Appeal No. 20-3114

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

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

v.

KEVIN B. DUFF, RECEIVER
Court-Appointed Receiver-Appellees

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION and CITIBANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., MULTIFAMILY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-SB48
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS IN CASE NO. 18-cv-5587, JUDGE JOHN Z. LEE

APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEE-RECEIVER'S MOTION TO DISMISS APPEAL

Appellants Federal National Mortgage Association ("Fannie Mae") and Citibank, N.A., as Trustee for the registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48 ("Citibank as Trustee", together with Fannie Mae, the "Appellants") file this Response in Opposition to the Appellee-Receiver's Motion to Dismiss Appeal ("Motion") and the United States Securities and Exchange Commission's ("SEC") Joinder of Receiver's Motion ("Joinder").

Background

The Appellants filed this appeal because the Receiver's actions are materially and detrimentally impairing their security interests. If this Court does not reverse the conduct of the Receiver as approved by the District Court, then the Appellants risk having their security interests irreversibly diminished. The Receiver is systematically selling estate property free and clear of pre-existing liens. The Appellants believe this process violates their secured interests and due process. This appeal should not be dismissed because it is proper under 28 U.S.C. §1292(a)(2). If the Motion is granted, it will likely deny Appellants a right to appeal because any appeal after the receivership proceedings conclude may be moot.

This case involves a federal equity receiver appointed in August 2018 at the request of the SEC. The SEC alleges the defendants engaged in a Ponzi scheme involving the sale of investments allegedly secured by certain real properties. The receivership estate is comprised primarily of multi-family commercial properties located in Chicago. Nearly every property in the estate is encumbered by one or more mortgage liens. Fannie Mae and Citibank as Trustee are each the holder of loans made to certain receivership defendants. Repayment of their loans is secured by a first priority lien mortgage on two separate properties (the "Properties") included in the estate. Fannie Mae and Citibank as Trustee are the holders of their respective first priority lien mortgages securing repayment of their loans. The Receiver is liquidating the estate's assets by selling all of the estate properties in a process that violates the Appellants' state-law real property security interests.

A. The Appellants' claims in the receivership.

Fannie Mae holds perfected security interests in the commercial real estate located at 1113-41 East 79th St., Chicago, Illinois and the rents generated therefrom ("Fannie Mae

Property"). As of June 28, 2019, the amount due Fannie Mae under the loan to the receivership defendant-borrower was no less than $1,319,255.08. Citibank as Trustee holds perfected security interests in the commercial real estate located 6250 S. Mozart Avenue, Chicago, Illinois and the rents generated therefrom ("Citibank Property"). As of June 28, 2019, the amount due Citibank as Trustee under the loan to the receivership defendant-borrower was no less than $1,461,176.83. In June 2019 each Appellant submitted their proofs of claims to the Receiver claiming the above amounts as due and owing. The amounts due the Appellants increases daily due to accrual of interest, default interest, and other fees and costs provided for under the loan documents. The Receiver has not made any principal or interest payments since this case began in August 2018. The Receiver has not filed any objection to the Appellants' proofs of claims or any objection to the Appellants' lien priority through a formal objection or avoidance action.

B. The Receiver's sale process of estate assets.

In January 2020, the Receiver sought the court's permission to market the Properties for public sale pursuant to 28 U.S.C. §§ 2001, 2002 by publishing a notice of sale. The Appellants, along with numerous other similarly situated mortgagees, filed objections to the sale process. Among other issues, the Appellants objected to: (i) the Receiver's ability to sell the Properties for less than the amount of the Appellants' debt; (ii) the sale of the Properties before the court determines lien validity, priority and amounts; and (iii) the requirement that the Appellants' post a letter of credit to be eligible to credit bid at any sale. The District Court overruled these objections.

Beginning in May 2020, the Receiver published a notice of public sale for four consecutive weeks with a bid deadline of June 3, 2020. The Receiver accepted a purchase price of $925,000 for the Citibank Property and a purchase price of $1,250,000 for the Fannie Mae

Property.[1] These sums are well below the current amount of debt secured by each property. The Receiver filed a motion to approve the sales and to sell the Properties free and clear of the Appellants' liens. The Appellants again objected to this motion. The District Court overruled the objections allowing the Receiver to sell the Properties free and clear of the Appellants' liens. This order is the subject of this appeal.

C. The Appellants' objections to the sale process and issues on appeal.

The Appellants believe the sales process violates their commercial real estate security interests in the Properties and established law. The Appellants' security interests in the Properties were perfected prior to the SEC's initiation of this case. As a result, the Receiver takes the Properties subject to the Appellants' liens. *Marshall v. People of New York*, 254 U.S. 380, 385 (1920); *see also SEC v. Credit Bancorp*, Ltd., 386 F.3d 438, 447 (2d Cir. 2004) (a receiver "takes the property subject to all liens, priorities, or privileges existing or accruing under the laws of the state"). One benefit of holding a security interest in property is that the secured creditor is entitled to foreclose that security interest if the debtor fails to pay as required. In the context of Illinois real estate, the secured lender must foreclose on the property via a judicial foreclosure process pursuant to the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1101 *et seq*. These proceedings provide a forum for a judicial determination of validity, priority, and amount of the mortgage lien and leads ultimately to a public auction of the property. The secured lender is entitled to credit bid the amount of its debt at the foreclosure sale. *FDIC v. Meyer*, 781 F.2d 1260, 1264-65 (7th Cir. 1986) (stating "the judicial finding of the amount due

[1] The net sale proceeds after deduction of closing costs is approximately $831,324.00 for the Citibank Property and approximately $1,058,212 for the Fannie Mae Property. The purchaser for each property is an affiliate of the current property manager, the same property manager in place during the alleged Ponzi scheme.

determines the amount the foreclosing lender can credit bid"). After the sale, the secured lender takes title and can dispose of the collateral in such a way and at such time as it sees fit, with the goal of satisfying its loan in full. Procedurally, the validity, priority, and amount of the lender's secured lien is determined by the court and then the foreclosure sale occurs. The amount of the credit bid is based on the judicially determined lien amount. Here, the District Court has allowed the Receiver to subvert this process by selling the assets free and clear before any determination of the necessary property interests. If allowed to proceed unchecked this will impair the Appellants' security interests.

Prior to the Receiver's sale of the Properties, the Appellants petitioned the District Court to determine the validity, priority, and amount of the liens on the Properties. This determination benefits all parties, not just the Appellants. The Receiver strongly opposed the petition and instead intends to sell the Properties prior to any priority or lien amount determination, segregate the sale proceeds, and allow any liens that were attached to the Properties to attach to the sale proceeds. The District Court rejected the Appellants' proposal and approved the Receiver's process. The resulting outcome is problematic for several reasons and impairs the Appellants' state law security interests.

First, a determination of lien amount and priority determines whether the property sale will generate any net proceeds for the estate. If the amount of the secured lien(s) exceeds the property's value, then there is no benefit to the estate because all proceeds must be paid to the secured lienholder. In such an instance, the Receiver should abandon the property and let the secured creditor foreclose pursuant to the established Illinois foreclosure laws and not expend estate resources selling a property that provides no benefit to the estate. *S.E.C. v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1284-85 (D. Utah 2009) (stating receiver should

abandon properties that are valued less than the amounts owed to secured parties or will not generate any benefit to the estate).

Second, the Receiver's process creates a forced discounted payoff. By stripping the Appellants' lien from the property and attaching that lien to the sale proceeds, the Receiver limits the Appellants' amount of recovery to the net sale proceeds. The net sale proceeds are less than the amount of the Appellants' secured debt. Therefore, the Appellants are forced to take a discounted payoff. Furthermore, the receivership estate is administratively insolvent. The District Court recently approved a receiver's lien to provide the Receiver and his professionals a priming lien on sale proceeds because there are not enough unencumbered estate assets to cover current and future costs.

Third, a determination of lien amount and priority allows a secured party to know if and how much it should credit bid. Adjudication of lien priority and amount is necessary because it identifies the priority structure, sets the limits of the senior lienholder's credit bid, determines how much cash a junior lienholder must pay to eliminate a senior lienholder, and determines the amount a lienholder must pay in cash if it bids more than its mortgage debt. A creditor is effectively precluded from credit bidding without this information.

Fourth, selling a secured party's collateral without providing a full payoff deprives the secured party of its right to foreclose the collateral and to sell that property at a later date on terms it concludes are best suited to permit it to recoup as close to the entire amount of its indebtedness as possible. The Receiver's process deprives each secured party of (a) the basis of the bargain in providing the loan (i.e., the option to foreclose the collateral) and (b) its state law security interests in commercial real estate.

Fifth, the Receiver's proposal conflicts with Northern District of Illinois and Seventh Circuit case law. In *Pennant*, federal receivers sought to sell certain commercial properties "free and clear of liens, claims, and encumbrances" with such liens, claims, and encumbrances "attaching to the proceeds of the sale." *Pennant Mgmt., Inc. v. First Farmers Fin.*, LLC, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015). *Pennant* expressly rejected sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties, which does not exist here. *See also Matter of Riverside Inv. P'ship*, 674 F.2d 634, 640 (7th Cir. 1982) ("As a general rule, the bankruptcy court should not order property sold 'free and clear of' liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate.")

The Receiver attempts to cure the foregoing deficiencies by allowing the Appellants to "credit bid." The District Court approved a process in which a secured creditor can "credit bid" the amount of its claim to repurchase its collateral, but it must post a letter of credit in the amount of its credit bid. This process does not cure the harm to the Appellants. First, a party cannot rationally credit bid when it does not know the value and priority of its secured claim. As to value, if the creditor bids $1,000,000 based on its belief its claim is worth that amount but its claim is later adjudicated to be worth $900,000, then it must pay out of pocket the $100,000 deficiency. This risk is not present in a judicial foreclosure because the lien amount is determined prior to the sale. As to priority, if a creditor bids on the assumption it holds a first priority lien, but then is determined to be second priority (or lower), it must then pay cash to each senior lienholder. Second, posting of a letter of credit may force a secured creditor to lend twice on the same collateral—the first loan is the original loan to the receivership defendant and the second loan is the letter of credit. The risks associated with this "credit bid" process are so great

that the process itself creates a disincentive to credit bidding and renders the option to credit bid illusory. The Appellants objected to this process, but were overruled.

The Appellants filed their notice of appeal after the District Court overruled their objections and proposals and granted the Receiver the right to sell the Properties free and clear of all liens.

Argument

A. Appellate jurisdiction is proper pursuant to 28 U.S.C. §1292(a)(2).

This appeal is proper under § 1292(a)(2) because the order entered granting the Receiver the right to sell the Properties free and clear of all liens is appealable as an order refusing to take steps to accomplish the purposes for winding up the receivership. Section 1292(a)(2) provides in relevant part that this Court has jurisdiction over appeals from "Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." The language clearly contemplates appeal for either (a) orders refusing to wind up receiverships, or (b) orders refusing to take steps to wind up "such as directing sales or other disposals of property." The order here falls into the second category. Indeed, the SEC admits in the Joinder that the sales of the Properties constitute a "wind up" of the estate. (Joinder, pp. 5-6, 8-9.) By overruling the Appellants' objections, the District Court is refusing to take steps to accomplish the wind up.

This Court's prior ruling in *United States v. Antiques Ltd. Partnership*, 760 F.3d 668 (7th Cir. 2014) is factually and procedurally distinguishable and does not preclude this Court from exercising jurisdiction over this appeal. This is particularly true in light of Fifth Circuit case law that is directly on point and that allows appeals in this instance. It is also true when this Court

considers the purpose of appeals under § 1292(a)(2) and the conflicting result if *Antiques* is applied in a broad manner.

In *Antiques*, a receiver was appointed for "postjudgment collection proceeding[s]" to sell the defendants' assets to satisfy the federal government's tax liens. *Id.* at 671. Importantly, *before* the receiver was appointed, the district court entered an order finding the tax assessments were valid and likewise so were the tax liens and that the tax liens attached to the defendants' property. *Id.* at 670. Based on these judicial determinations, the federal government moved for the appointment of a receiver to sell the property on which the government had a previously determined valid lien. *Id.* The sole purpose of selling the property was to satisfy the government's liens. *Id.* at 672 (stating the liens attached to the defendants' property "thus entitling the receiver to sell those interests in order to realize cash from the liens to satisfy [defendants'] tax obligations.")

Antiques is distinguishable from the present case for several reasons. First, its procedural background is the exact opposite of what happened here. Here, the Receiver seeks to sell collateral before the District Court makes any determination of lien priority or amount. Skipping this important procedural step results in impairment of secured creditors' rights and wastes estate resources. These issues are part of this appeal. Moreover, *Antiques* involved post-judgment collections proceeding where the receiver was appointed specifically to liquidate the defendants' collateral to satisfy the previously determined valid tax liens. The present case involves an SEC receiver, which is akin to a bankruptcy. *See* N.D. Ill. LR. 66.1 The Receiver takes all property subject to all preexisting liens and must act with due regard to the realization of the true and proper value of the properties. The Appellants believe the Receiver has not fulfilled this duty. This issue is part of the appeal.

Antiques is particularly distinguishable when viewed in light of *S.E.C. v. Janvey*, 404 F. App'x 912 (5th Cir. 2010). In *Janvey*, an appeal was taken under § 1292(a)(2) of the district court's order approving an SEC receiver's sale of estate property. *Janvey*, 404 F. App'x at 915. The Fifth Circuit held its jurisdiction was proper under § 1292(a)(2). *Id*. at 914. In so finding, the court relied on and confirmed its prior holding in the published decision *United States v. "A" Manufacturing Co.*, 541 F.2d 504 (5th Cir. 1976) where it held "[s]ection 1292(a)(2) provides for appeals from interlocutory orders which take steps to accomplish the purpose of receiverships such as directing the sale or disposal of property. It logically follows that if an order directing a sale is appealable then an order confirming a sale after the fact is likewise appealable." The present appeal is based on the same procedural and factual posture of *Janvey* and the rationale of *"A" Mfg*.

Moreover, the order qualifies as an appealable order because the order refused to take steps to accomplish the "winding up" of the estate. *Antiques*, 760 F.3d at 672 ("appellate jurisdiction over interlocutory orders involving receivers is limited to the three types of order specified in section 1292(a)(2)…[third] orders refusing to take steps to accomplish the purposes for winding up a receivership.") One dispositive issue is whether the Receiver should have sold underwater properties in the first instance or whether these properties should have been abandoned. If the Appellants' position is confirmed, then the Receiver must abandon the Properties. Second, each individual property is akin to a single asset bankruptcy. Nearly every piece of property is encumbered by a lien in favor of an institutional lender (like Appellants) or an Equitybuild investor, or both. Therefore, the properties are not general receivership assets that will generate proceeds to be divided up among unsecured creditors. Rather, the proceeds belong either to the institutional lender or an Equitybuild investor. The only task left after a sale

is a determination of lien priority and value for each of these individual "estates." The liquidation of assets is a step towards the wind up the receivership estate and the Appellants' requests related to this process relate to steps necessary for the wind up of the estate.

The Motion mistakenly relies on *Netsphere* to distinguish *Janvey* and *"A" Mfg.* *Netsphere* does not overrule either *Janvey* or *"A" Mfg*. The facts of *Netsphere* are inapposite to the issues in this appeal. The appeal in *Netsphere* involved orders approving interim fee applications. *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015). The Fifth Circuit framed the issue on appeal precisely as "whether the phrase 'take steps to accomplish the purposes thereof' vests us with jurisdiction to review a fee order issued in compliance with an earlier appellate directive to wind-up the receivership. We conclude that it does not." *Netsphere*, 799 F.3d at 331. This is unrelated to the issues in this appeal. The issues on appeal in this case relate to the Receiver's sale of estate property that is encumbered by pre-existing liens. In contrast to *Netsphere*, both *Janvey* and *"A" Mfg.* involve the sale of estate property by a receiver, which is a matter expressly referenced in § 1292(a)(2).

Moreover, the cases cited in the Motion and Joinder in support of *Antiques* are also distinguishable. In *Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218, 225 n. 3 (2d Cir. 2010), the Second Circuit in a footnote stated that an order approving release of funds to pay for living expenses and legal fees is not appealable under §§ 1292(a)(1) or 1292(a)(2). There is no other mention of § 1292(a)(2). In *SEC v. Black*, 163 F.3d 188 (3d Cir. 1998), the court held it lacked jurisdiction under § 1292(a)(2) regarding an appeal of an order approving the payment of attorneys' fees and expenses to the receiver. The jurisdictional issue decided in *Black* did not involve the sale of estate property. In *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010), a receiver was appointed over the California Department of Corrections to construct additional

hospital beds for inmates. The issue presented was whether the construction plan for additional hospital beds was appealable under § 1292(a)(2). The Ninth Circuit determined it did not have jurisdiction because an order refusing to block the construction plan did not amount to an order refusing to terminate the receiver or to take steps to accomplish the windup of the receivership. *Id*. at 1099.

State St. Bank & Tr. Co. v. Brockrim, Inc., 87 F.3d 1487 (1st Cir. 1996) is akin to *Antiques* in that a receiver was appointed over a business located in Michigan and Ohio to liquidate the defendants' assets to satisfy a debt owed to the plaintiff. The court approved the sale of the Michigan business, but it was unclear whether the sale proceeds of the Michigan business would satisfy plaintiff's debt, so the court conditionally approved the sale of the Ohio assets, subject to a later determination on the issue of satisfaction. *Id.* at 1489. The court certified this order of conditional approval pursuant to Federal Rule of Civil Procedure 54. *Id*. On appeal, the defendant challenged the Rule 54 certification. *Id.* The First Circuit found the certification was not appropriate. Moreover, it held the order was also not appealable under § 1292(a)(2). *Id.* at 1491. The crucial distinction in *Brockrim* is that the order was a conditional approval of the sale because the sale was "contingent on a later determination of its necessity." *Id*. at 1489. Unlike *Brockrim*, the order subject to this appeal is neither conditional nor subject to a later determination of necessity and expressly allows the Properties to be sold free and clear of existing liens. The Receiver can immediately dispose of the Properties and terminate the Appellants' liens on the Properties.

Based on the holdings of both *Janvey* and *"A" Mfg*. and the fact that the order at issue qualifies as an appealable order refusing to take steps to accomplish the "winding up" of the estate, the Appellants believe this Court has jurisdiction under § 1292(a)(2).

B. Dismissal of this appeal for lack of jurisdiction may deprive the Appellants of all appeal rights.

Should this Court dismiss the current appeal, any subsequent attempt to appeal may be moot once the Properties are sold. *Janvey*, 404 F. App'x at 915 (holding that a failure to seek a stay of a receiver sale will moot the appeal). This concept is set forth in *In re CGI Industries, Inc.*, 27 F.3d 296 (7th Cir. 1994).[2] There, this Court held the debtor's appeal was moot because the sale was already consummated. *Id*. at 301. In so holding, this Court explained that the purpose of a stay pending appeal is "to maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal of the sale." *Id*. at 299. Moreover, "[o]nce the sale has gone forward, the positions of the interested parties have changed, and even if it may yet be possible to undo the transaction, the court is faced with the unwelcome prospect of 'unscrambling an egg.'" *Id*. (internal citation omitted); *see also Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 501 (10th Cir. 2000) ("An appeal is moot if the court of appeals can no longer grant effective relief because the object of the suit has been transferred.").

If the appeal is dismissed, then the Receiver will proceed to sell the Properties to third parties. The Appellants would then be forced to wait until the end of the receivership to appeal the issues presented in this appeal. At that time, the Properties will have long been sold and this Court will be "faced with the unwelcome prospect of 'unscrambling an egg.'" *In re CGI*

[2] Concurrent with filing their Notice of Appeal, the Appellants filed in the District Court a motion to stay pending appeal. That motion is fully briefed and the District Court will issue a ruling without argument. The Appellants intend to seek a stay from this Court if the motion is denied.

Industries, Inc., 27 F.3d at 299. Applying *Antiques* in a blanket fashion as requested in the Motion will have the unintended and inequitable result of potentially mooting all future appeals for the Appellants and any other similarly situated party in this case and future cases involving the sale of receivership estate property.

Moreover, applying *Antiques* in a blanket fashion appears to conflict with the intent of § 1292(a)(2). As one leading treatise stated: "The purpose of allowing interlocutory appeals from such orders is similar to the purpose underlying injunction appeals. A receivership can drastically curtail existing property rights, foreclosing independent action and decision in irreparable ways." 16 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 3925 (3d ed., Oct. 2020 update). Similarly, a sister circuit stated "[t]he purpose of § 1292(a)(2) is to relieve the parties from interlocutory orders affecting control over property." *Secretary U.S. Dep't of Labor v. Koresko*, 646 F. App'x 230, 247 (3d Cir. 2016) (internal quotations omitted).

The issues raised in this appeal are precisely on point with the intent of § 1292(a)(2). The order granting the Receiver authority to sell the Properties "drastically curtail[s] existing property rights" and "forclos[es] independent action and decision in irreparable ways." 16 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 3925. In fact, it completely impairs those property rights by selling the Properties free and clear of liens with no realistic possibility of subsequent appellate review. This impairment applies to all parties with a secured interest, not just the Appellants. The specific issues facing the Appellants were not present in *Antiques* because the district court determined prior to the receiver's appointment that the government held valid liens and those liens attached to the defendants' property. Here, the Receiver skipped over this important procedural step. This important nuance shows why

Antiques is distinguishable and shows why a blanket application of *Antiques* violates the purpose of § 1292(a)(2)

Attachment of the Appellants' liens to the sale proceeds does not cure this harm. First, the sales do not provide a full payoff of the loan. Even assuming the Receiver eventually pays over the sale proceeds, the proceeds are significantly less than the debt amount and this results in a forced discounted payoff, without preserving the lender's right to determine the timing and conditions for disposition of its collateral. This also conflicts with case law that states a receiver should not sell property for less than the amount of the debt. *Pennant Mgmt., Inc.*, 14-CV-7581, 2015 WL 4511337, at *4-5 (N.D. Ill. July 24, 2015) (rejecting sales that did not satisfy all secured liens, absent a consensual agreement by the impacted parties); *see also Matter of Riverside Inv. P'ship*, 674 F.2d at 640. Second, the process denies the Appellants their right to foreclose the property and sell it at a later date. Attachment to the sale proceeds does not cure this harm, rather it amplifies the harm because it changes the type of collateral securing the loan. The collateral is changed from a unique parcel of real estate that can go up in value to a finite pot of money that will never go up in value and will not provide a full payoff. The Receiver's citation to *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189 (10th Cir. 2010) in support of the Receiver's actions is misplaced. In *Vescor*, a group of defrauded investors in a Ponzi scheme brought a lift stay motion seeking to obtain preferential treatment to the detriment of other defrauded investors. In affirming denial of the motion, the court expressly distinguished between investors who invested money in the defendants and secured creditors that loaned money to the fraudsters:

> Yet the receiver and the district court correctly viewed the two interests as quite different. As the receiver noted, U.S. Bank *loaned* money to VesCor in an arms-length transaction, and the terms of the loan appear commercially reasonable. The Covenant Group, on

> the other hand, appears to be an VesCor investor. Tellingly, the terms of its "loans" to VesCor include interest, "discounts" of up to 30%, and "profit participation" if the properties were sold for a profit. The Covenant Group is thus very different from U.S. Bank, and stands in the same shoes as all of the Vescor investors who "were duped in the same way" and who "were promised a valid security interest in Vescor assets."

Vescor, 599 F.3d at 1195-96 (emphasis in original). The Appellants are not investors in the Equitybuild scheme, rather, they are lenders similar to U.S. Bank in *Vescor*. Moreover, the court never directly discussed the appropriateness of releasing a lender's lien from collateral and attaching it to sale proceeds. In fact, the *Vescor* receiver abandoned two properties encumbered by lender liens. *Id*. at 1196. Moreover, the court stated "typically, secured creditors have recourse against specific collateral, and must be paid out of the proceeds of that collateral." *Id*. at 1194. This is precisely the relief the Appellants requested in the District Court.

C. The issues presented on appeal are unique.

This Court will not "open itself to a flood of appeals" if it determines jurisdiction is proper. (Motion, p. 8.) The issues presented in this appeal apply in very limited circumstances. The Appellants are not challenging a receiver's general authority to sell estate property. The Appellants challenge the specific manner in which this Receiver sells properties encumbered by pre-existing liens for which the general receivership estate will receive no benefit and for which Appellants are forced to take a discounted payoff in derogation of their state law real property security interests. These are unique issues facing this specific receivership and are not an attempt to have this Court "supervise" the Receiver. These issues raise substantive and material issues of law that will potentially apply to the entire case and help shepherd this case to conclusion.

Conclusion

For the forgoing reasons, the Appellants respectfully request that this Court deny the Motion.

Respectfully submitted this 30th day of November, 2020.

FOLEY & LARDNER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ William J. McKenna, Jr.
William J. McKenna, Jr. (Counsel of Record)