UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	**MEMORANDUM DECISION AND ORDER**
- against -	:	16-cv-6848 (BMC)
PLATINUM MANAGEMENT (NY) LLC; PLATINUM CREDIT MANAGEMENT, L.P.; MARK NORDLICHT; DAVID LEVY; DANIEL SMALL; URI LANDESMAN; JOSEPH MANN; JOSEPH SANFILIPPO; and JEFFREY SHULSE,	:	
Defendants.	:	

COGAN, District Judge.

The Receiver has moved for entry of an order approving the sale of the Receivership's rights in and to an affiliated company that owns a gold tailings pond known as "Abdala." A single "small fish" investor, Lloyd Keilson, and a group of 50 "Independent Investors" in Platinum Partners Credit Opportunities Fund ("PPCO") object to the sale.[1] For the reasons that follow, the objections are overruled and the Abdala sale motion is granted.

BACKGROUND

The Abdala Sale Motion

The Receiver filed a motion to approve the sale of the Receivership's rights to extract gold for ten years from the Abdala gold tailings pond in Brazil. Abdala is one of the most valuable Receivership assets, in which Platinum has invested at least $16,000,000.

[1] Zanhav Holding LLC (the losing bidder for Abdala) and Piping Brook LLC (an investor) also filed an objection to the sale motion. Those entities have since withdrawn their objection.

After a lengthy sale process, which lasted eight months and included two rounds of marketing and bidding, the Receiver selected the winning bid made by affiliates of Centerbridge Partners L.P. The Centerbridge bid has three main components: (1) $27,500,000 cash at closing; (2) an additional $3,000,000, creditable against future royalty payments, contingent on the results of required additional resource testing; and (3) a royalty of 7.5% of cash revenues once Centerbridge achieves a 3.0x multiple of invested capital. The Receiver can terminate this agreement with Centerbridge upon the acceptance of a superior offer, but that triggers a breakup fee equal to 10% of the gross value of cash, securities, and other assets paid by the new acquirer for Abdala.

The Centerbridge bid is designed to generate a substantial amount of cash up front, while also allowing for an enhanced return in the event that Abdala has significant recoverable gold. The Receiver estimates that the Centerbridge bid will result in a 1.8x return on Platinum's invested capital. Houlihan Lokey – which was retained to assist the Receiver with the sale of several of Platinum's assets, including Abdala – describes an arm's length sale process, and the Receiver believes in her business judgment that through this sale process, she arrived at the best possible deal for the Receivership.

The Receiver also seeks authority to pay its Brazilian legal counsel, Chediak, an additional $61,373.47 for outstanding legal fees, and up to an additional $25,000 for legal fees associated with closing and post-closing representation. The Receiver describes Chediak as instrumental in securing the Centerbridge bid and the proposed sale of Abdala, including interfacing with bidders and their counsel, negotiating terms of a lease for Abdala, and overseeing litigation involving the project.

Finally, the Receiver discloses the following closing costs: (1) Houlihan Lokey's 5% fee, which will be $1,375,000 pursuant to terms of its retention application; (2) Leite, Tosto's lump sum payment of $125,000 from the sale proceeds, which this Court previously approved; and (3) JDS Energy & Mining Inc.'s application of $318,090 to a retainer balance for outstanding fees.

The Objections

Lloyd Keilson is a self-styled "small fish" investor in the amount of $800,000. His objection claims that the Abdala sale is a "Hail Mary play" that will not lead to any recovery by investors. Keilson scolds the Receiver for dismissing the prior Receiver, Bart Schwartz's approach to Abdala – which was to invest in, rather than sell, the asset. In addition, Keilson claims that the Receiver should have invested Houlihan's fees in the Abdala project. Keilson would like the Receiver to explain how anyone (other than the retained professionals) will recognize any value from this sale.

The Independent Investors consist of 50 limited partners with an aggregate investment of $65,000,000 in PPCO. Each investor is unaffiliated with Platinum and its former management. The Independent Investors claim that the Receiver has not observed the proper procedure to dispose of the Abdala asset. Specifically, they argue that 28 U.S.C § 2001 requires a two-step process to approve the sale of this asset. First, they argue that the Court must have a hearing to order the private sale of the asset, and second that the Court must appoint three disinterested persons to appraise the asset before the Court can confirm the sale. The Independent Investors request that the Court deny the motion and adhere to the procedures prescribed under § 2001.

DISCUSSION

As the Court has already acknowledged, Abdala is a speculative Brazilian gold prospect. Notably, the original Receiver and the SEC disagreed over the disposition of Abdala –

specifically, whether to invest in it or to sell it. The original Receiver believed that the risks of proceeding with the Abdala investment were low, and that the project might produce a significant return for Platinum. The current Receiver disagrees. In the exercise of her business judgment, the Receiver – with the guidance of several qualified professionals – has opted to sell the asset in exchange for the highest and best bid made.

As a threshold matter, the Receiver has convinced the Court of good business reasons to (1) sell the Abdala asset (rather than invest in it), and (2) to select the Centerbridge bid. Again, as the Court has already made clear, the Receiver was entrusted with the responsibility to prudently wind-down the Receiver Entities and dispose of the Receivership Assets in a manner that safely returns to stakeholders what value can be salvaged. As for the Abdala asset, the Receiver has chosen to forego jeopardizing that return by making what she and her professionals believe to be a risky investment. This is a textbook application of the business judgment rule, and the Court has no reason to replace the Receiver's judgment with its own (or, for that matter, an investor's).

The Keilson objection is overruled. The Court understands Keilson's frustration (which other investors may share), that he might not receive the return on his investment that he intended or was promised. But that is not a reason to usurp the Receiver's business judgment. It's a difference of opinion – which is precisely the situation that the business judgment rule was designed to prevent. The Court will not violate that rule by instructing the Receiver to choose Mr. Keilson's preferred path instead of her own, which the Receiver has demonstrated was careful and informed, executed at arm's length, and chosen with the guidance of highly qualified professionals retained for this very purpose.

The Independent Investors' objection is also overruled. They claim that the sale motion should be denied because the Receiver has not observed the requisite procedures for a private sale of an interest in realty under 28 U.S.C. § 2001. That statute provides:

> (a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, 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. Such sale shall be upon such terms and conditions as the court directs. Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.
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> (b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

The objection is overruled for three reasons. First, the Independent Investors assume that the Abdala sale process was private. However, it was more akin to a public sale, and therefore does not trigger § 2001(b). In other contexts, the Second Circuit has held that "the docketing of

[a] decision [gives] effective notice to the public." United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988). Moreover, in the context of Rule 11 sanctions, "the opportunity to submit written briefs may be sufficient to provide an opportunity to be heard," as is required under the Federal Rule. Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 335 (2d Cir. 1999). Here, the Receiver put the public on notice of the Abdala sale at least twice. The first time was through the application to retain Houlihan Lokey, in part to assist in selling Abdala. The second time was through the sale motion for the Abdala asset itself. Each of these motions alerted the public to the Abdala sale, the process through which Houlihan Lokey took to elicit expressions of interest and receive actual bids, and why the winning bid was selected and reflects a proper valuation of the asset. The Independent Investors had an opportunity to be heard with both motions, and the Court considered their arguments against the Abdala sale each time. This process was conducted publicly, and the Court need not consult § 2001(b).

Further, the Abdala asset and the intended sale are publicly advertised on the Receivership's website.[2] On February 12, 2018, the Receiver posted an update for investors about the monetization of Platinum's investment portfolio. In this update, the Receiver wrote: "Moreover, Houlihan Lokey Capital, Inc. ("Houlihan Lokey"), which was previously retained by the Receivership to market certain Platinum assets, has worked diligently to prepare for marketing and sale of the Abdala gold tailings project in Brazil and Platinum's life settlements portfolio, among other assets." Under the section entitled "Purchasing Platinum Assets," the Receiver describes the Abdala Tailings Project (as "an interest in a gold tailings dam located near Cuiaba, Brazil"), and provides contact information for anyone interested in additional information on the listed assets. This information is publicly available, and as mentioned above,

[2] See Securities & Exchange Commission v. Platinum Management (NY) LLC, GCG, http://www.platinumreceivership.com.

the Centerbridge bid is subject to superior offers. When the Court approved Houlihan Lokey's retention application, when the motion for the sale was filed, and any time in between then and now, anyone could have submitted a higher and better bid. If anyone had come forward with a higher and better offer in response to this publication, the Receiver would have taken it, but no one did. Moreover, Houlihan Lokey researched who they thought might be the most likely bidders and expressly solicited them. As a result, the purpose of a public sale was largely satisfied here.

But even if it were a private sale, the requirements of § 2001(b) were sufficiently observed. The Court has already entrusted the Receiver with the responsibility of selling the Receivership's assets, which carries with it the obligation to act in the best interest of the Receivership. The Court also approved the retention of Houlihan Lokey as well as several other professionals to help value the asset, market it, and obtain bids at the highest and best value for the Receivership. Finally, the winning bid was made public by virtue of the sale motion, and those individuals who opposed the sale were able to be heard before it was approved. The purpose of § 2001(b) was achieved as a result.

Second, the Abdala sale does not constitute the sale of an interest in realty. The Receiver is selling the Receivership's equity interest in a company that holds the rights to Abdala; she is not selling the rights to extract the minerals themselves. Platinum owns all of the issued and outstanding membership interests in a limited liability company, West Ventures LLC. West Ventures, in turn, owns all of the issued and outstanding equity interests (defined as the "Sul Real Equity Interests") in a Brazilian limited liability company, Sul Real XXXII Participações Ltda. Under the terms of the sale agreement, Platinum is selling the "Acquired Assets" to Centerbridge, which is defined as: "all of Sellers' rights, titles, and interests in, to and under the

Sul Real Equity Interests, the Settlement Agreement, and the Loan Agreement." As a result, the Receivership is not selling property or an interest in it. It is selling its equity interest in a company that actually owns the rights to extract the gold, and § 2001 does not apply.

Finally, requiring the Receiver to follow § 2001 at this point would be a waste of Receivership assets and would likely result in the exact same outcome. As noted, the Receiver and Houlihan Lokey have described a lengthy and intensive sale process by which they arrived at the best possible value received in exchange for Abdala. This process has ensured the result that § 2001 demands – a sale of the property interest for an amount that adequately reflects its value. If these investors wanted the Court to apply their broad construction of § 2001, they should have requested that in their original objection to Houlihan Lokey's retention – not months later, after the Receivership has already spent significant time and money to undergo a rigorous, arm's length marketing and bidding process to sell this asset.[3] The Court does not understand how denying the sale motion, and making the Receivership undergo a second sale process that is similar to the one it just conducted, to sell the exact same asset, would result in any greater recovery for the Receivership or its investors. The past eight months would have been for naught, and the Court will not require the Receiver to start again from the beginning.

[3] The Independent Investors' objection on the basis of procedure is a red herring. They have been aware of the Receiver's proposed sale of Abdala and Houlihan Lokey's intended sale process for months. A "large group of non-insider [PPCO] investors," represented by the same law firm, previously filed an objection to the original Receiver's application to retain Houlihan Lokey on October 23, 2017. Their objection was limited to Houlihan Lokey's retention with respect to the proposed sale of Abdala. There, they asked the Court to defer action on the retention in order to give the Independent Investors a chance to be heard on the issue of alternatives to liquidating the Abdala asset. Curiously, they made no mention of needing to adhere to the procedures outlined in § 2001 in that objection. Rather, they opposed the Receiver's business decision to sell the Abdala asset. And it appears that, with the instant objection, the Independent Investors are attempting to block the sale in any way possible. In fact, they claim only that "there is no way to evaluate whether the Receiver's proposed sale comports with 28 U.S.C. § 2001's requirement that the sale price be sufficiently proportionate to Abdala's appraised value"; they don't actually object on the basis that the Centerbridge bid is too low. But the sale motion includes several details to explain how the Receivership's professionals engaged in the process of evaluating the asset's value and how they marketed and elicited bids reflecting that valuation. And the Independent Investors have not offered a competing appraisal or a superior offer to the Centerbridge bid.

Having overruled the objections to the Abdala sale, the Court also agrees that the Receiver's request for additional compensation for Brazilian legal counsel is appropriate. The Receiver has described counsel's significant efforts in securing the sale of this asset, and the proposed additional compensation reflects those efforts.

CONCLUSION

The Receiver's [357] motion is GRANTED.

SO ORDERED.

Digitally signed by Brian M. Cogan

Dated: Brooklyn, New York
September 11, 2018

U.S.D.J.