UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Civil Action No. 18-cv-5587

Plaintiff,

Hon. John Z. Lee

v.

Magistrate Judge Young B. Kim

EQUITYBUILD, INC.,
EQUITYBUILD FINANCE, LLC,
JEROME H. COHEN, and
SHAUN D. COHEN, Defendants.
_____/

OBJECTION OF LIBERTY EBCP, LLC TO MEMORANDUM OPINION AND ORDER DATED MAY 2, 2019

Liberty EBCP, LLC ("*Liberty*"), by its counsel, Jaffe, Raitt, Heuer & Weiss, P.C. files this *Objection to Memorandum Opinion and Order Dated May 2, 2019 ("Objection")* pursuant to Fed. R. Civ. P. 72(a), and in support thereof, states as follows:

INTRODUCTION

Liberty is seeking review of portions of the *Memorandum Opinion and Order* dated May 2, 2019 issued by Magistrate Judge Young B. Kim (the "*May 2 Order*") (R 352). The *May 2 Order* addresses the *Receiver's Second Motion for Court Approval of the Process for Public Sale of Real Property by Sealed Bid* (the "*Second Procedures Motion*") (R 228). Three of Liberty's collateralized properties, 7600 S. Kingston, 7748-50 S. Essex and 8326-56 S. Ellis (the "*Properties*") are subject to the *Second Procedures Motion* and the *May 2 Order*.

PRELIMINARY STATEMENT

Liberty has filed this *Objection* based on the deadline imposed under Fed. R. Civ. P. 72(a).

Liberty, along with the other lenders, have begun and intend to further engage in discussions with the Receiver regarding certain of the issues raised in this *Objection*, with the hope that this *Objection* can be resolved based on those discussions. Therefore, Liberty has noticed this *Objection*, other than on an immediate basis, to allow for possible resolution of the issues raised.

ARGUMENT

1. **Liberty Objects to the Determination that the Sealed Bid Process Does Not Have to Incorporate the Provisions of 28 U.S.C. §2001(a)**.

The Receiver, in the *Second Procedures Motion*, proposes to sell the Properties pursuant to the public sale provisions of 28 U.S.C. § 2001(a)[1]. Section 2001(a) requires a sale "at the courthouse, parish or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs." The Receiver proposes to sell pursuant to a sealed bid process, which in no way includes the requirements of Section 2001(a). Liberty took exception with this process because it was outside of the statutory requirements of Section 2001(a). The *May 2 Order*, after citing to certain case law, determined that:

> In the exercise of its discretion here, the court finds that the Receiver's proposed sale procedures comply with Section 2001(a) for several reasons. As an initial matter, Liberty has not shown that a public sale on the courthouse steps or Properties would result in a better outcome for any party, creditor or investor than the public auction proposed here. Nor has Liberty demonstrated that any of the identified properties can actually be "sold" on the courthouse steps. The Receiver is not authorized to sell anything without the court's approval, which cannot take place until after the auction period expires. The Receiver has the authority to "take all necessary and reasonable actions" to sell or lease "all real property in the Receivership Estate." (R. 16, Receivership Order, ¶ 38). While the Receiver must act "with due regard to the realization of the true and proper value of such real property," (id.)., neither Liberty nor any other Lender or Party has shown that the Receiver has not acted in the best interest of the Receivership Estate. And the Receiver describes measures—including publishing notice of the sale in a number of prominent publications and marketing the public sale on publicly available websites and through social media—that seek to "maximize awareness and

[1] Per footnote 2 to the *May 2 Order*, the Receiver is not relying on the private sale provisions of 28 U.S.C. §2001(b), in support of the Properties' sale.

> interest" in the Properties. The court therefore overrules Liberty's objection and approves the sale procedures proposed by the Receiver, except as otherwise provided below.

May 2 Order, pages 5-6.

Liberty objects for the following reasons.

First, the statute is explicit. It mandates where the sale, a public sale, is to take place. When a statute is explicit on its face, a court should not ignore its plain meaning. In *SEC v. T-Bar Resources, LLC*, NO. CIV. A.3:07CV1994-B, 2008 WL 4790987 (D. N.D. Tex. 2008) the court, while finding the testimony credible related to the sale of oil and gas interests, declined to approve the sale, as the requirements of Section 2001(b) (governing private sales, which require three appraisals and publication for four weeks) had not been undertaken. *Id.* The court also noted that Section 2004, which governs the sale of personal property, contains a discretionary right to deviate from the statutory requirements, by stating "unless the court orders otherwise." This language is not found in Sections 2001(a) or 2001(b). *Id*. As stated by the court:

> The procedures contained in § 2001(b) define the Court's authority to authorize the sale of real property. See, *Bollinger & Boyd Barge Serv., Inc. v. Captain Bass*, 576 F. 2d 595, 597 (5th Cir. 1978); *United States v. Garcia*, 474 F. 2d 1202, 1204 (5th Cir. 1973); *Arcadia Land Co. V. Horuff*, 110 F. 2d 354-354-55 (5th Cir. 1940). Accordingly, per the express terms of the statute, a court must have the assistance of three appraisals before confirming the private sale of real property. 28 U.S.C. § 2001(b) ("*Before* confirmation of any private sale, the court *shall* appoint three disinterested persons to appraise [the] property . . . ") (emphasis added).
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> * * *
>
> Reading §2001(b) in context with its surrounding counterparts provides further proof of the mandatory nature of the three appraisals. For example, in allowing court to order the private sale of personal property, 28 U.S.C. § 2004 informs that courts are to follow the same procedures outlined in § 2001(b), "unless the court orders otherwise." *Id.* Congress thus considered deviating from the rigors of § 2001(b)'s procedures in relaxing the process for the sale of personalty. The absence of any such authorization in the sale of realty suggests that Congress intended the more stringent procedures to be the rule when ordering the sale of real property.

SEC v. T-Bar. The *SEC v. T-Bar* analysis has been followed by many courts. In *SEC v. Yin Nan*

"Michael" Wang, et. al, Case No. CV 13-7553 JAK (SS), 2015 WL 12656907 (D. C.D. CA 2015) the court stated:

> Numerous courts, including the ninth Circuit, have recognized that the procedural provisions of section 2001(b) are mandatory and may not be waived by the court. *See, e.g., United States v. Stonehill*, 83 F. 3d. 1156, 1162 (9th Cir. 1996) ("private sales of real property" under section 2001(b) require the appointment of "three disinterested person to appraise such property" and may not be confirmed at a price "less than two-thirds of the appraised value") (quoting 28 U.S.C. § 2001); *Redus Florida Commercial, LLC v. College Station Retail Center, LLC*, 777 F. 3d. 1187, 1186 n. 16 (11th Cir. 2014) ("Courts have no power [under 28 U.S.C. § 2001(b)] to confirm a private sale at a price 'less than two-thirds of the appraised value.'"); *United States v. Brewer*, 2009 WL 1313211, at *1 (M.D. Fla. May 12, 2009) (court's power to authorize sale of real estate within a receivership estate is "limited" by the "requirements for sale set forth in 28 U.S.C. §2001.

Sec v. Yin Nan "Michael" Wang at *3. *See also, Huntington National Bank v. JS&P, L.L.C.*, 2014 WL 4374355 (D. E.D. MI 2014) ("[t]he Court does not have discretion to waive the requirements of § 2001(b) contrary to the argument that is inherent in the Receiver's position");

The same statutory construction applies to Section 2001(a), governing public sales. No discretion is granted to a court to deviate from the requirements of Section 2001(a).

Second, contrary to ruling, the statute does not require that Liberty show that a public sale on the courthouse steps or at the Properties would result in a better outcome for any party, creditor or investor than the procedure proposed by the Receiver. This is not a standard under Section 2001(a). Compliance with Section 2001(a) is not discretionary. The only discretion outlined in the statute is whether the sale occurs on the courthouse steps or at the property's location.

Third, certain of the cases upon which *May 2 Order* relies in support of other courts' deviation for the explicit requirements of Section 2001(a) are distinguishable. In both *SEC v. Billion Coupons*, Nos. 09-00068, 09-00069, 2009 WL 2143531 (D. Haw. July 13, 2009) and in *Pennant Mgmt., Inc. v. First Farmers Fin., LLC*, No. 14 CV 7581, 2015 WL 5180678 (N.D. Ill. Sept. 4, 2015) the opinions specifically noted that no objection to deviation from the requirements

of Section 2001(a) were posed by any party. And in *United States v. Hunwardsen*, 39 F. Supp. 2d 1157 (N.D. Iowa 1999) the issue was not whether the parties could deviate from the requirements of Section 2001, but, rather, whether the proposed sale should be carried out under the strictures of Section 2001(a) versus Section 2001(b).

Fourth, the *May 2 Order* confuses the method of sale with confirmation of the sale. The drafters set forth in Section 2001(a) how the sale is to be *conducted*, not how it is to be *approved*. Once *conducted*, the parties then seek *approval* by reporting to the court, as occurs in bankruptcy sales, the results of the sale, and the court then confirms the sale, based on offers of proof, transcripts of the auction sale or other evidence of the bids submitted and sale process generally. This two-step process is borne out in the pleadings in this case. Pursuant to the *Receiver's Motion for Court Approval of the Process For Public Sale of Real Property by Sealed Bid* (R130) (the "*First Procedures Motion*") the Receiver sought approval of sale procedures for the first set of properties. Thereafter, after choosing the highest bidders based on the sealed bids received, the Receiver filed the *Receiver's First Motion for Court Approval of the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Liens, Claims and Encumbrances* (R 230) (the "*First Approval Motion*"), under which the Receiver sought *approval* of the sale resulting from an initial sales effort. Under *May 2 Order's* rationale ("[n]or has Liberty demonstrated that any of the identified properties can actually be "sold" on the courthouse steps. The Receiver is not authorized to sell anything without the court's approval, which cannot take place until after the auction period expires"), no receivership sale could ever occur in accordance with Section 2001. That is simply not the law. The statute is specifically drafted to govern the *conduct* of sale, not the *approval* of the sale.

Fifth, the *May 2 Order* incorrectly relies on the marketing process proposed by the

Receiver, as justification for deviation from the conduct of the sale process mandated under Section 2001(a). 28 U.S.C. § 2002 sets forth the minimum marketing process requirements related to a public sale:

> A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state or judicial district of the United States wherein the realty is situated.

The marketing process proposed by the Receiver complies with Section 2002. But compliance with Section 2002 (or exceeding its requirements) does not write the sale conduct requirements of Section 2001(a) out of the statute. The provisions are meant to be read together, not to supplant one another.

Sixth, the Receiver's desire to seek sealed bids is not mutually exclusive to the requirements of Section 2001(a). After receipt of sealed bids, the Receiver has the ability, per approved procedures, to announce that the highest sealed bidder will be the opening bidder at the public sale at the property or on the courthouse steps, with a last opportunity for higher and better offers. Providing this last chance can only enhance the amount potentially received for the Properties. As noted in the *Objection of Liberty EBCP, LLC to Receiver's Second Motion for Court Approval of the Process for Public Sale of Real Property by Sealed Bid* (R 232) ("*Liberty's Second Procedures Motion Objection*"), with respect to the *First Approval Motion*, the proposed sale prices ranged from 45% to 88% of original purchase price for the properties purchased by EquityBuild less than two years earlier (R 232, page 5). Allowing a last opportunity for bidding can only enhance the potential outcome to creditors. And, as noted below, allowing Liberty the opportunity to credit bid at the public sale can only enhance the value received by the receivership estate. Accordingly, the sale procedures should include compliance with Section 2001(a).

2. **While the *May 2 Order* Granted Liberty the Right to Credit Bid, the Manner, Timing and Methodology for Placing the Credit Bid Has Not Been Spelled Out.**

The *May 2 Order*, while recognizing the right of Liberty to credit bid, did not specify the timing and manner for placing such a bid. Therefore, after issuance of the *May 2 Order*, Liberty's counsel reached out to counsel for the Receiver seeking clarification of the manner, timing and methodology proposed to be employed to receive credit bids, as part of the sale process. The Receiver responded, on May 14, 2019 as follows (the "*May 14 email*"):

> Jay –
>
> I am following up on your e-mail. This is generally how we anticipate that the bidding process will occur consistent with the Court's grant of the Receiver's motion and the May 2nd order. The credit bid offer will be made when all calls for offers are due pursuant to the terms and instructions on the bidding process (after publication for four weeks). The credit bidder at that time will be able to provide its offer that sets forth the terms and conditions of the credit bid offer that is being made (any such offer should consider that there will be costs of closing that will need to be addressed (including but not limited to, i.e, unpaid real estate taxes, utilities, property manager liens, and brokerage commissions and other costs). If the credit bid is the highest qualifying bid, at that time, we would provide information regarding the existence of any bona fide dispute(s), which would trigger the letter of credit mechanism that is discussed in the Court's May 2nd order. Subsequently, a short time later (within three business days), the credit bidder would provide confirmation of the posting of the letter of credit that is required by the Court's order, and we could then proceed to get all appropriate paper work together for a closing (all subject of course to court approval). We believe this process is consistent the terms and conditions approved by the Court. Hope this is helpful and responds to your question, but please advise if you have any other questions. Thanks.
>
> Michael

In summary, the Receiver contemplates that the credit bid right is limited to the right to submit a sealed bid, during the same timeframe that other sealed bids are to be received. Liberty objects

to this proposed procedure.[2]

As set forth in *Liberty's Second Procedures Motion Objection*, Liberty's right to credit bid, assuming compliance with Section 2001(a), could be exercised at the time of the sale on the courthouse steps or at the Properties. Therefore, Liberty's right to credit bid is being impinged by the *May 2 Order's* proposed deviation from the requirements of Section 2001(a).

Additionally, Liberty is entitled to a "last look" opportunity to bid, which Liberty would otherwise have under state law (as a foreclosing lender) or as a secured creditor under a Bankruptcy Code Section 363 sale, under 11 U.S.C. §363k.

As matter of law, Liberty has not been, and cannot be, divested of its "last look" right to credit bid, as a result of the receivership proceeding. As Judge Kim noted in his *Memorandum Opinion and Order* in this case (R 223) "The court is mindful that it has 'minimal authority' to extinguish 'preexisting state law security interest[s],' should such interests exist." Judge Kim supported this proposition by citing to *SEC v. Wells Fargo Bank, N.A.*, 848 F. 3d. 1339, 1344 (11th Cir. 2017). Judge Kim also noted that "the rights of the receivers can be no greater than those of their predecessors in title", citing to *Guaranty Trust Co. of N.Y. v. Fentress*, 61 F. 2d. 329, 333 (7th Cir. 1932) and *SEC v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1277 (D. Utah 2009). In *SEC v. Madison Real Estate Grp., LLC*, the court stated "[i]t is well-established that a receiver appointed by a federal court takes property subject to all liens priorities **or privileges** existing or accruing under the laws of the State") (emphasis added). The right to a "last look" credit bid is a privilege. *See also, U.S. Commodity Futures Trading Comm'n v. AlphaMetrix, LLC*, No. 13 C 7896, 2017 WL 5904660, at *2, n.3 (N.D. Ill. Mar. 9, 2017) ("[a] pre-existing contractual remedy

[2] Liberty will attempt to work with the Receiver to reach resolution on this issue, but in light of the deadline imposed under Fed. R. Civ. P. 72(a) to the *May 2 Order*, Liberty is required to reserve this issue as part of its *Objection*.

between creditor and debtor would bind the receiver . . ."); *United States v. Security Indus. Bank*, 459 U.S. 70, 76-78 (1982) (creditor's state law security interests were "property" entitled to Fifth Amendment protection). Therefore, absent a receivership, Liberty would be free to foreclose on its collateral and credit bid (as a "last look") at such a sale. Those rights are not extinguished by virtue of a receivership action.

Moreover, Local Rule 66.1 for the Northern District of Illinois provides that the receivership estates should be administered similar to bankruptcy cases. The United States Supreme Court has held that secured creditors have the right to credit bid when their collateral is being sold pursuant to a plan or a sale under Bankruptcy Code Section 363 (a sale free and clear of liens, as is proposed herein). *Radlax Gateway Hotel LLC v. Amalgamated Bank*, 566 U.S. 639, 644 (2012). *See also*, 11 U.S.C. §363(k) ("at a sale under subsection (b) of this section of property that is subject to a lien . . . the holder of such claim may bid at such sale and . . . may offset such claim against the purchase price of such property"). The reason for the right to credit bid is to protect "against the risk that [a lender's] collateral will be sold at a depressed price." *Morgan v. Blieden*, 107 F. 2d 133 (8th Cir. 1939). Section 363 sales are open sales, subject to higher and better offers. Such auctions are held either in the offices of the estate professionals or in open court. In either event, the secured lender is afforded the right to consider the other bids of record in determining whether to place a higher credit bid, to assure that the property will not be sold at a "depressed price."

The procedure proposed by the Receiver is not a "last look" process. It requires Liberty to blindly submit a credit bid along with other sealed bids, without the ability to determine the level of the existing bids. This, pure and simple, deprives Liberty of rights otherwise afforded to it under state law and bankruptcy law and constitutes a limitation on Liberty's due process rights.

Accordingly, Liberty objects to the *May 2 Order*, as it fails to specify the manner in which Liberty will be permitted to place any credit bid and eliminating compliance with Section 2001(a) eliminates a statutorily created "last look" opportunity for Liberty in the receivership context. The Receiver's unilateral determination of its proposed methodology is objectionable to Liberty and has not been approved by Judge Kim. Any credit bid should be part of a public bid process, with the right of other bidders to place even higher bids, at the time of the sale, under the statutorily mandated provisions of Section 2001(a) (at the sale on the courthouse steps or at the property). This assures that the Properties are sold at their highest possible value, while protecting Liberty's right to credit bid.

3. **Liberty Objects to the *May 2 Order*, as it Does Not Specify the Manner and Timing of the Credit Bid Letter of Credit Requirement.**

The *May 2 Order* likewise did not address the mechanics related to the timing of posting of a letter of credit in connection with any credit bid by Liberty. The Receiver, in the *May 14 email* proposes that Liberty should be afforded not greater than 3 business days after notification that its sealed bid is the highest and best bid and of the existence of a *bona fide* dispute as to Liberty's lien claim (per the *May 2 Order*), to obtain its letter of credit. As the Court can take judicial notice, there is a cost of obtaining a letter of credit, as well as an underwriting process by the letter of credit issuer. Liberty holds mortgages on 17 different properties, which could result in the procurement of up to 17 separate letters of credit. Liberty submits that it should not be required to obtain a letter of credit, other than as a condition to close, if Liberty is the successful bidder and a *bona fide* challenge to its lien position is asserted. Requiring Liberty's lender to underwrite and issue a letter of credit on three business days' notice is not commercially reasonable. Further it is not the submission of the bid which triggers the obligation to post the letter of credit. It is the identification of a *bona fide* dispute, thereafter, which is the trigger. Therefore,

Liberty will be unaware of any need for a letter of credit until after its bid is submitted and a challenge, subject to the terms of the *May 2 Order*, being asserted and if challenged, sustained.

To ensure against a failure by Liberty to obtain a required letter of credit as a condition to close (like any other condition to close of any bidder), the Receiver, as is common in all bankruptcy sales, may simply designate, as part of the bid procedures, that the next highest bid is a backup bid, to remain open and enforceable, in the event Liberty fails to close, for whatever reason.

Accordingly, Liberty requests that the *May 2 Order* be clarified to require the positing of a letter of credit by Liberty, if a *bona fide* dispute is asserted and sustained, as a condition to close. Liberty does not want the *May 2 Order's* language to somehow be deemed to be a definitive adoption of the Receiver's proposed credit bid methodology.

4. **The *May 2 Order* Should be Clarified to State that Liberty, if a Purchaser, will Obtain Immediate Title to the Property at the Time of Closing.**

The *May 2, Order* is silent with respect to the legal conclusion which follows from the closing on a sale of Property to Liberty, under which a letter of credit has been posted. Liberty asserts that upon closing, Liberty should be entitled to free and clear ownership of the Property, as if a cash bid had been placed. This is because the Receivership estate is now holding the cash to support the purchase price, while the lien dispute is adjudicated by the Court. If the credit bid was proper, the letter of credit would be released. If the credit bid was not proper, the proceeds of the letter of credit would revert to the Receivership estate. In either scenario, the Receivership estate is receiving it's bargained for consideration (either a reduction in Liberty's claim or cash). Therefore, Liberty's right to the Property acquired, at closing, should be unfettered.[3]

5. **Liberty Objects to the Finding That Liberty's Objection to the Property Manager's Ability to Bid is Moot.**

[3] If not unfettered, complications would arise as to who (Receiver versus Liberty) would have the rights to the rents and would bear the expenses of the Properties' operations.

Liberty and its Properties were not subject to the *First Approval Motion*, pursuant to which one of the two property managers to the Receiver, WPD Management, LLC ("*WPD*") proposed to purchase two of the properties subject to the *First Approval Motion*. Therefore, Liberty's rights were not impacted by the *First Approval Motion*. And in connection with the hearing on approval of the *First Procedures Motion*, the Court explicitly stated, on the record, that its ruling on those procedures would have no impact on procedures later proposed in the *Second Procedures Motion*. Notwithstanding Liberty's reservation of rights, in the *May 2 Order*, it was ruled that any objection by Liberty to the property managers, as bidders was moot. Liberty objects to this ruling. Liberty had no standing to object to the *First Approval Motion*.

The property managers have, among other duties, the obligation to provide overall property management and leasing services, to prepare financial reports and to assist in due diligence visits by interested purchasers. It is no secret that Liberty and the other lenders have been at odds with the Receiver over access to the property managers to have questions answered, based on substantial changes in occupancy, turnover costs, leasing commissions and property expenditures, between the pre and post-receivership periods; information that materially affects a given property's net operating income and therefore, market value.[4] To this date, the Receiver has refused to permit Liberty to engage directly with the property managers to explain these material discrepancies and after the Receiver directed that such questions be put in writing to the Receiver, none have been answered. *See, Motion to Determine the Rights of Liberty EBCP, LLC with Respect to the Receivership Estate and Other Relief* (R101).

[4] Liberty's request for access was denied without prejudice. Liberty, under its loan documents, has the contractual right to cause EquityBuild to remove a property manager, a provision the property managers acknowledged.

Based on WPD's dual role as the Receiver's agent and as a proposed purchaser and the possible dual role of the other property manager as purchaser, a higher system of checks and balances than is set forth in the Second Procedures Motion is required. The law in the bankruptcy area is quite clear that heightened scrutiny of a fiduciary or its agents involvement in a bankruptcy sale is to be given. 18 USC §154, part of the bankruptcy crimes statute, states that a "custodian, trustee, marshal or other officer of the court" who "knowingly purchases, directly or indirectly any property of the estate" or "knowingly refuses to permit a reasonable opportunity for inspection by parties in interest of the documents and accounts relating to the affairs of the estate" can be subject to a fine and removed from office. In *Donovan & Schuenke v. Sampsell*, 226 F. 2d 804 (9th Cir. 1955), a sale of real property of the debtor was made to an individual who had served as an officer of debtor during bankruptcy, and then resigned before the sale. The Ninth Circuit set aside the sale, stating:

> It is elementary that a fiduciary cannot deal or receive a transfer of the property which is the subject of the trust. It makes no difference whether the fiduciary be called an agent, custodian, trustee or officer. It makes no difference whether it can be proved that the fiduciary profited by the transaction. The principle is established by general law and does not depend upon the existence of a statute for enforcement. To affirm [such a] sale would seem to place a premium on shady dealings in a court of bankruptcy.

Id. at 812.

While Liberty has absolutely no notice of any impropriety in the actions of WPD as property manager or as purchaser, the opportunity exists for a conflict of interest. WPD, on the one hand, is trying to maximize value, as agent of the Receiver, but is also, on the other hand, a prospective purchaser, seeking to purchase at the lowest possible price. What is disseminated affects price. What diligence is shared with potential bidders affects price. Therefore, Liberty believes that the property managers should not be deemed to be eligible bidders related to Liberty's Properties.

6. **If the Property Managers are Permitted to Bid, There Must Be Much Greater Transparency and Overview of the Property Managers in the Sale Process.**

The *May 2 Order* overruled Liberty's request that it be provided the opportunity to "provide input into and be involved with the sale process and have direct access to the property managers for the Properties". *See, May 2 Order*, pages 8. Similarly, the *May 2 Order* overruled Liberty's request that lenders "be permitted to preview and approve due diligence materials before being provided to prospective bidders," and that "the Receiver should be compelled to share all offer information with the mortgage holders." *See, May 2 Order*, Page 9.

Liberty submits that the Receiver cannot have it both ways. If the foxes watching the hen house (the property managers) are eligible to bid, then someone needs to watch the foxes. Without a check and balance on the system, there is no assurance that the foxes are not shading the process for their benefit as potential bidders. The property managers, as agents of the Receiver, are likewise officers of this Court.

The property managers control the accounting. How much is spent on a given property, the turnover rate of units and when and if improvements are made fall partially or fully within the property managers' discretion. Income producing real estate prices are based, in large part, on the net operating income of a given property and occupancy. Therefore, the financial information being shared with prospective bidders (rent rolls, occupancy rates, historic financial statements, rent receivable agings, projections, capital expenditure reports and budgets, etc.) is critical in determining the price a bidder may be willing to pay. Based on the lack of access to the property managers, to date, to clarify questionable issues, Liberty should be provided with the opportunity to preview the due diligence materials proposed to be disseminated to bidders on its Properties, in order to comment on the same and clarify, *with the Receiver*, any material issues prior to their dissemination. Without this check and balance on the system, information provided to bidders

may unnecessarily depress the valuation of a given Property, to the detriment of both Liberty and the receivership estate. The Receiver should welcome a vetting of these due diligence materials with Liberty, to ensure their accuracy and to avoid any objections posed at a sale approval hearing that the diligence materials unfairly depressed the offers received by the Receiver.

The property managers also control potential bidders' access to the properties. Which apartments are shown (renovated versus those in disrepair), mechanical systems, roof, etc. can impact a bidder's view of a given property. It is commonplace in bankruptcy sales that the fiduciary (debtor or trustee), in conjunction with an asset sale, meet and confer with the parties who have an interest in the property being sold, to provide input on what may bring the estate and all creditors the highest value. This also provides a safety valve, to permit purchasers to vet any frustration or stonewalling which they perceive, as part of their due diligence process, not only to the debtor/seller, but to interested third parties to whom they can confide. Such third parties (lenders, creditors' committees or others) do not supplant the business judgment of the fiduciary, but instead are a resource to assist the fiduciary in fulfilling its duties. This open process also avoids surprises, such as is evolving in this case, where the parties learned, for the first time, through the *First Sale Motion*, of the involvement of an insider, the property manager WPD, as purchaser. Such events, as well as others, arise in any sale process, and the ability to address these issues openly before approaching a courtroom helps facilitate a more orderly and unquestioned sale process.

CONCLUSION

For the foregoing reasons, Liberty objects to or seeks clarification of the *May 2 Order* and requests that this Court grant to it the relief requested herein or such other relief as the Court deems equitable and just.

Respectfully Submitted,

/s/ Jay L. Welford

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Date: May 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2019, I provided service of the foregoing *Objection to Memorandum Opinion and Order Dated May 2, 2019*, via ECF filing to all counsel of record, and via electronic mail or U.S. mail to the following individuals and entities:

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