of the essence. They
7 have been part of this auction process. Some of these lenders
8 come to your Honor and suggest that this action needs to mirror
9 the call for, you know, the -- the outcry and call where you
10 would have, not 24 hours, you would have, you know, potentially
11 24 seconds to raise your hand and say my bid is X.

12 They have had -- and when you put it in context of all
13 the time that they have had to do this, there is no basis to
14 somehow suggest that the time, 24 hours, is not an appropriate
15 amount of time to respond. Mind you, we would also use that
16 same time when we have bids from -- from them in response to
17 the request. And we go back to other -- other buyers who are
18 interested in order to continue this bidding process. They
19 would also be subject to those same limitations, all in the
20 context of understanding that there is a market here that has
21 been driven, created, and these folks can't be left out hanging
22 in limbo with properties that also are hanging in limbo.

23 (Brief interruption.)

24 MR. RACHLIS: Your Honor, I don't think I have
25 anything further to add to our objection to the request for the

1 extension here. But I'm happy to address any questions or
2 provide -- I have with me the copies of the letters that were
3 sent to the broker from Mr. McClain identifying that they
4 wanted to be notified of the highest bid to participate in
5 this -- in the credit bid process and the like. I don't know
6 if your Honor needs that, but I am happy to address those
7 questions and provide that to the Court.

8 THE COURT: So let me ask you, aside from the lack of
9 effort exercised by the other lenders, the other basis for the
10 objection is that by granting the other mortgagees until August
11 30 essentially stops the momentum and stops the whole bidding
12 process.

13 MR. RACHLIS: Yes, it -- I think that that's fair to
14 say. And it also creates risk. It does -- so I would say that
15 there are two fundamental points to that. It does stop the
16 momentum. It leaves other buyers hanging out to dry who are
17 part of this process.

18 But in addition to that, it allows the opportunity for
19 fires to occur as actually occurred in one of the buildings
20 here. It allows other opportunities to go on.

21 And mind you, your Honor, your Honor has heard, you
22 know, so many times that they are -- the request for immediate
23 payment and interest and things like that, they are going to be
24 claiming, as they -- as they seek this delay, they are going to
25 seek, for sure from your Honor, the payment of interest and

1 other types of fees. Of course we're going to contest those.
2 But rest assured that the longer they delay this, the more the
3 cost for those interest payments are going to be made before
4 your Honor.

5 THE COURT: Mr. McClain.

6 MR. McCLAIN: Thank you, your Honor. I just want to
7 make the record absolutely clear, we are in no way trying to
8 delay or hinder the sales here. I just want to make that
9 absolutely clear.

10 And there absolutely is an emergency. We wouldn't be
11 here otherwise but for an emergency.

12 They gave us until tomorrow as an extended deadline.
13 There are still so many open questions and open issues that
14 there is no possible way that tomorrow can be a feasible
15 deadline.

16 I want to first address the point that Mr. Rachlis
17 made about the momentum and that there is a risk here to delay
18 these sales. First of all, the bidders on these properties
19 know that these properties are tied up in a massive litigation.
20 So the expectation that these are going to be -- that bids are
21 going to be resolved and sales can be completed immediately is
22 a complete farce.

23 If you look at the prior sales, it took weeks for the
24 Court to actually approve those sales. So the claim that we
25 are somehow hindering any sort of momentum is just blatantly

1 not relevant and just a complete red herring, your Honor.

2 I also want to go back to the point that he made that
3 we knew August 14th was the call for bid day. Yes, that is
4 absolutely true. We knew that August 14th was the call for bid
5 day for third-party bidders. There was never any indication
6 from the receiver or from the broker that they were going to
7 give us 24 hours -- less than 24 hours's notice actually to
8 submit our credit bids.

9 Your Honor, there are so many open issues here. And
10 the receiver even acknowledges it because he has taken the
11 position that the Liberty procedures govern. Just this morning
12 Liberty filed a motion indicating that their agreed-upon
13 procedures do not address anything related to the submission or
14 the timing or the mechanics of submitting a credit bid. There
15 are open issues here that need to be addressed by the Court.

16 For instance, the letter of credit. The Court has
17 ordered that the lenders post a letter of credit. You can't
18 just go out on 24 hours's notice and obtain an irrevocable
19 letter of credit drawn on a third-party bank in less than 24
20 hours. There is a ton of issues that need to be resolve. For
21 instance, the terms and conditions on the draws. You don't
22 just say, I want to get a letter of credit, here's a letter of
23 credit. You need to negotiate when the draws are going to be
24 taken, under what conditions the draws going to be made. And
25 there is litigation -- there is case law and litigation that

1 are involved just on the terms and conditions of the letters of
2 credit.

3 So to say that we have known the procedures on
4 submission of credit bids and submission of when we were
5 supposed to submit these, it is just absolutely not true, your
6 Honor.

7 And we actually in our Rule 72 objection specifically
8 called out to the Court, as well as all parties, including
9 Mr. Rachlis, that the exact procedures for credit bidding,
10 including manner, timing, and methodology of placing bids has
11 not been determined.

12 And that is clear as day. In the receiver's second
13 sale motion -- or second motion on the status of claims, he
14 indicates that the Liberty procedures govern this process.
15 Well, Liberty procedures are absolutely silent on the manner,
16 timing, and methodology of submitting credit bids.

17 So that's why before your court -- before the Court,
18 your Honor. We tried to resolve this with the receiver. I
19 personally called the receiver's office on August 15th and
20 asked what procedures are going to govern the submission of
21 credit bidding? And I was told by a representative of the
22 receiver's office that we would receive procedures and the
23 written bid or the highest bid amount in writing.

24 And sure enough at -- after 5:00 P.M. on Thursday we
25 received the highest bid and then a demand that within 24 hours

1 we submit our credit bid. It is simply not possible to do
2 that, your Honor. We don't know what the terms of the letter
3 of credit are.

4 We have also asked what the closing costs are. They
5 have not given us any of the closing costs. Pursuant to the
6 Liberty bid procedures, it indicates that the receiver will
7 provide us an estimate of the closing costs. They have been
8 silent on that. We need that information to formulate a credit
9 bid. We don't have it.

10 And also bringing up the May 2nd and July 2nd order,
11 your Honor, also highlights the fact that the process for
12 submission of credit bids has not been resolved. The receiver
13 is putting this on the lenders. But the entire time the
14 receiver was well aware that there were no court-approved
15 procedures for this. He didn't give us any notification at
16 all. He didn't propose any terms and conditions. He has been
17 completely silent for all this entire process.

18 So to say that we have known the procedures since --
19 that we have known the procedures since these properties went
20 to sale or since the Court approved the sale of these
21 properties in February, it is not true, your Honor, because
22 there is no court-approved procedure for submission.

23 THE COURT: Yes. Go ahead.

24 MR. HANAUER: Thank you, your Honor. This feels like
25 deja vu since the last time we were here where the -- these

1 exact same lenders come in and say, oh, we have all these
2 problems with credit bid procedures, about claim priority and
3 things like that. And the Court is (unintelligible). Why
4 didn't you raise that the last time? Why didn't you raise that
5 before your earlier objections?

6 We know that on June 28th, these same lenders
7 submitted their comments and objections to the Liberty credit
8 bid procedures that were agreed on with the receiver. And they
9 actually submitted a redline. That's document 430 dash 1.

10 Well, there is something about lien priority in there.
11 There is nothing about timing requirements, leaving ten days or
12 anything like that.

13 If these lenders really do need ten days in order to
14 credit bid, there is no good reason that they didn't include
15 that on their proposed provision -- revisions to the credit
16 (unintelligible).

17 Just like they waived their objections to the claim
18 priority, they have waived, in our view, they have waived any
19 objections to the timing because they had ample opportunity to
20 raise it. They did submit objections to the credit bid
21 (unintelligible), and there was nothing about timing or needing
22 ten days or needing any sort of additional time.

23 The big picture what's going on here, your Honor, is
24 the SEC really objects to, is these constant objections are
25 harming investors, they are harming creditors, they are

1 bleeding the receivership because every time we're holding the
2 (unintelligible) by the lenders, the receiver is going forward,
3 it is costing people money.

4 And on the flipside of the coin, we know that these
5 same lenders they're (unintelligible) and they are
6 (unintelligible) documents, they get attorneys's fees. So in
7 the event they actually do win on any of these claim priority
8 issues, there is the risk that they are going to be billing
9 for -- or coming into court saying, we want our attorneys's
10 fees too on top of the attorneys's fees they are causing the
11 receiver to incur.

12 So this dynamic, it is harming their receivership, it
13 is harming the investors, and there is really no reason to be
14 here when the creditors -- or the lenders have every
15 opportunity to raise this timing issue when they submitted
16 other objections to the credit bid procedures and they simply
17 failed to do it.

18 MR. RACHLIS: Your Honor, if I may respond, our --

19 THE COURT: Well, hold on.

20 MR. RACHLIS: -- Rule 70 --

21 THE COURT: Folks, folks. I want to move to Motion
22 481.

23 Mr. Welford, I reviewed your motion. And on page 2 of
24 the motion, you indicate that there are ten open issues that
25 need to be addressed in order for Liberty to file -- to file a

1 credit bid. However, if we go to the paragraph 11, that I
2 think is the structure agreed to by the parties regarding
3 credit bid, this particular paragraph only requires two items
4 to be provided by the receiver. The first one is the highest
5 bid, and the second one is terms and conditions of credit bids,
6 which includes good faith estimate.

7 So can you just explain to me the ten questions that
8 are on -- or ten issues that are on page 2, how that is
9 consistent with paragraph 11?

10 MR. WELFORD: Yes, your Honor. So the bid procedures
11 contemplated to conditions precedent to making the decision
12 whether to credit bid. So we're talking here notification of
13 whether we're going to credit bid, not the process for
14 submitting the credit bid. It was -- we are going to notify
15 the receiver within 24 hours or whatever time period your Honor
16 determines.

17 One is that we are going to have to bid against the
18 highest offer. And number two is the receiver is to make
19 certain disclosures to us with respect to costs.

20 As to the first, in order to place a competing credit
21 bid, the bid procedures require us to put together an asset
22 purchase agreement, subject to modifications to meet the credit
23 bid concept. And so what we asked for, what we contemplated,
24 and what we never expected would be the case, is that we would
25 not see the offer that they were going to be bidding against.

1 Because if we're going to be bidding apples to apples, then we
2 need to know what the original apple looks like.

3 We don't know if there is a due diligence period. We
4 don't know if there is a due diligence contingency. We don't
5 know if there are seller concessions. We don't know how
6 (unintelligible) were being prorated. We don't know anything
7 about what the offer says.

8 And so clearly if our interpretation and it is our
9 understanding that if we were going to be required to credit
10 bid in 2 percent increments above the highest offer, we would
11 know what we're bidding against. And so that was the reason
12 for Request Number 1.

13 Request Number 2 had to do with the exact language set
14 forth in the bidding procedures that we would know what the
15 costs would be. So that's -- we can get to a number and
16 determine how we're going to credit bid. And that has not been
17 provided to us.

18 As to the remaining items, your Honor, the purpose of
19 the credit bid in the case law is to make sure that we are not
20 selling below market. It is a protection for the lender to be
21 able to sell or protect its interests against a below market
22 offer.

23 As I have argued before your Honor, the statute in
24 this case, the federal -- the receivership sale statute allows
25 private sales with three appraisals for a public sale on the

1 courthouse steps. We have agreed to a modification to that for
2 a sealed bid process.

3 But in order for us to understand whether there have
4 been market exposure of our properties, we want to know what
5 happened with the sales process. And we saw that that
6 information would be made available to us because it has to be
7 made available to your Honor for purposes of approving the
8 sale. And the examples I give -- we know in this case, your
9 Honor, if the marketing period was no more than four weeks for
10 commercial real estate, which is a very short period of time,
11 so what we want to know and what we should know before we have
12 to credit bid is has the receiver received 20 offers on our
13 property, in which case I believe (unintelligible) would
14 conclude it has been tested by the market, or did it receive
15 one offer from the property manager who is an insider?

16 We don't know who accesses the due diligence room. We
17 don't know how many people conducted site visits. We don't
18 know how many offers were be received on each of our
19 properties.

20 And so that's a data point that we need to understand
21 in order to determine -- we're being asked to determine whether
22 we want to credit bid. We have no desire to credit bid if we
23 don't have to. But we do want to know was this properly
24 exposed to the marketplace. And so we are asking the same
25 questions that your Honor would ask or would be brought forth

1 through testimony for an offer of proof at a hearing to approve
2 the sale. You only got one bid, and it was from the property
3 manager, why didn't you advertise longer than four weeks, for
4 example.

5 So we're just trying to accelerate the process. If we
6 get the information, which is within the receiver's control, we
7 can make our determination whether to credit bid almost
8 immediately. Maybe not 24 hours, but 72 hours, whatever,
9 something reasonable, so people can get together and have a
10 conference call and make a decision.

11 So we're not trying to delay it, we just need the data
12 set. And we don't know why in a public forum receivership
13 proceeding this is hide the ball from the lenders. We're all
14 beneficiaries. Everyone in the room is a beneficiary of the
15 highest and best offer. And so we should have an understanding
16 of what has taken place to this moment to drive that process.

17 And if the receiver comes to us and says, I got
18 significant offers on every property, it has been market
19 tested, I can assure you, Judge, we probably won't have a
20 desire to credit bid. That's the rationale.

21 THE COURT: In terms of Questions 3 to 10, I get the
22 sense that the answers to these questions might provide Liberty
23 some information regarding the market climate. In other words,
24 it goes to Liberty's decision-making process as to whether it
25 is going to accept the market risk of credit bidding.

1 But it appears to me from your presentation, paragraph
2 11 does not envision answers to Questions 3 through 10.

3 Is that accurate?

4 MR. WELFORD: I don't understand the question.

5 THE COURT: Well.

6 MR. WELFORD: Paragraph 11 --

7 THE COURT: Let me start over then.

8 On page 2, you have ten questions or ten issues set
9 out. Paragraph -- first, Number 1, on page 2, you tie that to
10 the receiver's responsibility to provide you with the highest
11 bid. And as I understand your argument, in order to understand
12 the highest bid, you need to take a look at the asset purchase
13 agreement or the details of the bid in order to figure out what
14 the bid is.

15 As to Question 2 or Number 2 on page 2, that is tied
16 to the receiver's responsibility to provide details governing
17 the terms and conditions of credit bids, including a good faith
18 estimate of the seller's expenses at closing.

19 But your presentation does not connect Numbers 3
20 through 10 to paragraph 11.

21 I'm asking if that is accurate?

22 MR. WELFORD: Okay. I don't have a paragraph 11. I'm
23 looking at -- I have Items 1 through 10.

24 THE COURT: Let me ask the attorneys in the courtroom.
25 What will be an easy way for Mr. Welford find paragraph 11?

1 This is Document 430 dash 1.

2 MR. RACHLIS: Yeah, I think what Mr. Welford just
3 needs to understand is that your Honor's referring to paragraph
4 11 of the terms and procedures for the sales process. I think
5 that's where he may not be focused.

6 THE COURT: That's my fault. It is -- what I am
7 looking at is Document Number 430 dash 1 on the Court's docket,
8 or paragraph 11 of the sales process.

9 Let me know when you find it.

10 MR. WELFORD: Approved bidding procedures?

11 MR. RACHLIS: Of the -- I believe that we're
12 being -- everyone is referring to paragraph 11 of the agreed-
13 upon procedures between the receiver and Liberty, which are now
14 basically governing the credit bid procedures here.

15 MR. WELFORD: Okay. I am opening that.

16 THE COURT: Let me know when you have it.

17 (Brief interruption.)

18 MR. WELFORD: I have it, your Honor.

19 THE COURT: So it is titled special rules regarding
20 credit bids.

21 MR. WELFORD: Yes, yes, yes.

22 THE COURT: And let me ask the question a different
23 way.

24 Paragraph 11 does not require the receiver to answer
25 Numbers 3 through 10 on page 2.

1 Is that accurate?

2 MR. WELFORD: It does not specifically require the
3 delivery of that information, that is correct.

4 THE COURT: Thank you.

5 Let me ask, Mr. Rachlis, what about 1. How -- why --
6 why is Mr. Welford's argument not meritorious? In order for
7 him to figure out what the apple looks like, he needs to get
8 all of the details.

9 MR. RACHLIS: That's what every bidder would be
10 interested in, your Honor. Every bidder in an auction or in
11 this process would be more than happy to try and figure out
12 what other people are doing in their proprietary types of
13 analysis, if you will, in terms of the way it wants to
14 structure a bid. That is precisely what -- and so the
15 suggestion somehow that those are public is not accurate.

16 Those are submitted sealed to the -- to the
17 professional, the broker here, that's working on those in order
18 to engender the highest bid. So -- and we have provided the
19 information as to the highest dollar offer.

20 They now have the opportunity to utilize that. And
21 under paragraph 11, as your Honor has referred to, they can use
22 the purchase and sales agreement, which has -- which everybody
23 has used here, to convey its offer or they can modify such form
24 and/or adding one or more riders to make clear the terms of
25 their offer.

1 So they have the same opportunity as everyone else,
2 but the advantage of knowing what the highest bid is. So that
3 is precisely what was agreed to, precisely what was given to
4 them.

5 THE COURT: So when you say -- so when going back to
6 paragraph 11 where it says in the middle of the paragraph, the
7 receiver will advise the credit bid lender as to the amount of
8 a highest offer received.

9 So the only requirement here is to give the dollar
10 amount of the offer, nothing more than that.

11 MR. RACHLIS: Yes, your Honor. I mean, here is -- you
12 know, look, there are circumstances that even -- they have
13 occurred or that can occur where you get a bid, and you reach
14 back out to another party, and you say, can you come up
15 \$50,000? Can you do something else? Or things of that nature.

16 They are not provided with the entirety of who is
17 making the bid or the other mechanics of their bid or
18 contingencies or any other types of information. One is -- and
19 it is important again is that we -- fully adopt -- if wasn't
20 clear on that -- you know, what Mr. Hansen had indicated about
21 the fact that this has been litigated, you know, and the
22 opportunities litigated over and over and over and over again.

23 So your Honor correctly points to that language, and
24 that's the information that was provided. And they have that,
25 and they can utilize that.

1 THE COURT: Okay.

2 MR. RACHLIS: But there is no more that's necessary
3 for them to have.

4 THE COURT: But what about the additional details
5 governing the terms and conditions of credit bids, including
6 good faith estimate?

7 MR. RACHLIS: That -- you know, we have -- we told
8 them we would get that to them. As your Honor notes, and I
9 will read that so we are clear, it says additional detail
10 governing the terms and conditions of the credit bids,
11 including a good faith estimate at closing, will be made
12 available. That is the good term -- that is the good faith
13 estimate. We have going to provide it. We have agreed, and we
14 are working on having that information provided to anyone who
15 has requested it.

16 THE COURT: But.

17 MR. RACHLIS: And so that is that what we have -- so
18 that is the way we have certainly interpreted that.

19 THE COURT: But then are you requiring a credit bid
20 before the details are provided?

21 MR. RACHLIS: No, no. We were going to provide them
22 with that good faith estimate sometime. They -- the way the
23 mechanics have worked here, which is fine, is that we have
24 provided the highest offer that we received.

25 We then got back a request, in large part for many, to

1 say we need a good faith estimate of those closing costs. And
2 we have said that we will provide those. And we are in the
3 process of putting that together and providing that. And we
4 will not -- we will provide that information and then expect
5 the credit bids to follow after that information is provided.

6 THE COURT: But then aren't you then saying that
7 drawing the deadline as Friday would have been unreasonable?
8 Because you didn't provide the details before --

9 MR. RACHLIS: No --

10 THE COURT: -- then.

11 MR. RACHLIS: -- and it wouldn't in the sense that no
12 requests for that good faith estimate was made. After it was
13 made, after it was made, depending on the property -- you know,
14 I don't know if we had some for some properties available. But
15 I would say that we would not agree that it was unreasonable,
16 but we would agree that when the request for the good faith
17 estimate on closing was made, that we would modify -- agree to
18 modify that to allow that to be taken into account and then a
19 subsequent date selected.

20 But that subsequent date would not be 30 days out or
21 ten days out, it would be immediately upon or very close to the
22 time that they have.

23 MR. RACHLIS: Your Honor --

24 THE COURT: But is there a deadline for Liberty to
25 submit a credit bid? Is it the same deadline, Tuesday?

1 MR. RACHLIS: No, it is actually -- I -- and if your
2 Honor reads -- I wrote -- I had responded to Mr. Welford's
3 email -- or these points, much as your Honor has. I mean, 3
4 through 10 are irrelevant to any of the issues here.

5 Number 1 we indicated that the highest bid is
6 received.

7 Number 2 indicates that we're going to provide the
8 good faith estimate.

9 And then in the -- on page, it is on -- it is Exhibit
10 A to their motion. The second page of Exhibit A, if you look
11 under the last -- it is not really bulleted. It is not
12 numbered. But I do note to him, time is of the essence
13 (unintelligible) these matters as you well know. The receiver
14 will extend the time to receive credit bids from your client
15 until close of business Wednesday.

16 So they -- so we had provided them until the close of
17 business Wednesday. And we'll get them the good faith estimate
18 as quickly as we can.

19 THE COURT: But we don't know exactly when the --

20 MR. RACHLIS: Well, we are -- we have been --

21 THE COURT: -- details will be provided.

22 MR. RACHLIS: The details on the good faith estimate?

23 I --

24 THE COURT: Well, no, no. The additional details
25 governing the terms and conditions of credit bids.

1 MR. RACHLIS: They -- there is no -- I mean, we're not
2 aware of anything other than the good faith estimate. There is
3 nothing else that we would be providing to them. They already
4 have the number to work with.

5 MR. McCLAIN: Your Honor --

6 THE COURT: I'm sorry, just one -- Liberty takes the
7 position that it appears to be that the receiver is requesting
8 a 24-hour turnaround after the information is provided. That's
9 the position of the receiver.

10 MR. RACHLIS: Yeah. Well, subject to, you know,
11 agreement or modifications. But, yes. The answer is generally
12 yes.

13 When the -- we intend, for example, to -- when we have
14 their -- if they're going to credit bid and provide us with the
15 -- a number or their agreement consistent with what's set forth
16 in the procedures, we would give the next -- when we go back to
17 other high bidders, if you will, we expect them to respond
18 within 24 hours.

19 And, your Honor, I will tell you that I -- being in
20 the room with our broker during some of those discussions, the
21 response time on those when we have made those before can be a
22 range from ten minutes to an hour. So getting a response back
23 from somebody who has done their work and had months to look at
24 this -- these bidders didn't really participate in the same
25 proceedings. They didn't appear before your Honor or following

1 the docket in the same way. They can respond between ten
2 minutes and an hour.

3 And here after months of knowing these properties were
4 going to be sold, months of pleadings, months of filings, to
5 come here now and suggest that they don't know what's going on
6 and can't make a bid, I'll grant you, they want the good faith
7 estimate on closing costs. We're going to provide it.
8 Everything else is just a delaying mechanism and continues to
9 be that way.

10 THE COURT: Mr. McClain.

11 MR. McCLAIN: Yes. Thank you, your Honor.

12 This is a prime example of how the receiver has not
13 thought through this process. He just said, this is fine. He
14 did not give us the necessary information to determine whether
15 we should credit bid.

16 We made the request on Friday. It is now almost noon
17 on Monday, and he is still expecting us to submit a credit bid
18 by end of day tomorrow, yet he still has not given us this
19 information. This is not a fine process.

20 And regarding the governing terms and conditions for
21 submitting a credit bid, we still don't know anything about the
22 letter of credit. That is a huge unknown for my clients. A
23 giant risk and liability. The receiver has not set forth any
24 procedures or terms and conditions necessary for the letter of
25 credit.

1 And I also want to go back to this third-party
2 argument that these third-party bidders are available on the
3 drop of a hat and can respond immediately. I just want to give
4 some context at who these -- what we keep calling the lenders
5 actually are. They are not the Bank of Americas of this world.
6 They are not Wells Fargo. These are securitized trusts. These
7 loans are held in a securitized trust. There is -- just like
8 Equitybuild, there is investors that invest into that trust.
9 And those investors, the controlling certificate holder, is
10 entitled to make a determination on the management and the --
11 determine whether to credit bid on these loans.

12 So it is not as simple as walking into a bank and
13 saying, going to the loan officer, hey, you want buy this
14 property. The bid was a million dollars. Can you come up to
15 1.2? And the loan officer then crunching the numbers and
16 giving you the answer right there.

17 No, there are multiple steps that go into this
18 process.

19 The receiver has been aware of this since day one when
20 we initially indicated that these are CMDS (phonetic) loans.
21 These not your standard loans, your Honor.

22 And to go back to Mr. Hanauer's point that we have
23 somehow waived this or, you know, we have never made this
24 argument before, it is set forth clear as day in our Rule 72
25 objections that there is no court ordered process on submission

1 of credit bids.

2 And for the receiver to indicate that no good faith
3 request or reasonable request has been made, I personally
4 called their office on August 15th asking them to give us
5 details on how we are going to submit the credit bids and what
6 procedures are going to govern because there is no Court
7 ordered procedures. And I was told, you'll get a response.

8 And in typical fashion for this receiver, it was late.
9 It was after 5:00 P.M and then he created a fire drill by
10 giving us an artificial 24-hour deadline.

11 Your Honor, we are not trying to delay this process.
12 In fact, a hearing here today shows that we're trying to move
13 this process along. And we need more information. We need
14 more cooperation from the receiver than we're getting. And
15 that's why, unfortunately, we're before the Court.

16 A prime example is two of my have clients -- or one of
17 my clients has two properties. The second status report
18 indicates that there are no secured claims against those
19 properties other than my client.

20 So we asked the receiver last week, will you waive the
21 requirement --

22 THE COURT: You know what, I think we're going beyond
23 what -- why we're here. So let's just stick to why we're here.

24 MR. McCLAIN: Understood, your Honor. And I'm just
25 trying to paint a picture that we have actually been trying to

1 work this out with the receiver before seeking Court invention.

2 THE COURT: If you are talking about trying to defend
3 yourself from the accusation that you're trying to delay the
4 process, let's not go there. You know, it is, what it is. And
5 you are doing -- you are doing what you have to do. But the
6 impact -- and I don't think anyone can dispute that the impact
7 is delaying the process.

8 But that's not the same as saying, there is no some
9 deliberate effort on the part of the creditors to delay this
10 process.

11 MR. McCLAIN: It is what's been insinuated by both the
12 receiver --

13 THE COURT: I understand.

14 MR. McCLAIN: -- and the SEC.

15 THE COURT: I am not accepting it. At least I don't
16 have any of information to that effect.

17 Let me ask you, can you help me out with the decision
18 that require the letter of credit? Because I'm not sure that I
19 required the actual letter for bidding purposes.

20 MR. RACHLIS: Your Honor, it is --

21 MR. McCLAIN: Was that question addressed to me or
22 Mr. Rachlis?

23 THE COURT: Anyone can answer.

24 MR. McCLAIN: Your Honor, that is an open question.
25 It was we don't know if we are supposed to submit the letter of

1 credit with our credit bid or if it is supposed to come at a
2 later date. In any event, it is an unknown terms and condition
3 for submitting our credit bill.

4 MR. WELFORD: That was not intend of the Court. And
5 if you help me out, I can find it. If I can find it, I can
6 certainly clarify.

7 The purpose of the letter of credit is so that if the
8 creditors becomes the winning bidder --

9 MR. McCLAIN: Uh-huh.

10 THE COURT: -- but at some point Judge Lee adjudicates
11 the liens in a way where the creditor is not entitled to the
12 full percentage of -- well, 100 percent of that particular
13 property, then there is going to be adjustments that need to be
14 made.

15 It was make sure -- it was to ensure that that
16 particular creditor who won the bid is now having to pay money
17 outs to someone else. That was the purpose. And so for
18 purposes of actually submitting a bid, it is -- I don't think
19 that that was required.

20 MR. McCLAIN: So when would the lender be required to
21 submit the letter of credit?

22 THE COURT: When it is the successful bidder.

23 So let me see if I can --

24 MR. RACHLIS: May I respond, your Honor? It is on
25 your -- in your May 2nd order, if you look at that.

1 Yes, your Honor.

2 And, your Honor, it is crystal clear, this is just
3 another kind of obfuscation type of issue. It is crystal
4 clear.

5 THE COURT: We don't need to -- I really don't want
6 commentary --

7 MR. RACHLIS: I apologize, your Honor.

8 THE COURT: -- just the arguments and facts.

9 MR. McCLAIN: It is crystal clear. It is in the
10 order. You weren't -- your Honor makes it clear that the
11 credit bid, if they are the winning bidder, then there is going
12 to be questions raised as to bona fide dispute. When that then
13 comes up, they are supposed to be the letter of credit. It is
14 not ambiguous. It is absolutely -- you know, it is set forth
15 clearly in the May 2nd order and ask been now --

16 THE COURT: Let just find it.

17 MR. RACHLIS: -- for months.

18 MR. McCLAIN: And, your Honor, we submitted our Rule
19 72 to clarify that because if it was crystal clear, we would
20 not submit our Rule 72.

21 MR. RACHLIS: Maybe pages 6 and 7 of the order, your
22 Honor. I'm sorry I don't have it with me in my hand.

23 (Brief interruption.)

24 MR. RACHLIS: I do have a copy.

25 MR. WELFORD: Your Honor, Jay Welford on behalf of

1 Liberty. That procedure --

2 MR. McCLAIN: It is on page 7, and it is Docket 352.

3 MR. WELFORD: The Liberty --

4 MR. McCLAIN: Sorry, Jay.

5 MR. WELFORD: Your Honor, the Liberty approved bid
6 procedure that are subject to the pending objections say that
7 in the event that a credit bid lender is selected as the
8 winning bidder, the credit bid lender will be required under
9 certain circumstances established by the receivership court as
10 a condition of closing to post an irrevocable letter of credit
11 in the amount of the bid, minus any and all court-approved
12 sale-related expenses or such other amount as the receivership
13 court shall determine with time being of the essence.

14 It clearly can contemplate the subsequent hearing
15 before the Court required at closing as to whether a letter
16 will be needed and under what circumstances.

17 (Brief interruption.)

18 THE COURT: As it is written I see Mr. McClain's
19 position on this. It says here -- I say here, given this
20 Court's prior ruling, which did not disturb the rights and
21 interest of non-institutional lenders, recognizing that it has
22 minimal authority to extinguish preexisting state law security
23 interests, the Court sustains the lenders's predicate
24 objection. The Court agrees that all lenders have a right to
25 make a credit bid of their lien on a property that the receiver

1 proposes to sell. However if the receiver identifies a bona
2 fide dispute as to the validity of any lenders's debts and
3 provides sufficient support for the bona fide nature of the
4 dispute, then the lender is seeking to submit a credit bid
5 (unintelligible) irrevocable letter of credit drawn on another
6 bank to protect the receiver and receivership assets.

7 I think that it can be interpreted -- in fact, that
8 would be the plain meaning of the ruling, that a credit bid has
9 to be posted at the same time a bid is submitted. And that's
10 not -- certainly that's not what I meant to say because,
11 obviously, a bid is transient, and it is not definite or firm.
12 So I need to go back and clarify page 7 of record 352.

13 Having said that, with respect to -- so let me
14 just -- I have heard sufficient information to at least comment
15 on the motions.

16 As to Document Number 481, Liberty's motion, as long
17 as, and pursuant to paragraph 11, as long as the receiver has
18 provided the highest bid, which means that the amount of the
19 highest offer and provides the good faith estimate because --
20 based on the receiver's representation today, there are no
21 other terms and conditions aside from the good faith estimate,
22 then Liberty has to make a credit bid if it wishes to do so.

23 In terms of the time period, I will allow Liberty 48
24 hours to make that bid.

25 Each time that it has to -- it has the right to make a

1 credit bid. So I guess what I am saying is I'm providing
2 Liberty a 48-hour cushion to make that credit bid.

3 With respect to -- and with respect to the other
4 lenders's motion, my concern is this -- and this may also apply
5 to Liberty as well. Judge Lee hasn't ruled on any of the
6 objections.

7 MR. HANAUER: No, your Honor. And we were actually
8 going to submit, now that the issue is abundantly ripe, a
9 motion to expedite hearing under Rule 72 because it is a huge
10 elephant in the room.

11 THE COURT: And -- and I don't take back my statements
12 in court that this could have been avoided. But it is what it
13 is.

14 I'm not comfortable in setting a deadline when Judge
15 Lee has not ruled on the objections. And depending on -- I
16 mean, obviously I think that objections may be overruled. But
17 if he sustains the objections, the sales process may be in
18 jeopardy in terms of its structure. I just don't know. And
19 not knowing, by requiring other lenders or even Liberty, for
20 that matter, to do certain things is putting the cart before
21 the horse. And we may be undoing things, depending on what
22 Judge Lee says.

23 Do you have any anticipated rule day or hearing date
24 or anything? There is one in September?

25 MR. RACHLIS: Your Honor, it is September 25th. And

1 our reply is actually due next Wednesday. We're going to
2 endeavor to file that before that date and also file a motion
3 for expedited consideration.

4 THE COURT: In light of the fact that the hearing is
5 not until September 25, I don't think there is any harm in
6 giving Liberty and the other lenders until August 30 to submit
7 a credit bid. Because we're not going to get any finality
8 until September 25, right? Best case scenario?

9 MR. RACHLIS: Well, your Honor, I mean, I think that
10 it is fair to say that there may not be finality. I -- but the
11 rulings of your Honor, you know, have been the basis for us to
12 try and sell properties that need to be sold.

13 THE COURT: I understand.

14 MR. RACHLIS: I mean the exigency -- the exigencies
15 here in this circumstance -- I mean, I will harken back. I
16 mean, Mr. Marcus's statements, you know, they are -- they
17 bring -- there is elements of candor and of accuracy in those.
18 And we are trying in every way, shape, and form. Because if
19 those slow down, we then hear, where are the property taxes?
20 How are those going to be paid? How is this going to be paid?
21 How is that going to be paid?

22 And all of these other issues jeopardize the ability
23 to operate the receivership. I mean, your Honor, to be fair to
24 this Court, these issues have been litigated in the front of
25 your Honor for months.

1 And I recognize that Judge Lee has the opportunity and
2 the ability under Rule 72 to deal with these things. But in
3 the meantime, it does place a significant burden on the
4 receivership and on these buyers. I mean, that is our -- I
5 mean, clearly we are here today to deal with the fact that
6 we're in the middle of an auction process. And to have that
7 delayed out -- we have been told by our professionals that that
8 is a bad and negative thing.

9 And that may not be not just bad and negative for this
10 batch of properties, but how about the next batch of properties
11 that are out there? There are credibility issues that affect
12 market conditions. So it seems that those are at risk. And
13 these are significant exigencies that they are jeopardizing.

14 This is, you know, sort of a backhanded way of dealing
15 with the priority issues. So we are now going to now be
16 stalling these -- you know, whatever the reason may be, the
17 effect is the same. And the effect here is severely negative
18 on the receivership, severely negative on interested parties,
19 and we certainly don't believe that that's appropriate given
20 the incredible amount of time and effort spent by this Court
21 and by the -- by all of the participants here in order to
22 articulate these issues.

23 THE COURT: Mr. Hanauer.

24 MR. HANAUER: Just to address the Court's concern
25 about what happens if Judge Lee decides to go another way on

1 this. Let's remember that we're at step one in the two-step
2 process. What we did with the first batch of properties,
3 you're asking me (unintelligible) sales (unintelligible) right
4 now, and then the ultimate approval of the actual sale will
5 allow it to be consummated.

6 So you have -- if the Court would just flat out deny
7 the lenders's motion (unintelligible) process was really
8 (unintelligible) for the Liberty (unintelligible) we're still
9 back before this Court to approve the ultimate sale, and then
10 the lenders presumably would have a right to go up to Judge
11 Lee.

12 And so I think the concern about, you know, know
13 (unintelligible) get in front of Judge Lee, I don't really
14 think that's (unintelligible) here. But, on the other hand,
15 slowing down the process is harming the receivership either --
16 you know, a lot of things are money (unintelligible)
17 properties, you know, every day that the receiver has to
18 support the properties is money that could be spent on other
19 items.

20 The receiver has also informed me we're rapidly
21 approaching heating season where the receiver has to be paying
22 the costs associated with keeping the property warm. Those are
23 very real costs. And I'm just worried the longer that this
24 gets pushed off and the longer that (unintelligible) delays, it
25 is further costs that are harming the receivership and that

1 ultimately (unintelligible) investors and (unintelligible).

2 THE COURT: But those creditors also involve -- also
3 include the lenders.

4 So here's what I am saying. I don't want to do
5 something that may be -- that has to be undone. I don't know
6 what the probability is that Judge Lee will go a different way.
7 I tend to think that the probability is low. But, nonetheless,
8 there is that probability.

9 And I grant you that this particular process of having
10 certain motions and discovery issues to be resolved by the
11 magistrate judge, and which then builds in an objection
12 opportunity, at times it is not as efficient. But that's the
13 process we have.

14 I think the best way forward is this -- and I
15 understand your point that it is a two-step process. But then
16 the credit bidding process becomes a moot point or it becomes
17 meaningless if the creditors are not able to meaningfully
18 submit a credit bid because it has already objected to the
19 sales process.

20 What I am going to do is require both Liberty,
21 assuming that we have the good faith estimates provided to the
22 lenders, both Liberty and other lenders to submit a credit bid
23 by no later than August 30. And for subsequent credit bids to
24 be accomplished within 24 hours of the highest bid being
25 communicated.

1 Now I say no later because the sooner the lenders can
2 submit the credit bid, the sooner the receiver and others can
3 receive other bids from other potential buyers. Because I
4 don't know whether there is a level of distrust, but if the
5 receiver is in fact explaining to the other lenders that time
6 is of the essence and there are critical issues at play here,
7 actually taking until August 30 to actually provide a credit
8 bid may actually be damaging your own interest in this regard.

9 This is the best that I can do under the
10 circumstances. So that's the issue -- that's the order I'm
11 going to enter some time this afternoon.

12 MR. RACHLIS: May I make one more pitch on one thing,
13 your Honor?

14 THE COURT: Yes.

15 MR. RACHLIS: Your Honor, the time of the essence is
16 part of the credit bid process. It is part of paragraph 11.
17 So everybody is aware and knows that that's an important
18 element.

19 To that point I understand your Honor's desire to try
20 and balance these interests. If it were possible, you wanted
21 to extend at least some time, could that at least be by Friday
22 of this week? That gives them a full week. And then we
23 can -- we'll follow up accordingly.

24 But they will have information that they have. They
25 know that time is of the essence and you know that that's the

1 thank you, your Honor mentioned right now. So at least if we
2 could do that, that would give -- it is certainly something
3 that we could wanted to avoid. But if that's possible then we
4 will work with that for a date and then we are -- we are
5 satisfied, obviously with the 24 hour subsequent. But that
6 would at least allow some -- semblance of activity for this
7 week.

8 So if we could have credited by the end of the day
9 Friday, then we'll spend the time subsequent to deal with other
10 bidders.

11 THE COURT: I'm going to stand by my ruling. And I
12 use August 30 because the lenders actually asked for that. So,
13 you know, they should be able to submit their credit bid, and
14 they shouldn't have anything to complain about if that was in
15 fact given. But as I indicated, every lender including,
16 Liberty -- I know, Mr. Welford, you dropped off.

17 Every lender has the ability to pass the interest --
18 has the interest in protecting the assets. So the sooner that
19 the lenders can submit the credit bid or at least make a
20 decision that, you know what, we're not going to do this, then
21 you can move forward. And so I think this gives enough
22 flexibility for the lenders and for the receiver and not do
23 something that we need to undo at a later time.

24 Anything else?

25 MR. CROWLEY: Your Honor, James Crowley. I --

1 MR. WELFORD: Your Honor, Jay Welford on behalf of
2 Liberty. You gave us that point 3 through 10 that I have
3 requested.

4 THE COURT: I'm sorry, you are going to have to start
5 over.

6 MR. WELFORD: In my objections I had asked for
7 information regarding the sale process, how many bidders,
8 who -- who access the due diligence room, how many offers were
9 received.

10 THE COURT: And that objection is overruled.

11 MR. WELFORD: I am asking whether --

12 THE COURT: Mr. Crowley --

13 MR. CROWLEY: Your Honor, James Crowley on behalf of
14 UBS (unintelligible). I have been in the back of the courtroom
15 listening. I didn't step up, your Honor, because it was
16 Mr. McClain's motion. But when the Court is now addressing the
17 ruling that will affect all lenders, I do just want to step up
18 for two seconds.

19 First, we didn't file an objection to the timing
20 because we didn't get our notice that our property, one of our
21 properties, was sold until Saturday. So I haven't really had a
22 chance to even talk to my client about it. That's why UBS has
23 not filed an objection seeking additional time.

24 I just want clarity that if -- just based on the fact
25 that either a lender -- an institutional lender doesn't object

1 to -- or doesn't submit a credit bid doesn't waive their right
2 to later object to the sale of the proposed property.

3 THE COURT: Of course not.

4 MR. CROWLEY: Okay. So we retain that right.

5 Secondly, with respect to the request for information
6 regarding the credit bid that's been -- or I'm sorry -- the bid
7 that's been accepted by the receiver, all the receiver is
8 providing is the amount of the bid -- or the highest offer. He
9 doesn't provide any other terms.

10 And I'm suggesting under the terms of the credit bid
11 terms and conditions, it requires the receipt -- or the -- or,
12 well, anybody, the lender, equity investors or whatever, to
13 make a bid that is (unintelligible).

14 What I am saying is I don't see where the problem is
15 getting us the other terms. When is the closing date? Are
16 they closing within ten days? Thirty days?

17 THE COURT: Mr. Crowley, I'm sorry, this is going
18 beyond the issues before me, and I don't want to just --

19 MR. CROWLEY: Well, Mr. Welford --

20 THE COURT: -- comment off the cuff.

21 MR. CROWLEY: -- did raise these issues in his
22 objection. He wants the copy of --

23 THE COURT: Yeah. Those -- that information is not
24 going to be provided.

25 MR. CROWLEY: Okay.

1 THE COURT: You know, Liberty has a very unique
2 situation because Liberty has agreed to paragraph 11. I don't
3 know of any other lenders that have agreed to paragraph 11.

4 Right?

5 MR. McCLAIN: Right. No.

6 Correct, your Honor.

7 THE COURT: Okay. Thank you.

8 MR. CROWLEY: Thank you, your Honor.

9 MR. RACHLIS: Thank you, your Honor.

10 (Which concluded the proceedings.)

11 CERTIFICATE

12 I certify that the foregoing is a correct transcript
13 from the digital recording of proceedings in the above-entitled
14 matter to the best of my ability, given the limitation of using
15 a digital-recording system.

16

17

18 **/s/ Pamela S. Warren**
19 Official Court Reporter
20 United States District Court
Northern District of Illinois
Eastern Division

August 20, 2019
Date

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