UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 18-cv-5587**
v.	)	**Hon. John Z. Lee**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	)	**Magistrate Judge Young B. Kim**
Defendants.	)	

RECEIVER'S RESPONSE AND OPPOSITION TO CERTAIN LENDERS' MOTION REGARDING BANKRUPTCY

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Undeterred by the fact that it is the Receiver who has standing and authority relative to the decision to authorize a filing for bankruptcy relief, a small number of lenders (the "Lenders") have taken it upon themselves to file yet another motion, one "seeking leave to permit bankruptcy cases for the Receivership entities." (Motion at 1; *see also* Docket No. 16, Order Appointing Receiver, ¶¶ 32, 51-52) As the Receiver stated in open court on October 8, 2019 (transcript attached as Exhibit 1 hereto), he opposes the request and does not believe that any such filing is necessary or appropriate. (Ex. 1 at 16-17) The SEC has also stated its opposition to the Lenders' motion. (*Id.* at 14-17) At that time, the Court asked that written objections be submitted. (Docket No. 541) The Receiver provides the following written objection to further complement his objection as stated in open court.

PRELIMINARY STATEMENT

The Lenders recognize they lack the standing to cause the Receivership to move to a bankruptcy court, rather that decision resides with the Receiver. They also recognize they are expressly barred by existing Court Order "from placing any of the Receivership Defendants in bankruptcy proceedings." (Order Appointing Receiver, ¶ 52.) But prior orders of this Court do not deter them. It also cannot be overlooked that there are only a few participants signing on to the Motion, indeed fewer than on other similar efforts, and certainly not supported by other claimants who have made nearly 2,000 submissions as part of the claims process here. (*See, e.g.*, Docket No. 563) Instead, this Motion is led largely by one lender who has adopted adherence to the principle that every action of the Receiver and the Court must have an opposite reaction (in form of motions and objections in some fashion). The record in this regard speaks for itself.

Beyond those procedural issues, the Motion provides no legal support for the request. It is further, and critically, undermined by factual circumstances of this case, some of which have been

admitted (including the concession that this filing occurs when "much of the work has already been done" (Ex. 1 at 13 lines 14-15)), others conveniently misstated or ignored.

The Lenders assert that "Bankruptcy provides a streamlined, efficient and economical mechanism…." (Motion, at 2) They omit, however, the obvious point that in any lawsuit where there are hundreds of stakeholders with competing interests and a lot of money on the line (like this one) clashes are inevitable. However, the law recognizes that a receivership, in which a district court has extremely broad discretion to fashion procedures and relief, provides the best mechanism for accomplishing a "streamlined, efficient and economical" process. And that is precisely what has been established here, consistent with the request of the SEC when it originally filed its complaint and request for a receivership back in August 2018.

The Lenders would have the Court believe that the complexity of this matter will simply evaporate should the matter be shunted into bankruptcy so that another participant can lodge objections (which they claim is fine because that party is a neutral), and have yet a second court and third judge involved in adjudicating such matters. That is a self-serving fallacy. With no standing or ability to force such an event, and no legal or factual support for the relief requested, the Motion is what it purports to be – an effort to get to another forum to get another crack at making the same arguments and motions that were previously rejected. The Motion should be denied.

ARGUMENT

This Court established a federal equity receivership at the request of the SEC in its action against Jerry Cohen and Shaun Cohen as a result of their fraudulent conduct through EquityBuild. The receivership provides the best, most efficient opportunity to evaluate the claims of all of the stakeholders (not merely of a vociferous few) for purpose of determining a fair and equitable

method of providing a recovery to the Cohens' victims and creditors consistent with applicable laws. This type of case – with significantly different and disparate competing interests – increases the potential need for the Court to exercise its equitable powers to ensure a just result. Those equitable powers go not only to the ultimate determination of who is entitled to a distribution of receivership assets, but also, and at the present time most poignantly, as to a fair and equitable process.

The Receiver is taking steps to preserve the interests and protect the rights of all victims, including but not limited to all lenders. The Receiver has spent significant time marshaling and preserving the assets of the estate by protecting and enhancing those properties (which also protects other stakeholders such as tenants). The Receiver has implemented a plan to have an orderly, businesslike disposition of assets that is and has been crucial to keeping their value, with many properties already sold and/or subject to contract. Also, in a matter of a few months, the Receiver has designed a claims process which has been approved, provided notice to well over one thousand potential claimants, received over 2,000 claims submissions, reviewed each of those claims form submissions, prepared and filed three status reports, prepared a preliminary report listing nearly one thousand claimants and their claim amounts, identified on a property by property basis for 116 properties those that appear to have secured claims, which secured claims have competing secured claims, and which secured claims cover a cross-collateralization of properties. The Receiver also has spent substantial time analyzing the nature of the claims, the timing and prioritization of claims, issues to be presented for the Court for resolution, and the methodology or methodologies to be used for claims distribution. The Receiver also has responded to numerous objections from the lenders at every step as well as thousands of inquiries from the lenders and the investors. All of this has been accomplished in a matter of months in the face of the lenders'

relentless efforts to slow it down and detract from the Receiver's efforts. All of the Receiver's efforts with respect to claims analysis and distribution planning are part and parcel of a federal equity receivership and which also involve significant considerations of equity, public policy, and fairness when it comes to those interests as well as others.

Despite the significant amount of work performed, and the amount of time invested in those decisions by this Court and the Magistrate Judge, for the first time the Lenders submit a motion to "permit" another court (the bankruptcy court) and another party (the U.S. Trustee for the Northern District of Illinois) to become deeply involved in this matter on the premise: (i) it allows a "neutral" to be involved, including filing objections; (ii) bankruptcy courts allow adversary proceedings; (iii) claimed efficiency because bankruptcy courts deal with such claims, and there are a lot of claims here; (iv) there is an administrative logjam that is causing delay, and which will be cured through having a trustee and bankruptcy judge; and (v) there would be more transparency. (Ex. 1 at 10-14; Motion, ¶¶ 8-22) Even if these points were accurate, which they are not, they would not support the relief being sought. These reasons are not only wrong legally and factually, but they ignore the lenders' own conduct and submissions, as well as previous rulings that foreclose such arguments. As further discussed below, the law has long recognized that receiverships generally, and this Receivership specifically, has been and is addressing each and every one of the issues discussed by the lenders.

I. There Is No Legal Authority For The Lenders' Motion.

Both the Receiver and the SEC oppose the request set forth in the Motion. That is meaningful because not only should deference be given to the Receiver's business judgment and authority relative to the decision to initiate bankruptcy, but deference is certainly proper and appropriate here relative to the SEC's choice of forum because the SEC is charged with attempting

to remediate fraud in the manner it believes is consistent with its mission as a federal regulatory agency. Here, a receivership was specifically requested by the SEC and implemented by the Court. (Docket No. 4, pp. 16-18)

A receivership provides significant benefits to unwinding a complex fraud, liquidating assets, and returning funds to victims and creditors. For example, in *SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986), the Ninth Circuit observed, "a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors. *See SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n.9 (9th Cir. 1986); *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1368 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978); *accord Safety Finance*, 674 F.2d at 373. Accordingly, we generally uphold reasonable procedures instituted by the district court that serve this purpose." *Hardy*, 803 F.2d at 1038.

The Lenders point to no law that supports their request either procedurally or substantively. That is not surprising. "[A] district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration." *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) (citing *Hardy*, 803 F.2d at 1037; *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978); *SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 373 (5th Cir. 1982); 7 J.W. Moore, *Moore's Federal Practice*, ¶ 66.08[4] (2d ed. 1991)). Contrary to the arguments of the Lenders, a federal equity receivership not only addresses the resolution of disputed claims, but allows for unique procedural efficiencies and opportunities that bankruptcy proceedings do not provide. By contrast, a bankruptcy court would be limited in ultimately ensuring that the results are fair and equitable due to the different and more restrictive regime of bankruptcy laws and procedures. Indeed, where such questions have arisen, other courts have rejected the arguments raised by the Lenders.

For example, in *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 609 (9th Cir. 1978), the Ninth Circuit held that the district court had not abused its discretion when the court conducted a full hearing on a liquidation, rather than sending the matter over to a bankruptcy court as had been requested. Later, in *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992), the court observed that "[i]n *Lincoln Thrift*, the district court approved the receiver's decision to liquidate the company … [but the creditors argued] that the district court should have transferred the proceedings to a bankruptcy court or should have allowed a creditor's committee to carry out the plan of liquidation … [because the] creditors apparently believed that these procedures would better protect their interests." *Id.* (citing *Lincoln Thrift Ass'n*, 577 F.2d at 605).

In fact, when issues regarding comparing receiverships to bankruptcy procedures are discussed, receiverships are viewed favorably: "In receivership proceedings, the district court sits in equity and has the authority to approve any plan provided it is fair and reasonable. A receiver's distribution plan may, therefore, distinguish between different types of claimants and provide for different treatment for different classes of investors. For example, a distribution plan may seek to limit distributions to those claimants who suffered actual out-of-pocket losses. Or, differing treatment may be sought for distributions to investors in contrast to trade creditors." Kathy Bazoian Phelps, *Handling Claims in Ponzi Scheme Bankruptcy and Receivership Cases*, 42 Golden Gate U. L. Rev. 567, 572 (2012) (internal quote marks and citations omitted). "In contrast to a trustee in a bankruptcy case, a receiver may craft and propose a distribution plan that classifies claims in a manner specific to the facts of a particular case and based on equitable considerations. *Id.* at 573 (citing *SEC v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006) (noting that district courts have broad authority to craft remedies for securities violations); *SEC v. Basic Energy*

& Affiliated Res., Inc., 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001) ("[I]n shaping equity decrees the trial court is vested with broad discretionary power." (internal quotation marks and citation omitted)); *Hardy*, 803 F.2d at 1037-39.

If this were not enough, one tool available in a receivership is a summary proceeding. *See, e.g., Elliott*, 953 F.3d at 1566 ("The government's and parties' interests in judicial efficiency underlie the use of a single receivership proceeding. … A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.") (citing *Smith v. American Industrial Research Corp.*, 665 F.2d 397, 399 (1st Cir. 1981); *SEC v. Wencke*, 783 F.2d 829, 837 (9th Cir.1986), cert. denied, 479 U.S. 818 (1986); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984)). District Courts can use summary proceedings for presentation of evidence, a tool that is of major assistance relative to resolving disputes associated with claims and other issues: "In keeping with this broad discretion, 'the use of summary proceedings in equity receiverships, as opposed to plenary proceedings under the Federal Rules [of Civil Procedure], is within the jurisdictional authority of a district court.'" *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) (citing *Hardy*, 803 F.2d at 1040; *S.E.C. v. Wencke*, 783 F.2d 829, 836 (9th Cir.), cert. denied, 479 U.S. 818 (1986); *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir.1985); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 458 (9th Cir.1984)). "Such procedures 'avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership,' *Wencke*, 783 F.2d at 837 n.9, thereby preserving receivership assets for the benefit of creditors." *Bernstein*, 786 F. Supp. 170, 177-78 (E.D.N.Y. 1992) (citing 2 R. Clark, Law on Receivers, § 584 (3d ed. 1959)). In *Elliott*, the court concluded that "a district court does not generally abuse its

discretion if its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id.* at 1567. Put differently, procedures are available in receiverships to ensure efficient handling of claims and disputes, contrary to the suggestion of the Lenders.

Similarly, in requesting a receivership, the SEC well understood that there are issues that are avoided in a receivership that cannot be in a bankruptcy. For example, in a receivership setting, an *in pari delicto* defense is inapplicable against a receiver. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995); *In re Hedged- Investments Assocs., Inc.*, 84 F.3d 1281 (10th Cir. 1996) ("Put most simply, [a trustee] is a bankruptcy trustee acting under 11 U.S.C. § 541, and bankruptcy law, apparently unlike the law of receivership, expressly prohibits the result [the trustee] urges."). This is an important strategy for protecting the victims of fraud, as several courts have held the reasoning only applies to a receiver, and not to a trustee in bankruptcy. *See, e.g., Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co. Inc.*, 267 F.3d 340 (3d Cir. 2001); *In re Hedged-Investments*, 84 F.3d at 1284-86; *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1093-94 (2d Cir. 1995); *Global Crossing Estate Representative v. Winnick*, 2006 WL 2212776, at *16, n.21 (S.D.N.Y. Aug. 3, 2006); *In re Derivium Capital LLC*, 716 F.3d 355, 367 (4th Cir. 2013).

II. A Neutral Has Already Been Appointed, And It Is Unnecessary, Inefficient, And Costly To Have Another Appointed.

The Lenders argue in several points that permitting a bankruptcy proceeding is necessary so that a neutral can be appointed and involved (here, the U.S. Trustee), and that the individual is well respected. (Motion, ¶¶ 16-17) This argument is baseless (though the Receiver does not question that that the U.S. Trustee is a competent and respected professional).

As this Court knows on August 17, 2018, a neutral was appointed by the Court – the Receiver. (Docket No. 16) The Receiver has acted and is acting in that neutral role of fiduciary

to the Court since the inception of the Receivership: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it." *Booth v. Clark*, 58 U.S. 322, 331 (1854) (citing Wyatt's Prac. Reg. 355). "He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it." *Id.* at 331 (citing *Delany v. Mansfield*, 1 Hogan, 234).[1]

Not only is a neutral already in place, but the one appointed is as qualified, experienced, and well respected as the U.S. Trustee that is identified by the Lenders. The Receiver has decades of experience in fraud litigation matters, and specific significant experience with receiverships in this District, including before current Chief Judge Rebecca Pallmeyer and former Chief Judge Ruben Castillo. The Receiver is a board member and serving his second year as the President of the National Association of Federal Equity Receivers, a national organization that addresses receivership practice for receivers and receivership professionals nationally and internationally. He also is also is a leading educator nationally on federal equity receivership practice, including on the differences and advantages of federal equity receiverships in comparison to bankruptcies. The Lenders' request for another "neutral" is meritless.

[1] Some federal cases note that, "[i]n accepting or rejecting the claims of creditors, as well as in filing a report of findings of fact and conclusions of law, a receiver acts like a master." *U.S. v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 231 (D.R.I. 2006) (citing 3 Ralph Ewing Clark, Clark on Receivers § 650, 657 (3d ed. 1959)); *see also U.S. v. ECC Partners, L.P.*, 820 F. Supp. 2d 654, 660 (D. Md. 2011) (same); *U.S. v. Penny Lane Partners, L.P.*, 2010 WL 5796465, at *5 (D.N.J. Oct. 26, 2010). In that regard, the Receiver and his reports or recommendations would be governed by Fed. R. Civ. P. 53.

III. The Bankruptcy Gambit Provides No Efficiency And Greater Costs And Delay.

The Lenders argue that the bankruptcy court is more efficient because of the existence of adversary proceedings, and that there are rules and experience in those courts that are unavailable in receiverships.

A reality check is necessary here. If this argument had the significance now ascribed to it by the Lenders they would have filed such a motion a year ago. However, no such request was made. Having had their relentless motions and objections largely rejected, it is not merely coincidental to hear from them that another forum and different procedures would be better. This is the same type of tactic that the lenders have used before, and the same principles of waiver and estoppel previously applied by this Court in such circumstances should be applied now. (*See* Docket No. 540 at 5)

As a complement to this point, the Lenders' argument ignores (although at the last hearing it was admitted) that "much of the work has already been done" (Ex. 1, Tr. at 13). Elaborating on that point, many of the tasks of a receiver and receivership – marshaling and preserving assets, identifying claimants, quantification of claims, establishing a claims process by which to recommend claims be paid or not, and setting up a distribution plan for payments – are either implemented or being worked on here in this Receivership. Relative to the claims process, while it will require time and effort as it would in any complex proceeding – whether receivership or bankruptcy – having now devoted significant time as well as implemented large portions of the process, the Receivership remains the most cost effective and time effective means of evaluating the claims and submitting a distribution plan to the Court.

The remainder of the Lenders' arguments on this issue are equally meritless. As discussed above, a receivership is not only equipped, but better designed, to deal with the issues presented

in such circumstances. While the Lenders discuss "adversary procedures," receivership courts have summary proceedings available that allow for expeditious resolution of claims, but with equity and flexibility: "A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets." *See Elliott, supra*. Moreover, as noted above, a receivership has flexibility to "distinguish between different types of claimants and provide for different treatment for different classes of investors. For example, a distribution plan may seek to limit distributions to those claimants who suffered actual out-of-pocket losses. Or, differing treatment may be sought for distributions to investors in contrast to trade creditors." *See* Phelps, *supra.*[2]

The Lenders argue and imply that bankruptcy courts alone deal with complicated issues where there is not money to go around. (Motion, ¶ 3) That too is false. Receiverships deal with similar issues, but have significant equitable tools through which to assist parties and victims to a fair and equitable result, as emphasized in *Hardy,* where the court took the opportunity to "reemphasize these basic principles. A district judge supervising an equity receivership faces a myriad of complicated problems in dealing with the various parties and issues involved in administering the receivership. Reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld. A district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad

[2] The claims process benefits all claimants and properties. The secured creditors who have priority will benefit because the process will affirm their rights and provide them the finality and protection of a federal court order. The secured creditors who do not have priority will benefit from a fair opportunity to assert their claims and have them determined in accordance with legal and equitable principles. The undersecured creditors will benefit from determining the validity and amount of their claims. All claimants will benefit from invalid and ineligible claims being so determined. Claimants will also benefit from the Receiver's opposition to claims or components of claims that ought not to be allowed.

discretionary power. We would be remiss were we to interfere with a district court's supervision of an equity receivership absent a clear abuse of discretion." *Hardy*, 803 F.2d at 1038.

The Lenders also champion the automatic stay provision in a bankruptcy proceeding. (Motion, ¶ 13) But the Order Appointing Receiver already accomplishes this, including specific automatic stay provisions. (*See* Order, ¶¶ 32-34) The Lenders' angling for a bankruptcy proceeding also appears as yet another attempt to splinter this consolidated proceeding into what could ultimately be (if, as expected, the Lenders seek to lift the bankruptcy automatic stay) dozens of independent state court foreclosure actions (to the detriment of countless victims of the Cohens' fraudulent scheme), efforts which have been consistently rejected in this proceeding.

In *toto*, there is nothing more efficient about the Lenders' proposal. To the opposite, what is being proposed is a third layer of review based on the (false) idea that a neutral is necessary, and which contemplates active involvement from that neutral: "We have a neutral third party. If the lenders are out of line, the U.S. Trustee can object to that. If the receiver or the debtor in possession is out of line, the U.S. Trustee can object to that. That is a neutral third party, that this Court currently doesn't have the benefit of. So, one of the thinking -- one of -- at least the initial thought was this would be helpful to the Court rather than burdensome." (Ex. 1, Tr. 12-13).

It is inexplicable how it is even remotely efficient or cost-effective to have a *new* court and *new* major participant come now at this stage when this Court and Judge Kim and the Receivership have invested significant time and effort to set up this process. There is not only risk of inconsistencies, but having a trustee and a Receiver operating simultaneously will result in substantial uncertainty, potentially conflicting efforts, and substantial additional cost. A simple example of this is parallel or conflicting efforts to bring claims. *See, e.g.*, Phelps, 42 Golden Gate U. L. Rev. at 582 ("In a Ponzi case, it is conceivable that a trustee may bring claims under any of

these Bankruptcy Code sections seeking to recover property transferred by the Ponzi perpetrator either pre- or post-petition, and the trustee may seek to disallow that claim the extent that creditor fails to return the avoidable transfer to the estate."). Further, efficiency is made no better by the purported benefit of a bankruptcy court issuing final orders, which argument ignores that such orders can be appealed to this Court for review (*see* 28 U.S.C. § 158(a)), leading effectively to the same situation with certain decisions from the Magistrate Judge, except this Court will now handle appeals from two different courts on the same matter. This wholly unnecessary third layer will create havoc and additional cost in time and resources.

In these circumstances, the law and facts all made clear that there are substantial advantages of efficiency and fairness to an SEC equity receivership over bankruptcy proceedings where the Receiver, counsel, and the Court have already devoted substantial time and resources to the administration of the Estate; a mechanism is already in place to adjudicate and provide relief from claims; a liquidation plan is already being implemented and would be adversely impacted if interrupted or further delayed; and the Receiver and SEC oppose placing the Receivership entities into bankruptcy involuntarily. As one bankruptcy court, which had even less compelling reasons than are at issue here, observed:

> Allowing this matter to continue as a debtor proceeding under the Bankruptcy Code would result in a terrible waste of time and resources. Many services, already rendered in the administration of the receivership estate, would have to be repeated at additional expense to the estate. No advantage would accrue to the creditors if this matter were to proceed in the bankruptcy court. Rather, their best interests will be served by the continued administration of the equity receivership.

In re Michael S. Starbuck, Inc., 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981); *see also, e.g., In re Kreisers, Inc.*, 112 B.R. 996, 1000 (Bankr. D.S.D. 1990) ("One may file for bankruptcy unless the debtor meets one of Congress' narrowly tailored exceptions, conducts fraud on a federal court, *or is involved with a federal receivership substantially underway*.") (emphasis added and citations

omitted).

IV. The Delay Has Been Caused By The Lenders.

The Lenders write that the logjam that has been created is caused by the Receiver's administration, which is "bogged down by the inefficiencies and uncertainties regarding the common law process for federal appointed receivers," which will be cured through a bankruptcy setting (Motion, ¶ 20). That is false. As discussed above, the law is well-recognized and established relative to receiverships. District Court judges frequently appoint, supervise, and work with receivers in complex matters so that justice may be served for victims and creditors.

More importantly, the Lenders plainly misrepresent the reasons for delay. Whether intentional or not, one of the neutrals in this proceeding – Magistrate Judge Kim – found that the continual motions and objections by the lenders have been the cause of delay, plain and simple: "the filings of the Certain Mortgagees have in fact delayed the case." (Docket No. 483) As such, the delays created by the Lenders (and certain of their fellow lenders who are not involved in the motion) cannot be the basis for the Motion at bar.

V. There Is No Transparency Issue, Nor Is It Improved With Bankruptcy.

The narrative regarding transparency is a false one, and has nothing to do with the relief requested in the Motion at bar. The record belies the assertion of a lack of transparency, which argument has largely been code language for the lenders' reaction to their failed objections and motions.

In just over 14 months, the Receiver will have filed 8 comprehensive status reports with the Court, in addition to myriad other pleadings that touch on virtually every aspect of the Receivership. The Receiver also has delivered hundreds of monthly financial reports to the lenders, providing them virtually all of the financial information that the Receiver has regarding

the financial performance of the properties. The Receiver has arranged for property inspections for the lenders both in connection with their requests to inspect their collateral and in connection with the marketing and sale of properties on which lenders have sought to credit bid.

From the inception of the Receivership, the Receiver has had a web site which posts the substantive pleadings of the Receivership. The Receiver has sent multiple "blast" emails to the investors informing them about the Receivership, the progress of the Receivership, the claims process, and sundry other issues. Following discussion with the investor who raised concern about communication before Judge Kim, the Receiver revised the manner in which pleadings are organized and presented on the Receivership web site to make it easier for investors and others to locate pleadings in key areas of interest, including for status reports, property sales, claims process, and court orders. The Receiver and his professionals also have received and responded to thousands of emails from investors, creditors, and the lenders themselves. The Receiver and his team have developed answers to frequently asked questions so that responses to investors and others can be handled in a timely and efficient manner. None of this supports the suggestion there is insufficient transparency and none of this would be lessened by a bankruptcy. The "transparency" issue does not support the Motion.

CONCLUSION

The Motion is unsupported by the record in this action. To the contrary, the record shows that a federal equity receivership is appropriate for this action. The Motion is expressly opposed by the Receiver and the SEC. There is no law supporting the request. It is simply an expression of desire from a small number of claimants, who have not gotten their way, to find a new forum and different procedures. The Receiver respectfully requests that the Motion be denied.

Dated: October 29, 2019

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing Receiver's Response and Opposition to Certain Lenders' Motion Regarding Bankruptcy, via ECF filing, to all counsel of record on October 29, 2019. I further certify I caused to be served the Defendant Jerome Cohen via e-mail:

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Defendant

/s/ Michael Rachlis
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Exhibit 1

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

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	Docket No. 18 C 5587
Plaintiffs,	)	
vs.	)	
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, AND SHAUN D. COHEN,	)	Chicago, Illinois
Defendants.	)	October 8, 2019
	)	9:03 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTIONS
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

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For BMO Harris:	CHAPMAN & CUTLER BY: MR. JAMES P. SULLIVAN 111 West Monroe Street, Suite 1600 Chicago, Illinois 60603
For Liberty EBCP:	JAFFE, RAITT, HEUER & WEISS BY: MR. JAY L. WELFORD 27777 Franklin Road Southfield, Michigan 48034
Also Present:	MR. KEVIN B. DUFF, Receiver

APPEARANCES (Cont'd):

Court Reporter: MR. JOSEPH RICKHOFF
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THE CLERK: 18 CV 5587, United States Securities and Exchange Commission vs. Equitybuild.

MR. HANAUER: Good morning, your Honor, Ben Hanauer and Tim Stockwell for the SEC.

MR. RACHLIS: Good morning, your Honor, Michael Rachlis on behalf of the receiver and the receivership. With me is Kevin Duff, who's the receiver, as well.

MR. DUFF: Good morning, your Honor.

THE COURT: Good morning.

MR. CHERNY: Bill Cherny on behalf of Shatar Group, LLC.

MR. KURTZ: Michael Kurtz, K-u-r-t-z, on behalf of 1839 Fund I, LLC.

MS. MAJEWSKI: Jennifer Majewski on behalf of Freddie Mac.

MS. CONDON: Shannon Condon on behalf of Capital Investors.

MS. NICHOLSON: Jill Nicholson on behalf of Citibank, U.S. Bank, Wilmington Trust as trustees, as well as Fannie Mae.

MR. CROWLEY: James Crowley on behalf of UBS.

MR. WELFORD: Jay Welford on behalf of Liberty EBCP, LLC.

MR. FULLERTON: Tom Fullerton on behalf of Midland Loan Services.

MR. SULLIVAN: James Sullivan on behalf of BMO Harris Bank.

THE COURT: Good morning, everyone.

So, I issued my ruling with regard to a certain number of objections.

Also pending before the Court are the receiver's first and second interim applications and motions for court approval of payments of fees and expenses of the receiver and of retained professionals. That is Docket No. 411 and 487.

The first interim application covers the period from August 17th, 2018, through September 30th, 2018. The receiver requests $96,681 for the receiver; $273,678.94 for Rachlis, Duff, Adler, Peel & Kaplan; $3,300 for the Kraus Law Firm; $3,465 for BrookWeiner, LLC; $27,635 for Whitley Penn, LLP; and, $8,538.50 for Prometheum.

The second interim application covers the period from October 1, 2018, through December 31st, 2018. In that application, the receiver requests $120,471 for the receiver; $392,385.09 for Rachlis Duff; $21,642.50 for BrookWeiner; $15,979 for Whitley Penn; and, $3,490.84 for Lauren D.W. Tatar.

In securities law receiverships, the awarding of fees rests in the district court's discretion, which will not be disturbed unless he has abused it. SEC vs. First Securities Company of Chicago, 528 F.2d 449, 445. Seventh Circuit, 1976.

The Court may consider all of the factors involved in a particular receivership in determining an appropriate fee. Gaskill vs. Gordon, 27 F.3d 248 at 253. Seventh Circuit, 1994.

In making this determination, courts consider that the benefits provided by a receivership may take more subtle forms than a bare increase in monetary value. That's Gaskill, 27 F.3d at 253. Accordingly, even though a receiver may not have increased or prevented a decrease in the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation. That, too, is Gaskill v. Gordon. And courts also look to the position of the SEC, which is given great weight in determining whether fees should be awarded. First Securities Company, 528 F.2d at 451.

Certain lenders have filed objections to fee applications. The lenders argue that the fee applications demonstrate that the receivership is insolvent, and that its operating costs far outweigh its capital and the benefit to the interested parties. However, the receiver points to various sources of expected future income, such as the sale of various unencumbered properties, that will more than cover the fees and expenses set forth in the two applications. All in all, the receiver indicates that he expects to hold in excess of $6 million in the receiver's account. That's at ECF No.

527.

Furthermore, as the Court has previously recognized, there is a significant need for the receiver assets to be managed by a neutral party until an orderly claims process is concluded. Thus, the Court finds that the receiver's efforts have benefitted, and will continue to benefit, the receivership estate; and, accordingly, the Court overrules the lenders' objections in this regard.

Furthermore, the lenders contend that the receiver and his retained professionals should not be paid until rents are restored to the lenders, pursuant to the Court's February 13th, 2019, order. That's ECF No. 223.

To be sure, the February 13th order does confer on the receiver an obligation to restore the rents, to the extent there are enough funds now or later, if they have been used for the benefit of other properties. But the receiver has informed the Court that he is in the process of restoring the rents. See, for example, ECF No. 460 and ECF No. 527.

And what is more, the February 13th order does not require that this process be completed before any fees are awarded. Rather, it directs the receiver to restore the rents as possible when the funds to do so are available.

Given that the receiver has already made substantial progress towards restoring the rents, the Court overrules the lenders' objections in this regard, as well.

Additionally, the lenders argue that the receiver's fee applications fail to comply with the SEC's billing instructions, and that the receiver requests compensation for efforts that are unreasonable, duplicative or provide no appreciable value.

The SEC, however, approves of the fee applications and states that they substantially comply with the SEC billing guidelines. See ECF No. 526. And, as previously stated, the Court is to give the SEC's position great weight in a securities law receivership case like this one.

Having reviewed the applications, the Court agrees with the SEC and finds the applications substantially comply with the billing guidelines. Additionally, the Court concludes that the lenders have failed to show the requested fees are unreasonable. And, therefore, those objections are overruled, as well.

Finally, the lenders also point out that, although the receivership order requires the receiver to file quarterly fee applications, the receiver's first interim application was not filed until June, 2019, approximately ten months after he was appointed. The second application was filed in August, 2019. The receiver acknowledges the delay and explains that he was devoting his efforts to other needs of the receivership estate.

The Court recognizes that the applications were not

timely filed. However, it is not persuaded that those delays, in and of themselves, provide a sufficient basis to deny compensation to the receiver and his retained professionals. That said, going forward, the receiver is ordered to file quarterly applications, as required by the receivership order.

In sum, the Court determines that award of fees requested is appropriate, based upon the complexities of the receivership, the quality of the work performed, the benefits to the receivership estate, and the time records presented with the applications. Accordingly, the lenders' objections are overruled and receiver's Motions 411 and 487 are granted.

There's also Jerome Cohen has filed an objection -- that's Document 512 -- to Magistrate Judge Kim's August 27th Report and Recommendation. I just want to let the parties know that I'm overruling that objection. I'll be issuing an order on that shortly.

So, there are a couple of other motions that, I understand, are up or in the process of being briefed or will be briefed as of today: The receivership's motion for Court approval of invoices of claim service vendor and continuing retention of claims vendor; the receivership's motion regarding real estate located at 1102 Bingham, Houston, Texas; and, the receivership's motion for Court approval of sale.

There's also certain lenders' motion to permit bankruptcy cases for receivership entities. That's noticed

for today. That's Document 538.

So, I took a look at the motion. And the claims process or the way by which the receivership will address all the various claims that are made with regard to the properties in the receivership estate has been the subject of far too much litigation in this case already. And I wondered -- my first impression, looking at the motion, was whether this was just another attempt by the lenders to get out from under the claims process that Judge Kim established -- Magistrate Judge Kim established -- and try to find a different venue in which to do that.

Perhaps I'm wrong. Perhaps there are other reasons. And I wondered if the lenders who filed the motion can, perhaps, educate me on what those reasons are.

MS. NICHOLSON: Your Honor, I'd be happy to address this.

THE COURT: Can you state your name again, please.

MS. NICHOLSON: Yes. Jill Nicholson on behalf of Citibank, U.S. bank and Wilmington Trust as trustee, as well as Fannie Mae.

Your Honor, I don't think we're trying to disturb the claims process at this point, because the claims have been filed. They would be docketed as filed in the bankruptcy case. And the -- and, as the debtor in possession, the receiver would have the ability to object to those claims --

as he would in any case -- in this case, as well as in the bankruptcy case.

When you have a Chapter 11 case, you not only have claims that can be filed by the debtor in possession; you also have the opportunity to have objections filed by the Office of the United States Trustee -- a neutral third party, which is an arm of the Department of Justice -- as well as creditors also have an opportunity to object to claims, as well.

So, there's a little more of a -- I don't want to say a robust property. It's more additive than rather than restrictive than the process that's actually here in place.

We're not trying to seek to divest the receiver of his authority in any way, shape or form, or say he can't object to claims. That's within his ability to do so. And, again, the claims have been filed, and he's in the process of doing that.

The reason we filed this is because we know that there are hundreds of investors. There are a number of lenders here. And I can assure the Court, having represented at least four of these lenders here, we have worked very hard and very diligently to file -- as much as we can -- briefs signed by multiple people. We want to be respectful of the Court's time.

So, one of the things that was contemplated is bankruptcy anticipates what's called an adversary proceeding.

I'm sure -- because the bankruptcy court -- you're aware of this -- is an adjunct of your court, your Honor -- that they can handle multiple matters; they have seen these issues; and, they can move them on parallel tracks.

That's not to say this Court isn't capable of doing it either, but it's something that the bankruptcy courts do on a daily basis.

And we have here, you know, quite a bit of a logjam, as the Court has acknowledged. We're a year into the case. The lenders -- I can't speak for all of them; I can speak for my clients -- would like to see a process that is -- has -- you know, again, we see this issue where we're demanding more transparency. We want more information. We feel like we're not getting it. I feel like a lot of times these issues could be resolved if we had more transparency instead of, you know, motions filed without being consulted. We're happy to do that. That's not the issue here.

But having that adversary place in process, having the benefit of a neutral third party, such as the Department of Justice and Patrick Lang -- who is, again, a former AUSA -- having lawyers there to say, look, a gut-check reaction here. We have a neutral third party. If the lenders are out of line, the U.S. Trustee can object to that. If the receiver or the debtor in possession is out of line, the U.S. Trustee can object to that. That is a neutral third party, that this

Court currently doesn't have the benefit of.

So, one of the thinking -- one of -- at least the initial thought was this would be helpful to the Court rather than burdensome.

Other arguments that, you know, we would say is, if you look at the local rules, your Honor, it says that you should incorporate bankruptcy rules, bankruptcy procedures -- this is Rule 66.1 -- and that those are kind of guiding factors. Our position is, well, what better venue to have it in, if these cases are to be informed by bankruptcy. Have those borrowers placed into bankruptcy to adjudicate the priority claims issues, the claims distribution issues. It's a very streamlined process.

Much of the work is, I will acknowledge, already done. But I can anticipate if you have hundreds of investors and you have scores of lenders who are now fighting that different -- that battle, the adversary, distinct proceeding would make much more sense, and would be much more efficient and economical on the whole, you know.

And I won't get into the other issues, your Honor, that I raised in the motion. You know, we have -- there's the benefit of the automatic stay, which, I would argue, is almost -- is broader than what we currently have in this receiver order. And the receiver order contemplates that the receiver could file for bankruptcy, if he so chooses.

So, there are a number of reasons, you know, I think we've articulated in the motion why we think, you know -- it sounds like they want to move the case forward. And we want to move the case forward. And we're equally aligned in that, in trying to find a vehicle that would accomplish that.

And I think the other argument, that maybe we don't have currently in this situation, is bankruptcy judges can decide core matters and issue final orders. Those core orders also include things like lien priority, sales. Things that, unfortunately, Magistrate Judge Kim cannot decide on a final basis. So, there's some inherent efficiency with that, as well.

I anticipate what the receiver and the SEC may say is, well, look, you know, this is going to take work, it's going to take time. But I think the response to that is, typically, a claims agent would have all this information. They've already spent the due diligence. They know what the assets are. They know what the liabilities are. And what this case has been bogged down in, frankly, is administration. And I think moving that venue will help ease that burden.

So, that's my response to your question, your Honor.

THE COURT: Thank you.

MR. HANAUER: Thank you, your Honor.

The SEC opposes that motion. And going to what counsel said about there being a logjam that needs to be

broken, first response: The logjam is of the lenders' making. It's been the lenders who have been objecting to virtually every action the receiver's taken.

But, also, the logjam, it appears, has been broken last week by the Court's order allowing the sale process to go forward. And, hopefully, that will mean that continued liquidation by the receiver can go forward quickly, as well.

As counsel alluded to, going into bankruptcy is highly inefficient. The things that a bankruptcy court would supervise -- the liquidation of properties and the claims process -- that's already ongoing. And that's ongoing under the Court's supervision and Judge Kim's supervision.

There's no need for another neutral party because, oh, by the way, the receiver is a neutral party. The receiver is an agent of the Court and acting on the Court's behalf for the benefit of all creditors.

So, really, the bankruptcy process doesn't give the lenders anything that they aren't getting here except for maybe a new judge who may see things differently from the Court and Judge Kim. But forum shopping, that's not grounds to grant the motion.

And, finally, I would just note that the Court has entrusted the receiver, in his business judgment, with the ability to go into bankruptcy for himself or any of the receivership entities. That's a decision, the SEC believes,

that the receiver should be making in his reasonable business judgment, and he should not be having these lenders -- who have been fighting the receiver at every step of the way -- taking attempts to force the matter into bankruptcy, which would really just bring us back to Square One and slow down a process that's already been bogged down considerably.

MR. RACHLIS: Your Honor, we join in the objection and the reasons that the SEC has articulated, and as well as joining your Honor's reaction to the filing of the motion, as well. I think that the concessions that you heard are well-taken. The process has already been in place. The claims process is in place. The sales process is in place. It's been delayed because of their actions to this point. But, hopefully, that logjam has been broken.

The extent that there would be this additional layer will be highly more costly. It will create additional burdens. And I don't believe it will alleviate any burden on this Court because the sales, ultimately, under the receivership statute, are going to still, ultimately, have to get approved by this Court. Ultimately, this Court will have to approve those sales.

And, ultimately, there's an ability to object and file additional appeals from the bankruptcy court to this court.

So, in that context, we're going to end up in the

same process; but, instead, it would be through an effort to get to a different forum, see what that judge will do, and then have the same type of appeals that you've had to this day.

So, there's nothing efficient that's being stated here, and the concession's important. This process has been set in place. There's a sales process that's been, generally speaking, you know, provided to the Court. We're making every effort to do that. The claims process is definitely far along at this point in time.

So, we do object, as well.

MR. HANAUER: And I'm sorry, your Honor, if I can make one additional point before counsel responds; and, that is, going to the efficiency argument.

If we go into bankruptcy, it's just one more party that needs to be paid administratively; and, that would be the trustee. So, adding to the receiver's fees, it just means more money having to go to administer whatever estates there are, less money for investors, less money for other creditors.

THE COURT: All right.

So, here's what I'd like to do: First of all, I would like to have the SEC and the receiver file a written response to the motion to address all the arguments raised in the motion.

Can do you that in 14 days?

MR. RACHLIS: Unfortunately, no. We have -- there are several matters that -- including a large filing, we have before Judge Kim in this matter involving the claims process -- that is going to be -- that is occupying, essentially, full-time right now, to make sure that that status report is completed. And, then, we have a status hearing before him on the 22nd. And, then, we also have some out-of-towns -- oh, and additional filings at the end of this month. So, that might be a little bit of a problem on our end.

THE COURT: Okay.

Well, let's do this: I will give you 21 days. I want it filed by the 29th.

What time is your status before Judge Kim on the 22nd?

MR. RACHLIS: I believe it's either 10:00 or 11:00 o'clock, your Honor.

THE COURT: And what's going to happen at that?

MR. RACHLIS: It's supposed to be a status on the claims process at this point. There's a status report that's due -- I believe it's on the 15th -- that we are heavily working on right now; and, there will be a further discussion of that before Judge --

THE COURT: Okay.

MR. RACHLIS: 11:00 a.m., your Honor.

THE COURT: I would like to meet with the parties off

the record on October 30th at 10:00 a.m. Okay?

As far as the lenders, it's fine if you all want to be here. If you want to designate one or two people and the rest of you can participate by telephone conference, that's fine, too. I'm going to see if I can attend. You might see me in Judge Kim's courtroom on the 22nd.

But I'd like to get a sense off the record about what all the issues are that are brewing that I haven't seen yet and kind of see what the plan is kind of on a 40,000-foot level going forward. Okay?

And perhaps we can try to -- by having more of an informal session off the record, maybe we can either narrow some of the issues that might come up or prevent them or kind of have more of a free exchange. All right?

As I said, I think that for all the lenders, if you want to participate by telephone conference, that's -- and you want to designate one or two people to be here in person, that's probably the preferred way to go. But it's obviously up to you all. Okay?

Does that timing work for everyone?

MR. RACHLIS: Yes.

THE COURT: 30th at 10:00 a.m.?

MS. NICHOLSON: Your Honor, would you like a reply?

THE COURT: I won't need a reply.

MS. NICHOLSON: Understood. Thank you.

MR. KURTZ: Your Honor, if I may?

If any of the other --

THE COURT: Can you state your name.

MR. KURTZ: Michael Kurtz, K-u-r-t-z.

If any of the other creditors object to the institutional lenders' motions, do we also have leave to file a response to the motion; or, is it just the SEC?

THE COURT: You may, but I want them consolidated.

MR. KURTZ: Thank you.

THE COURT: Okay?

The same time frame.

So, at this point, I'll see you all here on the 30th at 10:00 a.m., or I'll hear you on the phone.

Thank you.

MR. RACHLIS: Thank you.

MR. HANAUER: Thank you, your Honor.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph Rickhoff October 17, 2019
Official Court Reporter