UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS – EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et. al.,	)	
Plaintiff,	)	Case No. 18 cv 05587
v.	)	Honorable John Z. Lee
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN	)	Magistrate Judge Young B. Kim
Defendants.	)	

REPLY IN SUPPORT OF VENTUS' MOTION TO DESIGNATE INTERLOCUTORY ORDER AS A FINAL JUDGMENT

Intervenors, Ventus Holdings, LLC and Ventus Merrill, LLC (collectively, "Ventus"), for its Reply in support of its Motion that this Court designate its "August 13 Order" (Docket 1025) a "final judgment" for the purposes of appeal pursuant to Fed. R. Civ. P. 54(b), states as follows:

I. ARGUMENT

A. Ventus' Motion deserves consideration despite being filed more than thirty (30) days after entry of the August 13 Order.

Receiver's first and principal argument against Ventus' Motion is that it was untimely brought because it was not filed within thirty days of entry of the August 13 Order. Thirty days is the case law standard for requesting Rule 54(b) designation, since there is no such deadline in the Rule itself. However, as Ventus explained in the Motion, it was in a hopeless position to preserve its rights to an appeal by the very language 28 U.S.C. §1292(a)(2) (hereinafter, "Section 1292"). Specifically, Ventus *had* to file a Notice of Appeal of the August 13 Order by no later than September 12, in accordance with Fed. R. App. P. 4(a)(1)(A). This is due entirely to the language of Section 1292, which provides (*emphasis added*):

> …the courts of appeals shall have jurisdiction of appeals from: … (2) 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…

Prospective appellants have no choice but to suppose that this language renders their issue ripe for appeal, because while the Federal Rules are often a model of clarity, this section of the Code is undeniably not. Essentially, all Ventus' rights to appeal rested on this one, confusing section of text. Even with the distinct prospect that the Appellate Court would determine that Ventus' issues were not yet ripe, had Ventus not filed its Notice of Appeal when it did, it was risking *permanent foreclosure* of that option.

Receiver makes much of the fact that the Seventh Circuit has not permitted a Rule 54(b) filing later than thirty days for the last fifty years. However, the Seventh Circuit has been far more stringent in dismissing appeals where the notice was filed more than thirty days past the order that was appealable as of right under Rule 4. As a result, where the very language of Section 1292 leaves parties in doubt as to whether their issue is appealable as of right, the only viable option is to attempt to preserve all such rights as best as possible. That is precisely what Ventus did – it filed the Notice of Appeal on a timely basis, and then promptly brought this Motion once the Seventh Circuit had interpreted the language of Section 1292 to decide that the August 13 Order was not, in fact, immediately appealable.

Ventus asks only for fairness, which would be to consider its Motion on the merits. If the thirty-day requirement for filing a Rule 54(b) motion were to outweigh basic principles of equity, there would be no case law acknowledging that a tardy filing *can* be excused under certain circumstances (as there is – *see, e.g., Schaefer v. First Nat'l Bank of Lincolnwood*, 465 F.2d 234, 236 (7th Cir. 1972)). Where, as here, failing to immediately appeal any order that refuses to take steps to accomplish the winding up or a receivership jeopardizes those very appeal rights, the

"interests of justice" supports consideration of Ventus' Motion, even though it was brought past the thirty-day window, through no fault or neglect of Ventus. *Id.*

B. This Court has the authority and discretion to render the August 13 Order final for the purposes of appeal, and it should do so to promote efficiency and resolution of this singular, separable issue involving Ventus.

Receiver's second argument appears to be that Rule 54(b) *cannot* operate to render the August 13 Order appealable – the heading in Receiver's Response Section II specifically states that the Order cannot be "properly appealed" even *with* a Rule 54(b) finding. However, there is no Seventh Circuit case citation or support for this position in his brief, or in reality. Receiver essentially re-argues the fact that the Seventh Circuit did not find the August 13 Order appealable under Section 1292 (which is uncontested, and not the issue here), and then cites an Eleventh Circuit case for the prospect that a Rule 54(b) cannot "transform" an interlocutory order into a final order for the purposes of appeal. This is a gross misstatement of the case, *In re Southeast Banking Corp.,* 69 F.3d 1539 (11th Cir. 1996), which actually performed a careful Rule 54(b) analysis.

It was not that Court's holding that a Rule 54(b) determination "cannot transform" an interlocutory order into an appealable one – in fact, that is the very quintessence of Rule 54(b). Rather, the Eleventh Circuit held that the lower court's determination was not supported because its "ruling did not dispose of *separable* claims[.] *Id.,* at 1549, *emphasis added*. Separable claims, of course, is a fundamental basis for whether an order is *suitable* for a Rule 54(b) designation. Clearly this Court has, within its discretion, the ability to grant a Rule 54(b) finding of an otherwise interlocutory order. Receiver's claim that the August 13 Order "cannot" be appealed is simply not true. The real question is whether granting the Rule 54(b) designation is in accordance with the purposes of Rule 54(b), as explicated by case law.

In fact, it is telling that the Receiver chose to stress that the August 13 Order cannot be given a Rule 54(b) designation, rather than more fully engaging in the analysis of whether Rule 54(b) is appropriate in this instance. Ventus has submitted compelling facts as to why an interlocutory appeal of this one, specific issue is well within a Rule 54(b) designation framework. Ventus' issue is wholly separate and distinct from the broad issues underlying this case: the Ponzi scheme, the receivership, the management of claims, and the allocation of recovered funds to claimants. In accordance with *VDF FutureCeuticals, Inc. v. Stiefel Labs., Inc.,* 792 F.3d 842, 845 (7th Cir. 2015), Ventus' claims do not have "significant factual overlap with those already decided." Ventus' factual issues, which are entirely regarding its attempt to purchase various properties from the Receiver, have literally nothing to do with the Ponzi scheme that is the foundation of this case.

And similar to *Peerless Network, Inc. v. MCI Communications Services, Inc.,* 917 F.3d 538, 544 (7th Cir. 2019), the relief Ventus seeks, which deals only with the return of its earnest money, is not, in any way, "aimed at the same recovery" as all the other parties in this matter. Ventus' claim is therefore wholly separable from the claims and issues in the rest of the case. *See, In re Southeast Banking Corp.,* 69 F.3d at 1547, cited by the Receiver: "Claims are separable when there is more than one possible recovery, … or if "different sorts of relief" are sought[.]" (*Citations omitted.*)

It is true that in many of the cases cited by Ventus, the actual decision was to deny a Rule 54(b) designation. Ventus understands and accepts that Rule 54(b) is utilized very sparingly, and that the Seventh Circuit discourages interlocutory appeals due to the danger that they will create more work and piecemeal approaches. However, as this Court surely knows, reported decisions will nearly always favor determinations where a Rule 54(b) request was denied. There will be far

fewer decisions that are challenged when a Rule 54(b) designation is granted – after all, the party seeking the appeal and bringing the motion got what they asked for. The idea that the Receiver advances – that an interlocutory order should, practically speaking, never be designated as appealable – renders Rule 54(b) a nullity. That cannot be correct, and it should not be sanctioned.

II. CONCLUSION

Ventus should be afforded an opportunity to appeal the August 13 Order. It will inure to the benefit of all the parties, including the Receiver, as well as the Courts. The issue presented by the August 13 Order is completely separable from all the other issues in this case, and having it resolved will streamline the remaining case for trial and/or resolution.

WHEREFORE, for the above and foregoing reasons, Intervenors Ventus Holdings, LLC and Ventus Merrill, LLC, respectfully request that this Honorable Court: (i) find, pursuant to Fed. R. Civ. P. 54(b), that there is no just cause to delay appeal of its Order of August 13, 2021, docketed as number 1025 in this cause, (ii) designate that this Order shall be considered a final judgment so as to render it immediately appealable, and (iii) grant any further relief the Court deems fair and necessary under the circumstances.

Respectfully submitted,

Ventus Holdings, LLC and Ventus Merrill, LLC,
Intervenors

By: /s/Saskia Nora Bryan
One of their attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I electronically filed the foregoing Reply in Support of Motion to Designate Interlocutory Order as a Final Judgment for the Purposes of Appeal with the clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system, which will serve a copy of the foregoing upon counsel and parties of record.

/s/Saskia Nora Bryan