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 COMBINED RESPONSE TO
OBJECTIONS TO SEVENTH AND EIGHTH FEE APPLICATIONS

Michael Rachlis
Jodi Rosen Wine
Rachlis Duff & Peel, LLC
542 S. Dearborn St., Suite 900
Chicago, IL 60605
Phone (312) 733-3950
Fax (312) 733-3952
mrachlis@rdaplaw.net
jwine@rdaplaw.net

Attorneys for Receiver, Kevin B. Duff

Table of Contents

Table of Authorities

Other Authority

I. BACKGROUND

Certain institutional lenders have objected (Dkt. Nos. 777 & 792) to the Receiver's seventh and eighth fee applications (Dkt. Nos. 755 & 778), for services between January 1, 2020 and June 30, 2020. During this period, the Receiver undertook significant work for the benefit of the Estate and the claimants, including developing the claims process, preserving and maintaining the properties in the Estate, and conveying properties through public sale auctions. (*See*, *e.g.*, Dkt. Nos. 683, 720; *see also* Dkt. Nos. 615, 681, 645, 649, 651, 663, 670, 674, 690, 699, 712) Consistent with his role as receiver and the duties he has been ordered to perform by the Court, the Receiver and his retained professionals have worked diligently to present and implement a fair and equitable process for resolving the claims being legitimately asserted by hundreds of competing interested parties. The objectors continue, however, to refuse to acknowledge the work that the Receiver has undertaken to preserve, manage, and sell a portfolio of more than a hundred real estate properties to maximize the value of those assets for the benefit of the claimants who may ultimately realize those values. They address only their own interests and eschew any notion that the claims process must accommodate and protect the interests of all competing claimants. They ignore the Receiver's considerable efforts to implement and report on a process that benefits all claimants, including institutional lender claimants, providing a full and fair opportunity to assert their claims. (*See* Dkt. Nos. 638 (at 24-25), 693, 698) And they fail to recognize that the Court has approved the Receiver's efforts in this regard, consistently, and found that the Receiver's efforts have benefited the Estate and the claimants. (*E.g.*, Dkt. No. 614, at 3)

II. LEGAL STANDARD

The Court has identified the applicable law in connection with prior fee applications:

> In securities law receiverships, . . . the awarding of fees rests in the district judge's discretion, which will not be disturbed unless he has abused it." *S.E.C. v. First Secs. Co. of Chicago*, 528 F.2d 449, 451 (7th Cir 1976). "[T]he court may consider all of

> the factors involved in a particular receivership in determining an appropriate fee." *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 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." *Id.* (quoting *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992)). Accordingly, "[e]ven 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." *Id.* (quoting *Elliott*, 953 F. 2d at 1577). And courts also look to the position of the SEC, which is given "great weight" in determining whether fees should be awarded. *First Secs. Co.*, 528 F.2d at 451 (citation omitted).

(Dkt. No. 614, at 2)[1] *See also SEC v. Byers*, 590 F. Supp. 2d 637, 644 (S.D.N.Y. 2008) ("A receiver appointed by a court who reasonably and diligently discharges his duties is entitled to be fairly compensated for services rendered and expenses incurred."); *Drilling & Exploration Corp. v. Webster*, 69 F.2d 416, 418 (9th Cir. 1934) (same); *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (same).

In addition, the Court has broad discretion to determine the duties of the Receiver and the manner in which the costs of the estate will be paid. It is well-established that "the district court has authority to impose a lien on the property in a receivership to satisfy the receivership expenses." *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994). This is because a "[r]eceivership

[1] The objectors again cite *In re Taxman Clothing Co.*, 49 F.3d 310, 314 (7th Cir. 1995), for the proposition that professional fees can become subject to disgorgement if the efforts required (and the fees associated with those efforts) outweigh the potential for recovery to the estate. (Dkt. No. 792, at 18-19). But *Taxman* also considers whether the Receiver has conferred a benefit on the estate and its claimants. Here, as in *Elliott*, the benefits that the Receiver has brought include, but are not limited to, preserving, administering, maximizing the value of, and orderly selling the assets of the Estate and implementing and administering a claims process that affords all potentially interested parties, including hundreds of ordinary lenders, the opportunity to establish a priority secured interest in a judicially efficient process. Further, *Taxman* is distinguishable on the basis that its focus was on the relative benefit to the estate of pursuing preference claims in relation to the cost of doing so. Whereas here, the vast majority of the Receiver's fees and expenses are the result of efforts to preserve and liquidate the assets of the Estate and implement and administer a claims process, which are necessary irrespective of whether or not the Receiver can successfully increase the amount of funds in the Estate. The question then, is whether the Receiver's fees and expenses in preserving and liquidating the assets of the Estate and implementing and administering a claims process are reasonable. (*See also, e.g.*, Dkt. No. 527, at 4-5 & n.2)

is an equitable remedy, and the district court may, in its discretion, determine who shall be charged with the costs of the receivership." *Id.* Moreover, "[a]s a general rule, the expenses and fees of a receivership are a charge upon the property administered." *Id.* (citing *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 375-76 (1908)). "The costs and expenses of a receivership are primarily those incurred by the court in performing its duty of preserving the assets of the defendant so that these assets or their proceeds if sold will be available to meet the valid demands of the litigants and other creditors of the defendant. The costs and expenses of preserving, administering and realizing the property or fund must primarily be paid out of the property or fund." Clark on Receivers, § 673 (3d ed. 1959).

In addition, "[r]eceivers can displace even *prior* security interests in receivership property in some circumstances." *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 842 (7th Cir. 2015) (citing *Gaskill*; emphasis in original). For example, "[c]ourts in equity have allowed liens for receivership expenses to take priority over secured creditors interests in the property when the receiver's acts have benefitted the property." *Gaskill*, 27 F.3d at 251 (citing with approval *SEC v. Elliott*, 953 F.2d 1560, 1576-77 (11th Cir. 1992)). "This district court's award of a receiver's compensation is ... firmly within its discretion, ... and the court may consider all of the factors involved in a particular receivership in determining an appropriate fee." *Gaskill*, 27 F.3d at 253 (citations omitted); *see also Elliott*, 953 F. 2d at 1576 ("The district court appointing the receiver has discretion over who will pay the costs of the receiver.").

The law is clear that the Court has the discretion to appoint a receiver, and compensate a receiver to preserve and liquidate assets while the Court determines who is entitled to their proceeds. This is of particular import, and beneficial to the properties and the claimants, where the properties are subject to continuing costs and risks, like here. None of the cases cited by the

objectors is to the contrary; and none of the cases they cite involved a priority dispute between competing allegedly first-secured claimants that required a receiver to preserve, maintain, and liquidate assets while the court determined and implemented the process by which the dispute between the claimants would be resolved. *See, e.g., Bank of Commerce & Trust Co. v. Hood,* 65 F.2d 281, 284 (5th Cir. 1933) (finding certain administrative expenses not chargeable against fund from sale of mortgaged property where there was "no uncertainty or complication or issue of any sort about [the mortgage foreclosure]," but finding receiver was entitled to be reimbursed from the mortgage fund for other fees); *U.S. v. FDIC*, 899 F. Supp. 50, 56 (D.R.I. 1995) (finding capital gains tax could not be deducted from secured creditor's collateral); *MW Capital Funding, Inc. v. Magnum Health and Rehab of Monroe LLC*, 2019 WL 3451221, *6, Case No. 16-14459 (E.D. Mich. July 31, 2019) (court declined to surcharge secured creditor for Medicaid overpayments owed by receivership estate); *S. Cnty. Sand & Gravel Co. v. Bituminous Pavers Co.*, 108 R.I. 239, 246 (1971) (finding "no doubt" that there may be circumstances in which receiver's fees should take priority over sole secured creditor's interest, and remanding for further hearing and completion of record). "The obligations and expenses which the court creates in its administration of the property are necessarily burdens on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. The appointing court pledges its good faith that all duly authorized obligations incurred during the receivership shall be paid." Clark on Receivers, § 673.

Moreover, *Gaskill* and *Elliott* are most on point and controlling. "The court *in equity* may award the receiver *fees from property securing a claim* if the receiver's acts have benefitted that property." *Elliott*, 953 F.2d at 1576 (citing *Bank of Commerce & Trust Co.*, 65 F.2d at 283 (5th Cir. 1933); *S. Cnty. Sand & Gravel Co.*, 108 R.I. at 274; *In re Loop Hospital Partnership*, 50 B.R.

565, 571 (Bankr. N.D. Ill. 1985) (noting that the *court's equitable powers permit it to grant fees* to a bankruptcy trustee); Clark on Receivers § 641 ("property which is benefitted by the receivership should bear its share of the costs and expenses of the receivership including receiver's fees")) (emphasis added). Even the authorities cited by the objectors hold that it is appropriate for a receiver to be paid from the proceeds of secured property if the receiver has benefited that property. (*E.g.*, Dkt. 792, at 8-10)

The latest objections to the Receiver's seventh and eighth fee applications repeat many of their objections to the Receiver's earlier fee applications, and these objections have already been overruled. (Dkt. Nos. 541, 546, 547, 614 & 710) The Court has repeatedly determined:

- "there is a significant need for the Receivership Assets to be managed by a neutral party until an orderly claims process is concluded;"
- "the receiver's efforts have benefitted and will benefit the Receivership Estate;"
- "the Receiver and his legal professionals have devoted significant resources responding to various motions, objections, and inquiries made by lenders, with these efforts increasing the amount of fees the Receiver is reasonably entitled to;" and
- the efforts of the Receiver and his legal professionals "have been delayed in part by time spent responding to various motions and objections made by the lenders."

(*E.g.*, Dkt. No. 614, at 3)

III. DISCUSSION

A. The Objectors Disregard the Complexity of this Action and the Need for a Receiver.

The objectors persist in refusing to recognize the magnitude and complexity of the receivership estate or their own role in the pace of the receivership and commensurate impact on legal fees. Ignored and unaddressed are the descriptions in the Receiver's fee applications of the substantial efforts undertaken with regard to, and without limitation, property sales (*e.g.*, Dkt. No.

755, at 7-9; Dkt. No. 778, at 6-10), financial reporting (*e.g.*, Dkt. No. 755, at 9-10; Dkt. No. 778, at 10-11), litigation relating to the properties (*e.g.*, Dkt. No. 755, at 10-11; Dkt. No. 778, at 11-12), and claims (*e.g.*, Dkt. No. 755, at 13-15; Dkt. No. 778, at 13-16).

Furthermore, as this Court is aware having repeatedly determined that a claims process is the appropriate mechanism for resolving allegedly competing disputed claims, this is not a typical foreclosure case involving a single secured lender. *Compare Elliott*, 953 F.2d at 1577 ("Generally, a receiver is nothing more than an opponent of one who claims secured status, *but this scenario envisions only a one-on-one contest*. In this case, the Receiver opposed many competing claims of secured status to the same property") (emphasis added). As in *Elliott*, the Receiver's role in this case is different than the typical cases relied upon by the objectors. This is a receivership involving a company that operated an enormous Ponzi scheme in violation of federal securities law and which kept its operation afloat by (1) siphoning funds from the accounts of performing properties to pay debt service, property taxes, insurance, and other costs incurred in connection with non-performing properties and (2) deploying funds raised from hundreds of "mom and pop" investors in connection with allegedly new acquisitions in order to stave off defaults on institutional loans. EquityBuild was not legitimately paying the debt service to the institutional lenders; the investors were. To complicate matters further, the defendants raised the money they needed to keep the Ponzi scheme afloat by at times granting its investor-lenders mortgages against particular properties and then, in many instances, surreptitiously releasing those mortgages without the investor-lenders' knowledge or authorization in order to pave the way for new loans from institutional lenders, or, in other words, to borrow against the same properties twice. The end result was a thicket of competing claims between hundreds of investor-lenders, institutional lenders, lienors, and other assorted claimants against nearly 120 separate real properties. A federal

receivership is the most efficient vehicle for adjudicating the claims asserted by the victims of the Ponzi scheme, and, in that vein, the Receiver has invested substantial time and effort crafting and implementing a claims process that will afford every potential claimant the opportunity to submit documentation and information pertaining to its claim(s), to discover information relating to directly competing claims, and to obtain a fair resolution. (*See, e.g.*, Dkt. No. 638)

The objections continue to fail to recognize this receivership is characterized by competing secured and other claims in relation to the properties of the estate. They describe their various efforts to alter or avoid the claims process, through motions to stay, foreclose, convert to bankruptcy, and so forth. But the Court has repeatedly said that the claims process and priority determination will proceed together because of the nature of this action, as wrought not by the Receiver, but by the Cohens. A fair process that appropriately and legitimately addresses (and will resolve) the claims that are competing with theirs, such as the Receiver has proposed, benefits the objectors and all secured claimants. *Elliott*, makes this clear. 953 F.2d at 1577.

B. A Receiver Is Needed Despite the Financial Constraints of the Receivership.

The objectors assert that there are not sufficient general assets to cover the expenses of the receivership, a scenario that the Receiver also has noted may ultimately prove true. The cost associated with preserving, managing, and selling the properties and implementing a claims process is substantial. But the sacking of the Receiver will not eliminate the need to maintain and sell the remaining properties subsumed within the receivership estate, nor relieve the Court from administering a full and fair claims process. The objectors' arguments here are simply collateral attacks upon the Court's prior rulings that the determination of priority of claims and entitlement to the properties or their sales proceeds ought to be administered through a claims process, and these same arguments have consistently failed to persuade the Court.

C. The Receiver Has Provided and Shown Substantial Benefit to the Properties and the Secured Claimants.

During the first half of 2020, the Receiver: continued all operations of the Receivership as the COVID-19 pandemic hit and shut down many parts of the global and local economy (Dkt. Nos. 698, 757); filed a comprehensive claims process motion to address all allegedly secured competing claims against all of the properties (Dkt. No. 638); made substantial progress in reviewing over 2,000 claims submissions, including as reflected on the master claims spreadsheet listing nearly 1,000 claimants and their claim amounts on both a claimant and property-by-property basis (Dkt. Nos. 624, 693, 698). The Receiver has also provided significant benefits protecting, preserving, and enhancing the properties and selling them in order to limit their costs and maximize sales prices. (*See, e.g.*, Dkt. Nos. 683 (regarding sales), 720 (regarding claims), 755 (including discussion of work performed), 778 (similar)) He has worked to sequence and prepare the properties for sale to minimize operating losses and maximize sales proceeds. (*See, e.g.*, Dkt. No. 166, at 4; Dkt. No. 698, at 3; Dkt. No. 790, at 20) The Receiver continued work on and filed a consolidated motion to market and sell 36 properties and to confirm the sales of 12 more properties (Dkt. No. 618), including carefully and meticulously analyzing title commitments on each of those properties, assembling all the publicly-recorded documentation supporting all special exceptions identified on those commitments, and thoroughly reciting the relevant details of each and every EquityBuild transaction that resulted in each of the competing encumbrances (Dkt. No. 703, at 3). The Receiver also began more focused efforts regarding the development of the portfolio of 37 single family homes. By the end of June 2020, the Receiver had closed on the sales of 39 properties sold for an aggregate amount of $37,281,000.00 and generating net proceeds of $32,459,823.87, including sales of $16,823,000.00 and net deposits of $15,218,362.15 in the first and second quarters of 2020 (despite the challenges of the pandemic). (*See* Dkt. No. 698, at 4; Dkt. No. 757,

Ex. 1) In addition, in these same quarters, the Receiver entered into contracts to sell an additional 26 properties for $22,073,000.00. (*See, e.g.*, Dkt. Nos. 615, 681, 645, 649, 651, 663, 670, 674, 690, 699, 712)

During the first six months of 2020, the Receiver also provided benefits to the institutional lender claimants by preparing and delivering hundreds of financial reports, including, but not limited to, monthly operating profit and loss statements for each of the properties and arranging property inspections for lenders both to inspect their collateral and in connection with the marketing and sale of properties on which they expressed an interest in credit bidding. (Dkt. No. 755, at 9; Dkt. No. 778, at 10) In addition, the Receiver and his professionals provided benefits through regular, systematic, and efficient communication of information, including receiving and responding to thousands of e-mail inquiries from claimants, including institutional lender claimants. (*E.g.*, Dkt. No. 755, at 14; Dkt. No. 778, at 15)

Each of the foregoing efforts, and all other essential functions performed by the Receiver and his retained professionals are described in great detail in the 335 pages of invoices submitted in connection with the seventh and eighth fee applications, which themselves reflects many thousands of separately described tasks undertaken for the Receivership Estate, including its properties and creditors. (Dkt. No. 755, Exs. D-I; Dkt. No. 778, Exs. E-I)

D. The Receiver Does Not Favor Any Claimant and Has Not Yet Opposed Any Claim of the Objectors.

To fit their narrative, the objectors seek to recast the Receiver as an antagonist, who is advancing interests on behalf of one group, or otherwise intervening in areas in which he has no interest. (Dkt. No. 777, at 3, 15) This argument was rejected in *Elliott*, where the appellants similarly argued that the receiver was an adverse party and all of his work was to deprive the appellants of their secured interest. *Elliott*, 953 F.2d at 1577. Just as in *Elliott*, "[t]his is not exactly

true, for the Receiver is an officer of the court." *Id.* (citations omitted). As the court in *Elliott* noted, "[e]ven though the Receiver may at times take adverse positions to certain claimants, the Receiver acts under supervision of the court, *id.*; for the court must independently approve the Receiver's legal and factual findings." *Id.* (citations omitted).

To that point, as the person responsible for administering the claims process, the Receiver will evaluate the validity, fairness, legality, and classification of each claim and report to the Court, on a property-by-property basis, all of the information bearing on the claims that the Receiver believes in his judgment and discretion to be reasonably necessary for the Court to resolve any disputes with respect to or between the submitted claims. (*E.g.*, Dkt. No. 638, ¶¶ 48, 51) This work is performed in the Receiver's role to assist this Court "[i]n supervising an equitable receivership [as it is] the primary job of the district court . . . to ensure that the proposed plan of distribution is fair and reasonable." *SEC v. Wealth Mgmt., LLC*, 628 F.3d 323, 332 (7th Cir. 2010). Undertaking and completing that work requires the Court to approve the claims process proposed by the Receiver or otherwise determine what the claims process will be, which will inform and guide the Receiver's work to process *all* claims.

Even case law relied upon by objectors indicates that the Receiver is obligated to advocate to the Court what he believes to be the best course of action to distribute the assets of the estate. (Dkt. No. 708, at 18 (citing *SEC v. Schooler*, 2015 WL 1510949, *3 (S.D. Cal. March 4, 2015))). In *Schooler*, the district court concluded that as an officer of the court a receiver *"has a duty to* protect, preserve, administer and *distribute appropriately the receivership assets and must advocate, to the court, courses of action that are consistent with those duties*." *Id.* (citing *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (receiver's role is to assist the district court in achieving a final, equitable distribution of assets)) (emphasis supplied). To remain

unbiased between the parties in the litigation, a receiver "must not take positions or advocate for actions primarily for the benefit of one party *unless such positions or actions are consistent with the receiver's fiduciary duties*." *Id.* (emphasis supplied).

Accordingly, and consistent with these principles, in exercising his duty to advocate for the appropriate distribution of receivership assets the Receiver in this case may recommend a course of action which benefits one party over another. *See Elliott*, 953 F.3d at 1577 (a receiver may at times take adverse positions to certain claimants). From time to time, the Receiver also must zealously oppose efforts to tilt or skew the process by one or more participants, lest it become unfair or inequitable for others. There is no reason to believe, however, that the positions taken by the Receiver to ensure and implement a fair claims process will benefit investor lenders over institutional investors, or vice versa. *See also Elliott*, 953 F.2d at 1577 (receiver's role in the claims process includes opposing secured claims for the benefit of other secured claimants). Put differently, such recommendations, decisions and actions by the Receiver which the objectors may not agree with or otherwise believe to be adverse, do not make the Receiver antagonistic – it simply reflects that the Receiver is doing his job.

Further to this point, the objectors do not support their arguments with any evidence that the Receiver has spent time adverse to them on activities for the benefit of unsecured creditors or attempted to void their contractual rights. (Dkt. No. 777, at 8-9) Contrary to such conclusory statements, the Receiver's efforts to date have been to: preserve and maintain the properties, which benefits whoever has an interest in them; sell the properties – to protect the interests of whoever is entitled to funds; and implement a fair claims process to validate the claimants' legitimate contractual rights both in relation to the Estate and each other. If the objectors are ultimately correct that their interests are superior, then they are the parties who will most benefit from the

Receiver's efforts. The objectors specifically cite *Elliott* for the proposition that a receiver cannot get a receiver's lien for "adverse activities includ[ing] time the Receiver spent opposing their claims to be secured, their objections to administrative fees, and their appeal to this Court." (Dkt. No. 777, at 8 (citing Elliott, 953 F.2d at 1578)). But, here, the Receiver has not spent time opposing their secured claims, has not sought compensation for opposing objections to administrative fees (nor for preparing and submitting fee applications), and there has not been an appeal. In fact, their argument that the Receiver has opposed their secured claims is undermined by their argument that the Receiver has not yet vetted their claims (as set forth in their objection to the Receiver's ninth sales motion). (*See, e.g.,* Dkt. No. 769, at 13 ("the Receiver has not filed any objection to Fannie Mae's [sic] proof of claim"); *see also, e.g., id.* at 13 n.6 ("the Receiver has not objected to any proofs of claim by any creditor")) Furthermore, the Court has consistently approved the Receiver's efforts and noted their benefit to the Estate and claimants. (*E.g.*, Dkt. No. 614, at 3)

The objectors also suggest that the Receiver has "held hostage" properties where no priority dispute exists. (Dkt. 777, at 10) But this is the same false premise and flawed argument that they made in response to the Receiver's ninth motion for approval of sales. (Dkt. No. 769; *compare* Dkt. No. 787, 790) The objectors simply ignore that other claimants have disputed priority on the vast majority of the properties in the Receivership estate and that the Court has made clear that as part of the claims process it is going to address not only priority disputes, but also unresolved issues as to properties where there are no competing mortgagees within the claims process that the Court will implement.[2] (Dkt. No. 790, at 3 & n.2). The objectors' follow up argument that this is

[2] The objectors have themselves argued against the Receiver addressing priority disputes. They also submit an affidavit in an apparent attempt to adjudicate their claims in the context of the fee applications. These matters are before the Court in connection with the claims process motion (Dkt. No. 638) as well as the pending ninth sales motion (Dkt. No. 749), and not appropriately litigated here. In any event, the Receiver notes that the objectors' claims and declaration only provide the perspective of the objectors, who

a no asset case and that the Receiver should abandon the properties has been repeatedly opposed by the SEC and rejected by the Court. And the Receiver has explained that the complexities of the case make abandonment a practical impossibility because the mortgagee to which such abandonment would be made has not yet been determined by the Court. Until then, the Receiver is charged with preserving and liquidating the properties until the Court has made that determination and concluded the claims process.

E. The Receiver's Bills Are Reasonable and Moderate.

The objectors also assert that the Receiver's fees are not moderate and reasonable (Dkt. No. 777, at 19-21), although they do not identify a single such instance, nor identify any instance where a professional billed time for work when it was unreasonable for that work to have been performed. "A party objecting to a fee application may not do so based on the general proposition that the fee sought is simply too much." *FTC v. Capital Acquisitions & Mgmt. Corp.*, 2005 WL 3676529, *4 (N.D. Ill. Aug. 26, 2005) (citing *In re Hunt's Health Care, Inc.*, 161 B.R. 971, 982 (Bankr. N.D. Ind. 1993); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992) ("a gestalt reaction that there was too much [time spent or that fees are excessive] ... isn't good enough")). Rather, "[t]he objector must, at some point, identify any allegedly improper, insufficient, or excessive entries and direct the court's attention to them." *Id.*

In fact, the Receiver's fees are reasonable and moderate. The invoices themselves provide great detail of the nature of the work performed, with the properties the work relates to specified when reasonably possible. (Dkt. No. 755, Exs. D-I; Dkt. No. 778, Exs. E-I; *see also, e.g.*, Dkt. No. 755, at 21-22) The Receiver has accomplished an overwhelming amount of work on this case

heretofore have objected to the Receiver taking a position as to the priority of their claims. The Receiver will be prepared to address those claims and assertions, as well as all other claimants' claims and assertions, and reserves the right and ability to do so, in the context of the claims process the Receiver has proposed and once the Court establishes the procedure for the Receiver to follow.

by employing a lean staff that has worked with remarkable efficiency to accomplish tasks that could easily keep the litigation department at a national law firm busy for years. The Court is aware of and can take judicial notice of the extensive record in this matter of the Receiver's efforts, including but not limited to preserving and maintaining the properties, preparing the properties for sale and selling them, and implementing a claims process for the benefit of all claimants.

Again, the Receiver has achieved improvement in efficiencies as this matter had progressed. The average billing rate achieved for Receiver and his firm for the first and second quarters of 2020 were $262 and $264 per hour, respectively. These average billing rates are the lowest achieved since the inception of the Receivership and *even lower* than the billing rates achieved for the third and fourth quarters of 2019, in relation to which the Court stated that the Receiver's applications "are on even stronger footing than the ones the Court has previously approved, [where] the Receiver has made substantial reductions in his fees and billing rates." (Dkt. No. 710, at 3) Thus, in this regard, the current applications are the strongest yet. Together with the substantial work and progress achieved, as discussed herein and reflected both in the submitted bills and the docket for this action, the current fee applications show significant economies and demonstrable overall value to the Estate.

Moreover, the SEC has supported and approved the Receiver's fee applications. (*See, e.g.*, Dkt. Nos. 526, 606, 622, 705, 797) "In securities law receiverships, the position of the Securities and Exchange Commission in regard to the awarding of fees will be given great weight." *First Securities Co.*, 528 F.2d at 451 (citing *SEC v. Fifth Avenue Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973)). (*See also* Dkt. No. 607, Ex. 1, October 8, 2019 Tr. 6:12-15) Further, this Court has already found that the Receiver's efforts have benefitted the estate and will continue to

benefit the estate, thus justifying reasonable compensation for the Receiver and his retained professionals. (*See, e.g.*, Dkt. No. 614, at 3)

F. The Court Should Approve Payment of the Fees and Expenses of the Receiver and His Retained Professionals.

As the Receiver has observed, the primary beneficiaries of the Receiver's efforts are and will be the claimants who receive funds from the real estate properties that the Receiver has worked to preserve, maintain, improve, and liquidate, following the claims process that the Receiver has worked to implement and administer. While there may be funds to pay the Receiver and his retained professionals from monies that have been or will be recovered, net proceeds from the sales of unencumbered properties, net equity from the sale of encumbered properties, and funds returned to the Receiver's account from the sales proceeds of properties that received cash infusions to preserve and maintain them during periods when their operating income alone could not sustain them, there is a diminishing likelihood that such funds will be sufficient to pay the Receiver and his retained professionals. Cash on hand in the Receiver's accounts totaled $135,195.51, as of September 17, 2020. Additionally, $1,047,972.77 will be restored to the Receiver's account in connection with the portion of the Receiver's second restoration motion for which there were no objections. (Dkt. No. 795) In addition to those amounts for which there was an objection, the Receiver anticipates seeking additional restoration amounts, as properties that received the benefit of monies from the Receiver's account are sold. The Receiver also closed the sale of a property in May 2020 from which the Receiver presently expects in excess of $1,200,000 in equity. Because of future uncertainties regarding sources of funds along with concerns for equity and fairness to all claimants, the Receiver has requested a receiver's lien in connection with the pending claims process motion, which clearly sets out the Court's authority to order in an appropriate case such as this. (*See* Dkt. Nos. 638 (at 21-25), 755 (at 18-25), 778 (at 18-25))

G. The Court's Establishment of a Receiver's Lien Is Necessary and Appropriate.

The objectors argue that the Court has authority to allow a receiver's lien on the property in a receivership to cover receivership expenses only if "the receivership benefited the property and the mortgagee acquiesced in, or failed to object to, the receivership." (Dkt. 777, at 8 (citing *Gaskill*)). However, *Gaskill* does not say, as the objectors suggest, that this is the "only" circumstance in which a receiver's lien is allowed. Instead, *Gaskill*'s description of the applicable law puts the language the objectors quote in context when it comes to a receiver's liens in federal equity receiverships. First, *Gaskill* affirms that "the district court has authority to impose a lien on the property in a receivership to satisfy the receivership expenses." *Gaskill*, 27 F.3d at 251. Second, *Gaskill* explains that "[r]eceivership is an equitable remedy, and the district court may, in its discretion, determine who shall be charged with the costs of the receivership." *Id.* (citations omitted). Third, *Gaskill* identifies the "general rule" that "the expenses and fees of a receivership are a charge upon the property administered." *Id.* (citing *Atlantic Trust Co.*, 208 U.S. at 375-76). Fourth, *Gaskill* confirms that under federal common law a "[c]ourts in equity have allowed liens for receivership expenses to take priority over secured creditors interests in the property when the receiver's acts have benefited the property." *Id.* (citing *Elliott*, 953 F.2d at 1576-77). *Elliott*, which *Gaskill* cites with approval and follows, cuts through the issue, explaining that "there is an 'implied understanding that the court which appointed him and whose officer he is will protect his right to be paid for his services, to be reimbursed for his proper costs and expenses.'" *Elliott*, 953 F.3d at 1576 (citations omitted).

The objectors' argument also ignores the benefit of work already performed and specific descriptions of benefit that the Receiver provided, including in the bills, in the fee applications, in the claims process motion, in status reports, and in sundry other pleadings submitted in this action.

While they cite to *Elliott*, that case clearly supports the appropriateness of a receiver's lien in a case like this. Further, the objectors' reliance on *S. Cnty. Sand & Gravel Co.*, 108 R.I. 239, is unavailing.[3] (*See also, supra,* at pp. 4-5)

The objectors point to bankruptcy principles and cases interpreting bankruptcy principles as though they would and should transform the nature of this action and undermine the appropriateness of a receiver's lien. But neither those principles nor those cases address a situation where a receiver or a bankruptcy trustee was appointed by a court to preserve and liquidate assets while there was a dispute over priority to those assets; further, in none of those cases was a receiver or trustee directed by the court to propose a claims process like the one the Receiver has proposed here in order to specifically address and resolve what amount to hundreds of disputed claims. *See, e.g., U.S. v. FDIC*, 899 F. Supp. 50 (D.R.I. 1995) (considering whether IRS could recover capital gains tax from proceeds from sale of secured lender's collateral). The cases cited by the objectors involve and presuppose secured lenders whose priority is unquestioned. They do not involve a benefit brought by a receiver who must preserve and liquidate properties while the court works through a process to determine who has priority to those assets or funds derived from their sales. (*See also, supra,* at pp. 4-5)

The case law cited by the Receiver is on point and authoritative. *See, e.g., Gaskill*, 27 F.3d at 251, 253; *Elliott*, 953 F. 2d at 1576-77. Those cases make clear that the Court has the discretion to determine who shall bear the expenses of the Receiver's work, whether the secured claimants have been benefited by the Receiver's work, and to pay the Receiver out of the proceeds of the

[3] *Elliott* did not cite *South County* for the proposition that a receiver's implementation of a claims process is ineludibly antagonistic to a secured lender's interests. Nor does *South County* stand for the proposition that a receiver passing on the validity, fairness, and legality of claims, and ensuring that the process is fair for all participants, should not be reasonably compensated for those efforts. (*See also, e.g.,* Dkt. No. 638, ¶ 52)

sales of the properties at issue. *Gaskill*, a decision of the Seventh Circuit, is direct and mandatory authority and in that decision the Court cites *Elliott* with favor on these precise issues. *Elliott* further shows that secured creditors receive a benefit that supports a receiver's lien in a case where part of the defendants' "fraud was convincing investors they were collateralized when they really were not" (like here) and using "the same securities as collateral for several different investors" (like here) and the Receiver spent significant time "cutting through this web to determine who really was entitled to the collateral" (like here) and opposing "many competing claims of secured status to the same property" (as will be inevitable here). *Elliott*, 973 F.2d at 1577. The court further explained that even where "the prevailing secured claimant had to fight the Receiver's opposition to his claim, he reaped benefits when the Receiver defeated competing claims. By combatting competing claims, the Receiver became his ally. We find that, with these types of activities, the Receiver conferred a benefit on the secured creditors and merits fees from their collateral." *Id.*

Here, the Receiver has been, is, and will be providing such benefits to all claimants. (*See, e.g.*, Dkt. No. 710, at 3 ("the Court once again reaffirms both that there is a significant need for the Receivership Assets to be managed by a neutral party until an orderly claims process is concluded, and that the Receiver's efforts have benefitted and will continue to benefit the Receivership Estate")). (*See also, e.g., supra*, at pp. 1, 5-9)

The objectors argue that the Receiver's lien request is premature, as well as speculative or hypothetical. (Dkt. No. 777, at 16-17) It is not. First, the Receiver has already performed significant work to implement the claims process and the "time spent disentangling the [Cohens'] paper trail is relevant, as is … [t]ime spent in preparing his Proposed Plan with regard to these

secured creditors…."[4] *See Elliott*, 953 F.2d at 1578. Second, there is nothing speculative about the fact that the Court has ruled that the claims process (in which the Receiver has been intimately involved in implementing and administering) will be used to determine priority and entitlement to the assets of the Estate, and for which the Receiver will continue to maintain his responsibilities. Separately, and looking at the preservation and orderly disposition of the properties, by December 2020 or soon thereafter, all or almost all of the properties will have been sold as a result of the deliberate and dedicate efforts of the Receiver and his professionals. Third, it is essential for the Receiver and the retained professionals and vendors to have certainty that their substantial and essential work in implementing the claims process will be fairly compensated through a receiver's lien. This is particularly true as the general assets of the Estate appear increasingly unlikely to be sufficient to cover the costs of the Receivership. In such circumstances, liens have been approved to ensure that if a property leaves the Receiver's control it will be subject to a lien that provides collateral for approved fees and expenses to be paid. *See Gaskill*, 973 F.2d at 251 (citations omitted). The Court can allow the receiver's lien premised on the understanding that the Receiver will be providing a benefit by implementing the claims process and performing the duties that the Court orders the Receiver to perform. Finally, the fee application process will be a means for the Court to review the time and expenses conferring that benefit to confirm that the amounts to be satisfied pursuant to the lien are reasonable and appropriate before anything is paid.

[4] *See* Dkt. No. 703, at 2 (during the third and fourth quarter of 2019, the Receiver accepted over 2,000 claims submissions; conducted initial reviews of those claims; prepared and filed three status reports regarding those claims; prepared a preliminary report listing nearly a thousand claimants and their claim amounts; and preliminarily identified at least 116 properties potentially subject to secured and often competing claims, including claims associated with cross-collateralized loans; devoted substantial time and attention to analyzing the nature of the claims, considering the timing and prioritization of claims, and articulating the litany of issues to be presented to the Court).

H. The Receiver's Proposed Allocation Is Fair, Reasonable, and Consistent with Applicable Law.

The Receiver has noted that the primary beneficiaries of the Receiver's efforts are and will be the claimants who receive funds from the real estate properties that the Receiver has worked to preserve, maintain, improve, and liquidate following the claims process that the Receiver has worked to implement. A receiver's lien that allows for administrative expenses to be paid from operating income generated by properties or from the sales of those properties is particularly fair because it provides payment from those sources who have directly and substantially benefitted from the efforts to preserve and maintain those properties. Absent the imposition of a receiver's lien to ensure that the costs of preserving and selling the properties, and the costs of implementing a claims process relating to those properties, are paid from the operating income generated by the properties themselves or from their sales proceeds, the unsecured claimants are left to bear virtually the entire economic burden of a process that disproportionately (and perhaps exclusively) benefits the secured creditors. Such a result would ignore the reality that a large portion of the expenses that have been incurred relate to and are for the benefit of the secured lenders and the properties that secure such obligations.

The objectors ignore that some activities and tasks benefit specific properties, while other activities and tasks benefit all of the properties. In the former instances, the Receiver has already allocated time entries to specific properties when tasks can reasonably be attributed to them. However, in the latter instances, where the Receiver's efforts stretch across the properties and therefore benefit all claimants directly and indirectly, including reference to every property in the bills is impractical. With nearly 1,000 claimants who are mostly *not* similarly situated and over 100 unique properties, dividing and tracking most professional time by property is not realistic. Moreover, given that there are tens of thousands of individual time entries in the invoices submitted

with the fee applications, it would not be reasonable to require a receiver to divide each task into fractions of tenths of an hour and track time in that manner within the bills.

Significantly, and also ignored by the objectors is the fact that the Receiver and his professionals already allocate time among the billing categories specified in the SEC Billing Guidelines. Within each daily entry, and then within each billing category, time entries are further broken down by separate tasks; and, then, for each separate task, the amount time is recorded according to the nearest tenth of an hour. And, when it is possible to reasonably identify specific properties to which the task and time spent correspond, those properties are identified.

Additionally, the Receiver has proposed allocating all receivership fees and expenses for the Receiver and the retained professionals: first, by property, when it is possible to reasonably identify specific properties; second, eliminating certain billing categories (meaning those would not be part of fees for which a lien would apply); third, eliminating time relating to third-party claims (again, such entries would not be part of the fees for which a lien would apply); and fourth, allocating remaining fees and expenses – after the all of the foregoing steps have already been taken – to the properties as a percentage of their gross sales prices. (*See, e.g.*, Dkt. No. 755, at 22-24)

This methodology avoids the "counting heads" concern expressed in *Elliott* and alluded to by the objectors in their brief. (Dkt. No. 777, at 17) Instead, it connects the Receiver's work to the properties that have required the work to preserve, maintain, and liquidate, and with respect to which the secured claims that require a process for resolution administered by the Receiver under the Court's supervision, revolve. This approach also is consistent with the premise that a receiver's fees for preserving the properties, realizing funds from property sales, and administering the claims process must primarily be paid out of the properties or their sales proceeds *See, e.g.*, Clark on

Receivers, § 673. The objectors neither address this methodology nor propose any alternative.[5] The Receiver's request for a lien to be paid on a first priority basis, consistent with the foregoing law and proposed methodology should be granted.

I. A Hold-Back of Fees Is Not Warranted.

The objectors' contention that the Court should require at least a 20% hold back fails to "explain[] what therein is unreasonable or, at least, what would be reasonable under the circumstances [and,] [a]bsent such evidence …, the opposition fails." *FTC v. Capital Acquisitions & Mgmt. Corp.*, 2005 WL 3676529, *4 (N.D. Ill. Aug. 26, 2005) (citation omitted). Nor have the objectors cited any case law that mandates suspending payment to a receiver while he is conferring a benefit to a receivership estate. Indeed, their arguments ignore that the Receiver and his legal professionals are providing at least a 25% discount on rates (*and a 55% discount for one lawyer*), and have achieved significant efficiencies as this matter has progressed (as shown above).[6] (*See, e.g.*, Dkt. No. 755, Ex. A) Moreover, since the inception of this receivership, the period between the time that the Receiver's services have been rendered and the time that payment for those services was made has been substantial, at times exceeding a year. In fact, the Receiver has not yet reimbursed himself and his counsel for the fees associated with the work performed during the second, third, or fourth quarters of 2019, which fees have already been approved by the Court.

Further, the Receiver has provided a substantial discount to the Estate, the properties, and the claimants for the professional services provided. For the period covered by the seventh and

[5] Also ignored by the objectors is the Receiver's proposal to allocate fees and expenses on a property-by-property basis in a spreadsheet that will include a schedule for each property that reflects the property-specific fees and expenses that identify, reference, or relate directly to each property from the beginning of the receivership through the most recent quarter.

[6] While the objectors wrongly represent that the Receiver's fees amount to $7,000 per day, that figure is wildly inflated. In fact, the daily fees of the Receiver and his firm were nearly 45% lower than their assertion in the first quarter of 2020 and 25% lower in the second quarter of 2020.

eighth fee applications, alone, the Receiver and his firm's discounted billing rates have provided a $454,218 discount off standard billing rates. As noted above, he also has achieved significant economies and demonstrable overall value to the Estate.

Moreover, as noted, the SEC has supported and approved the Receiver's fee applications without any holdback. (*See, e.g.,* Dkt. Nos. 526, 606, 622, 705) *See, e.g., First Securities Co.*, 528 F.2d at 451. And this Court has previously rejected the request for a holdback and found that the Receiver's efforts have benefitted the estate and will continue to benefit the estate, thus justifying reasonable compensation for the Receiver and his retained professionals. (*See, e.g.*, Dkt. No. 614, at 3)

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court exercise its discretion to (i) find that the Receiver has provided a benefit to the properties and the claimants in connection with the work performed and expenses incurred as reflected in the seventh and eighth fee applications; (ii) approve the Receiver's seventh and eighth fee applications and payment of all fees and expenses described therein out of the funds in the Receiver's account, including as to any such future funds that come into the Receiver's account; (iii) impose a first priority receiver's lien on the properties and proceeds of sale to satisfy the receivership expenses; and (iv) for such other relief as the Court deems equitable and just.

Dated: September 23, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

Michael Rachlis (mrachlis@rdaplaw.net)
Jodi Rosen Wine (jwine@rdaplaw.net)
Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
Phone (312) 733-3950; Fax (312) 733-3952

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020 I provided service of the foregoing Receiver's Combined Response to Objections to Seventh and Eighth Fee Applications, via ECF filing to all counsel of record, and via electronic mail to Defendant Jerome Cohen at jerryc@reagan.com.

By: /s/ Michael Rachlis

Michael Rachlis
Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
Phone (312) 733-3950; Fax (312) 733-3952
mrachlis@rdaplaw.net