

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

Case No. 1:18-cv-5587

Hon. John Z. Lee

MOTION FOR CLARIFICATION OF ORDER

U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50 (“U.S. Bank as Trustee”) and Midland Loan Services, a Division of PNC Bank, NA (“Midland” together with U.S. Bank as Trustee, the “Claimants”) respectfully file this Motion (“Motion”) requesting clarification of this Court’s November 18, 2021 Minute Order [Dkt. 1090] (“Order”). In support of this Motion, the Claimants state as follows:

BACKGROUND

The Claimants file this Motion seeking clarification of when the Receiver must file his notice of dispute notifying the Claimants that the Receiver intends to contest the Claimants’ proof of claim or lien. The Claimants believe this notice must be provided prior to the January 28, 2022 status hearing.¹ The Receiver disagrees with this timing. The Claimants attempted to resolve this dispute prior to filing this Motion.

¹ For the avoidance of doubt, the Claimants do not believe the Receiver is required to file his “position statement” prior to January 28. Rather, the Claimants believe the Receiver should file his Dispute Notice prior to January 28.

On October 29, 2021, the Claimants together with Kevin Duff, Receiver (“Receiver”) filed a Joint Motion to Determine Claims Process for Single Claim Properties [Dkt. 1072] (“Claims Motion”). The Claims Motion set forth two competing claims processes for the single claim properties. The Claimants filed one proposal and the Receiver filed his own proposal. A copy of the Receiver’s process is attached as Exhibit A (“Receiver’s Process”).

The Court held a hearing on the Claims Motion on November 17, 2021, at which counsel for the Claimants and Receiver set forth their arguments in favor of their respective proposals. The Court entered the Order ordering the uncontested claims process to “begin immediately” and setting forth scheduling deadlines. Specifically, the Court set deadlines for third party subpoenas, the Claimants’ response deadline to certain Discovery Requests Directed to Institutional Lenders, submission of a status report, and a January 28, 2022 status hearing. The Order also states after the January 28 status hearing, “the parties shall have 60 days for discovery to the extent necessary.” Order (emphasis added). The additional discovery consists of additional discovery requests between the Receiver and the Claimants, including interrogatories, requests for production, requests for admission, and three depositions. *Id.* The Order also requires the Receiver to file his “position paper” by April 29, 2022, which will set forth the Receiver’s factual and legal basis for any objection to the Claimants’ proofs of claim and liens.

Following entry of the Order, the Claimants sought clarification from the Receiver as to his timing to disclose his Dispute Notice (as defined in the Receiver’s Process). It is the Claimants’ position that the Dispute Notice must be provided prior to the January 28, 2022 status hearing. It is the Receiver’s position that he does not need to provide the Dispute Notice prior to the January 28, 2022 status hearing and instead believes the status hearing is when the Receiver must inform

The Dispute Notice shall “include a short and plain statement of facts setting forth the legal basis for his dispute.”
Ex. A, Sec. I.

the Court of “how soon thereafter [he]’d be in a position to provide the notice.” The Claimants believe this is contrary to the Court’s Order and the Receiver’s Process. Because the parties are unable to reach a resolution on this dispute, the Claimants file this Motion seeking clarification from the Court.

REQUEST FOR CLARIFICATION

It is the Claimants’ position that the Court intended the Receiver to provide the Dispute Notice prior to the January 28 status hearing because that date triggers the 60-day period of additional discovery. Indeed, the Receiver stated at the November 17, 2021 hearing that providing the Claimants “notices of no dispute or notices of avoidance” will “trigger” the 60-day period of additional discovery. Hearing Tr. (Nov. 17, 2021), 25:5-12. This is also consistent with the Receiver’s Proposal which provides that the Receiver will issue his Dispute Notice and then the parties will have 60 days to complete additional discovery. Ex. A, Sec. I, II(B). The 60-day period of additional discovery begins January 28, so logically the Receiver must provide his Dispute Notice prior to that date. In fact, in response to the Court’s question regarding what other information the Receiver needs to make a determination as to whether or not he will oppose a claim, the Receiver stated that he would like to obtain documents from the third party loan originators and title companies and the Claimants to answer certain of the standard discovery requests. *Id.* 18:11-19:1. After this, the Receiver will have the information necessary to provide “disclosure of an avoidance” or that there is no challenge. *Id.* The Receiver’s counsel has indicated to the Claimants that the Receiver has received several document productions in response to the third party subpoenas.

The Claimants bring this Motion to avoid future delay and confusion. The Receiver’s position is that he is only obligated to inform the Court on January 28 of “how soon” he can provide

the Dispute Notice. This invites further delay. The Court ordered this claims process to begin immediately and set a firm deadline for the beginning and end of the additional discovery. The additional discovery will only occur “to the extent necessary.” Hearing Tr. (Nov. 17, 2021), 32:12-14; *see also* Order. The additional discovery is only “necessary” if the Receiver, in fact, contests the Claimants’ proofs of claim or lien. Given the delay thus far in beginning this claims process, the Claimants are concerned that without a firm deadline to provide the Dispute Notice, this process will be further delayed.

CONCLUSION

The Claimants respectfully request that the Court clarify as to when the Receiver must provide his Dispute Notice to the Claimants, which shall contain a short and plain statement of facts setting forth the legal basis for his dispute.

Dated: January 3, 2022

Respectfully submitted,

/s/ Jill Nicholson

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on January 3, 2022, I electronically filed the foregoing document with the Clerk of the above-referenced Court through the CM/ECF system, which will send notification of such filing and serve copies of the same on all attorneys and parties of record.

/s/ Jill Nicholson_____

EXHIBIT A

Claims Process for Single Claim Properties

As directed by the Court in its Order Regarding Claims Resolution Process No. 2 (Dkt. No. 941, ¶ 18(b)), this process governs resolution of the proofs of claim submitted by claimants (“Claimant” or “Claimants”) against the following properties of the receivership estate for which the only claim submitted to the Receiver was the Claimant’s (each a “Property” and collectively, the “Properties”):

<u>Property ID No.</u>	<u>Address¹</u>
16	1017 W 102nd Street
17	1516 E 85th Place
18	2136 W 83rd Street
19	417 Oglesby Avenue
20	7922 S Luella Avenue
23	8030 S Marquette Avenue
24	8104 S Kingston Avenue
25	8403 S Aberdeen Street
27	8529 S Rhodes Avenue
31	11318 S Church Street
45	2129 W 71st Street
65	6749-59 S Merrill Avenue
66	7110 S Cornell Avenue
21	7925 S. Kingston**
29	9212 S. Parnell**
30	7210 S. Vernon*
32	6825 S. Indiana*
34	406 E 87 th Place*

¹ Properties marked with an * are those for which only one claim was submitted but there are potentially adverse liens in the title record. Properties marked with an ** are those where a filing releasing a lien prior to that of the claimant exists, but which release is potentially invalid.

36	6554 S. Rhodes*
37	7712 S. Euclid*
38	8432 S. Essex*
39	3213 S Throop*
41	8107 S. Kingston*
42	8346 S. Constance**
43	10012 S LaSalle*
44	9610 S. Woodlawn*
46	6759 S. Indiana Ave*
48	8517 S. Vernon*

This process is intended to fully resolve the single claim brought against each of the Properties as well as any claim that any other potential claimant could have brought against each of the Properties that are the subject of this single claim process, and all claims of the Receiver, including any claims for a receiver's lien or holdback amounts.

I. Claims Resolution Process – Preliminary Proceedings

In an effort to streamline proceedings, minimize costs to the parties and the Estate, and maximize judicial efficiency, this matter is referred to Magistrate Judge Young B. Kim for purposes of exploring whether a settlement or other joint resolution can be reached as to any of the Claimants and/or properties that are the subject of this proposed Non-Investor Single Claim Process.

While Group 1 of the Disputed Claims Process is before the Court (see Order Regarding Summary Proceedings for Group 1, Dkt. 1006), the Receiver and Claimants will work together to draft written document requests directed to the originators of the loans against the Properties that form the basis for the Claimants' liens, and the title companies who prepared the title

commitments and insured these loans. The Receiver shall serve subpoenas on those parties with the jointly prepared document riders.

Additionally, during this period, Claimants shall: (i) answer Document Requests No. 6, 7 and 8, and Interrogatory No. 5, of the Standard Discovery to Institutional Lenders that have been approved by the Court; and (ii) produce all responsive documents in connection with these requests for production and interrogatories. (Dkt. No. 928, Ex. C).

The Receiver will make every effort to complete his review of (i) the Proofs of Claim and supporting materials submitted by Claimants, (ii) the Claimants' standard discovery responses and document productions, and (iii) the discovery obtained from the loan originators and title companies, concurrently with the Group 1 proceedings before the Court. During this period, the Receiver will attempt to provide notice of this Court's order initiating this process for these Properties to those who potentially have adverse liens in the title record by using last known addresses as well as posting such order on the Receiver's website, so that any such lienholder will have an opportunity to be heard.

On or before December 17, 2021, the Receiver will submit a status report to the Court. The Receiver will advise the Court whether his work relating to Group 1 has or will interfere with his ability to complete this process concurrently, and will propose a date by which he will notify counsel for each of the Claimants if he intends to contest the validity of any of the Claimants' liens on the Properties or the amounts in the proofs of claim.

If the Receiver provides notice that he does not contest the validity or amount of any claim, then the process described in Section III below will commence as to that claim.

For any claim for which the Receiver contests the validity or amount of the claim, the Receiver will provide the Claimant with a notice of dispute (the "Dispute Notice") which shall

include a short and plain statement of facts setting forth the legal basis for his dispute. In the event that the Receiver disputes the amount of a claim, the Receiver shall state: (i) what he believes to be the correct amount; (ii) which elements of the claim he disputes; and (iii) the basis for disputing each such element.

The Claimants shall have no obligation to review any materials produced by third-parties unless and until the Receiver provides notice that he intends to contest the validity of their liens on an inquiry notice, fraudulent conveyance, or some other avoidance theory, and they will be granted sufficient time to do so in Section II below.

II. Claims Resolution Process – Contested Claims

A. Settlement Referral for Contested Claims

All claims for which the Receiver has provided a Dispute Notice are referred to Magistrate Judge Young B. Kim for purposes of conducting a settlement conference. With notice to the Claimant, the Receiver shall provide a copy of the Dispute Notice to Judge Kim's courtroom deputy along with the docket reference to these procedures and this referral. Judge Kim may extend the schedule set forth herein in his discretion as fairness and justice require.

B. Contested Claims Discovery

The parties shall have sixty (60) days to take limited additional discovery (the "Contested Claim Discovery Period"). Discovery shall be as set forth in the Federal Rules except that:

- (i) each party will be limited to 5 interrogatories;
- (ii) each party will be limited to 5 requests for production;
- (iii) no requests for admission may be served;
- (iv) each party will be limited to three depositions;
- (v) There will be no third party discovery except for title companies and loan originators, without leave of court;

(vi) Neither the Receiver nor any Rule 30(b)(6) representative of the Estate may be deposed; and

(vii) no expert discovery is permitted.

The Contested Claim Discovery Period and the foregoing limitations on discovery may be enlarged or extended by agreement of the parties or by leave of Court.

C. Position Statements

Within 21 days of the close of the Contested Claim Discovery Period, the Receiver shall file his position statement setting forth the Receiver's factual and legal basis for contesting the Claimant's lien or amounts due ("Position Statement"). The Position Statement shall include as exhibits all documents relied on by the Receiver for his legal and factual bases for contesting the claim.

Within 21 days after the Receiver files his Position Statement, the Claimant may file a written response to the Position Statement with supporting evidence ("Claimant's Response").

Within 14 days after the filing of the Claimant's Response, the Receiver may file a reply.

After the time for a reply has passed, unless it determines that the issues may be summarily determined without a hearing consistent with due process, the Court will set a hearing on the Position Statement and Claimant's Response. Each party will be afforded the opportunity to present evidence in support of their positions, consistent with any Court order regarding such hearing and its parameters.

The Court will issue a ruling with respect to each claim contested by the Receiver.

III. Interim Distribution of Funds

Within 21 days of (a) the Receiver's notice that he does not intend to contest the validity or amount of the claim asserted against a Property (except to the extent of any amounts sought

by the Receiver pursuant to the Receiver's lien or by a fee application to the Court), or (b) the date, following the Contested Claims Process, that a Court order requiring distribution to the Claimant from funds held by the Receiver in the segregated account for the Property becomes final and non-appealable, the Receiver will submit a plan to distribute to the Claimant the net balance of the sale proceeds from the Property held by the Receiver in a segregated account less the Holdback Amount as described in Section IV below (the "Interim Distribution Plan").

The Receiver's determination that he will not contest a claim shall not be deemed a waiver of his right to object to a claim against the estate for any deficiency amount or to hold, receive, or use any amounts that are identified in Section IV below consistent with orders of the Court.

IV. Holdback of Funds for Additional Liabilities, Fees, and Expenses

The Receiver will file a motion, in accordance with the schedule set by the Court (*e.g.*, Dkt. No. 1064), to approve the Receiver's proposed allocation of fees to the particular properties ("the Receiver's Allocation Motion") in accordance with the Court's August 27, 2021 Order (Dkt. No. 1030). The Receiver also intends to file a funds restoration motion that is in process but will take several additional weeks to complete and will address allocation of insurance premiums for the benefit of all properties, including properties that are the subject of the Non-Investor Single Claim Process, as well as reimbursement for other property-related costs fronted by the Estate for certain properties. Until those motions and any quarterly fee applications that impact the properties that are the subject of the Non-Investor Single Claim Process are ruled upon, the Receiver will retain a Holdback Amount in the segregated account for each of the Properties, which Holdback Amount shall be no less than the total of: (i) the amounts allocated to the Properties in the Receiver's Allocation Motion; (ii) the amounts allocated to the Properties

in connection with any fee application that is not addressed by the Receiver's Allocation Motion; (iii) the amount to be withheld for potentially due taxes consistent with the amounts identified by the Receiver's tax advisors; (iv) the amount of all deductibles on any applicable insurance policy; and (v) 5% of the net sales proceeds in each separate property account (as of the date of the Order approving the Claims Process for Single Claim Properties) to cover fees, costs, or other liabilities subsequently discovered or incurred) (in total, the "Holdback Amount"). Once the Court has ruled on the Receiver's Allocation Motion, any approved amounts will be paid to the Receiver from the segregated accounts, and the Holdback Amount shall be reduced consistent with the Court's orders.

The Holdback Amount shall remain in the segregated account for each of the Properties to satisfy, subject to further order of the Court, all fees and expenses approved pursuant to the Receiver's Allocation Motion, the Receiver's funds restoration motion, all taxes, all other priority liabilities, insurance deductibles corresponding to policies applicable to the Properties, and all approved fees and costs for the Receiver and his retained professionals incurred subsequent to June 30, 2021.

Following payment of all fees and expenses approved pursuant to the Receiver's Allocation Motion, the Receiver's funds restoration motion, all approved taxes or other priority liabilities, insurance deductibles corresponding to policies applicable to the Properties, and any other approved allocation to the Properties of fees and costs for the Receiver and his retained professionals incurred subsequent to June 30, 2021, the net remaining balance of the Holdback Amount shall be distributed to the Claimant pursuant to the Receiver's final distribution plan in this action, unless otherwise ordered by the Court.