Appeal No. 20-3155

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.

VENTUS HOLDINGS, LLC,
Appellant

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 FILED BY VENTUS HOLDINGS, LLC

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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 Appellant, Ventus Holdings, LLC ("Ventus"), filed a notice of appeal of an interlocutory decision of the District Court approving the Receiver's sale of three real estate properties (7600-10 S. Kingston, 7656 S. Kingston, and 6949-59 S. Merrill) that are part of the Receivership Estate. (Dkt. No. 825 at 1-4 (attached hereto as Exhibit 1))

Ventus is not a claimant in the Receivership. Nor is Ventus seeking to enforce a contract. Nor is Ventus a jilted highest bidder. Rather, Ventus was a prospective purchaser that entered contracts to purchase these properties but *it backed out of the contracts*. It was only because and after Ventus breached the contracts that the Receiver entered new contracts with other purchasers to sell the properties. Ventus never provided the Receiver with a new, subsequent offer to purchase the properties. Instead, when the Receiver moved for the District Court to approve the contracts that were entered into with the new purchasers, Ventus objected to the sale of the properties based on a suggestion that it was working to get new financing and that it would pay more than the amounts the Receiver had agreed upon with subsequent purchasers. The District Court approved the sale to the new purchasers and overruled Ventus' objection. (Dkt. 825)

Ventus' actual interest, but which is not the subject of its appeal, involves its efforts to obtain approximately $450,000 in earnest monies that it put in escrow to protect the Receivership Estate against exactly what happened when Ventus

defaulted and terminated the original purchase agreements. But the earnest money dispute has not been adjudicated by the District Court and remains the subject of ongoing motion practice.

Nevertheless, on November 2, 2020, Ventus filed a notice of appeal from the District Court's order approving the sales of the three properties. Ventus asserts without explanation that jurisdiction for this interlocutory appeal exists under 28 U.S.C. § 1292(a)(2). (*See* Appeal Dkt. No. 1) But Section 1292(a)(2) does not provide jurisdiction over this appeal. Controlling authority from the Seventh Circuit and the language of the statute show that an interlocutory order approving a receiver's sale of properties is not appealable under Section 1292(a)(2). Additionally, Ventus has not suffered an injury, further undermining the effort to manufacture jurisdiction. 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 operating, maintaining and preserving these properties and created an even greater impetus to sell them expeditiously. (*See, e.g.,* Dkt. No. 699, at 4) 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))

Consistent with his duties and responsibilities regarding the orderly disposition of the properties in the Receivership, the Receiver marketed the three properties that are part of this appeal in accordance with the procedures approved by the District Court (*e.g.,* Dkt. Nos. 352, 382, 540, 618), after which he entered a purchase and sale agreement for each. Specifically, in October 2019, the Receiver originally accepted contracts without financing contingencies from Ventus to sell 7600-10 South Kingston for $1,870,000 and 7656 South Kingston for $510,000. (Dkt. 618, at 66, 69) In December 2019, the Receiver accepted a contract to sell 6949-59 South Merrill to Ventus for $1,935,200. (*Id.* at 76)

After the District Court confirmed these sales (Dkt Nos. 633 and 680), Ventus defaulted and the purchase contracts were terminated. (*See* Dkt. 739, Exhibits A & B) By letter dated April 20, 2020, and despite the fact that there was no financing contingency in the agreements, Ventus informed counsel for 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 acquiring the three properties. (*Id.,* Exhibit A) Ventus then requested the return of its earnest money deposits (representing ten percent of each purchase price), which the Receiver refused.

With Ventus' unequivocal pronouncement that it could not proceed, and the contract thereby in default and terminated (*see id.*, Exhibit B), the Receiver secured

new purchase contracts for each of the three properties from other buyers who had participated in the auction process. On June 11, 2020, the Receiver moved to confirm the sales of the three properties to the new purchasers. (Dkt. 712) As set forth in the motion, with respect to 7600-10 South Kingston, the Receiver accepted a purchase agreement for $1,530,000. With respect to 7656 South Kingston, the Receiver accepted a purchase agreement for $320,000. And with respect to 6949-59 South Merrill, the Receiver accepted a purchase agreement for $1,520,000. (*See* Dkt. 712, at 5-11)

On June 22, 2020, however, Ventus moved to intervene in the District Court action[1] and filed a memorandum in opposition to the Receiver's motion to confirm the sales to the new purchasers and otherwise for return of the earnest monies it had put in escrow in connection with the original contracts. (Dkt. 721) Ventus' objection did not include any statement that it actually *had* procured financing – indeed it terminated the purchase agreement precisely because it did not have financing. (*See* Dkt. 712, at 5-7, 10) Nor did it acknowledge that the original contracts on which it defaulted had no financing contingency. Instead, Ventus only said that it "is *in the process of* securing alternative financing and has received, and approved, term sheets from a new lender." (Dkt. 721, at 3) (emphasis added). Importantly, these representations appeared in Ventus' objection to the Receiver's motion to approve the sales to new purchasers, two months after Ventus terminated

[1] The Receiver did not contest the intervention motion because it ensured that the earnest money dispute would be resolved by the District Court.

the purchase agreements and six weeks after the Receiver had entered agreements with the new purchasers. (*See* Dkt. 825 at 3)

On October 26, 2020, the District Court entered the order that is the subject of this appeal, which overruled Ventus' objection and granted the Receiver's motion for approval of sale of these three properties. (Dkt. No. 825) The District Court's order also allowed Ventus to file a motion for the return of earnest monies, which Ventus subsequently filed and which remains pending before the District Court. (Dkt. No. 861) On November 2, 2020, the Appellant filed its notice of appeal, asserting Section 1292(a)(2) as the jurisdictional basis for this Court's review of the District Court's interlocutory order. (Dkt. No. 847) The Receiver moves to dismiss this appeal on the ground there is no jurisdiction to hear this appeal.

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 does the Appellant suggest otherwise. In fact, to the contrary, the Appellant continues to seek relief in the District Court with respect to the same transactions that are the subject of its appeal. Thus, the sole inquiry is whether there is a statutory basis for appellate jurisdiction. The Appellant has asserted 28 U.S.C. § 1292(a)(2) as the basis for this Court's jurisdiction over its 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).

The Appellant's unsupported effort to create jurisdiction entails a characterization of an order approving the sale of receivership estate properties as a refusal to take steps to wind up the estate is belied by the face of the order itself and the ongoing proceeding below. It is also a position that 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 claimants or other objectors who could argue that the District Court is refusing to rule their way and/or provide them immediate relief. There are nearly 900 claimants in this action alone, along with dozens of actual and potential purchasers of receivership properties. 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 Appellant seeks here through its 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).

Indeed, this Court's *Antiques* decision recognized that other circuits follow the same interpretation and reject the type of expansive jurisdictional argument advanced here by the Appellant. *See Antiques*, 760 F.3d at 672; *see also, 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, the First Circuit recognized that a district court's approval of the sale of certain properties did not fall within Section 1292(a)(2). *State Street Bank & Trust Co.* at 1490-91. 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." *Id.*

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 Appellant simply cannot get around this Court's binding decision in *Antiques* and the great weight of persuasive authority in other circuits by an effort to relabel what is clearly a non-appealable interlocutory order *en route* to winding up a receivership as an order *refusing* to wind-up the receivership. The effort to do

so represents a legal and factual failure and a public policy nightmare. Through that lens, any action taken by a receiver or approved by a district could be immediately 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.

Ventus' jurisdictional failings are also heightened by Ventus' lack of injury. Ventus' real complaint is that it believes that it is entitled to the return of its earnest monies. That issue, however, has not been resolved by the District Court. As such, even if jurisdiction existed for the appeal of the order at issue (which it does not), Ventus does not have standing to pursue an appeal because it has not suffered any injury from the order, a fact that Ventus tacitly admits as it actively pursues its motion for earnest monies. (Dkt. 861) *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (reversing judgment for plaintiff based on lack of standing, and providing the following general rule: "our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,'" [citations omitted] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the

court." [citation omitted] Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [citation omitted]).

CONCLUSION

For the reasons set forth herein, there is no appellate jurisdiction 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.

Dated: November 19, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 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