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. Manish S. Shah**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	**Magistrate Judge Young B. Kim**
Defendants.	

RECEIVER'S REPLY IN SUPPORT OF HIS EIGHTEENTH INTERIM APPLICATION AND MOTION FOR COURT APPROVAL OF PAYMENT OF FEES AND EXPENSES OF RECEIVER AND RECEIVER'S RETAINED PROFESSIONALS

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Certain institutional lenders (the "Objectors") have again filed objections to the Receiver's petition for payment of fees and expenses (Dkt. 1394, 1395) – this time, to the Receiver's 18th Fee Application (Dkt. 1384), covering the period from October 1, 2022 through December 31, 2022. The narratives of those objections repeat in most respects previously overruled objections to the Receiver's 14th through 17th Fee Applications. (*Compare* Dkt. 1250, 1304, 1305, 1346, 1394; *see also* Dkt. 1353, Section I (incorporated herein by reference)) FHFA also has objected on identical grounds to its prior objections. (*See* Dkt. 1302, 1347, 1395) To the extent there are differences, the Receiver addresses them herein.

Notably, and as it has done for the prior seventeen applications, and the Receiver's fee allocations, the SEC indicated that it has no objection to and approves the payment of the fees and allocations set forth in the Receiver's 18th Fee Application and confirmed that such fees comply with the SEC guidelines. (*See* SEC Reply in Support of Receiver's Eighteenth Fee Application, Dkt. 1408)

Two institutional lenders, U.S. Bank and Midland, have waived their objections by agreement as to the Receiver's fees and expenses allocated to the 35 properties that were the subject of motions filed by the Receiver and those lenders. (Dkt. 1272, 1289, 1330, 1344, 1351, 1368, 1382; *see also* Dkt. 1305 at 5-6) The Court has already entered Orders approving those fees and allocations. (Dkt. 1286, 1288, 1303, 1364, 1369, 1373, 1391) And, thus, the fees and allocations *relating to those 35 properties* do not require further review or approval from the Court. The Receiver has not allocated any fees with respect to those 35 properties to be paid from the proceeds from the sale of any other properties, and will credit the amounts sought in any pending or approved fee applications consistent with the Court's prior orders, as needed, to avoid any overpayment.

I. The Objectors Erroneously Assert that the Fees and Expenses of the 18th Fee Application Are Not within the Categories Approved by the Court.

The Objectors continue to lodge objections to fees in categories other than the Asset Disposition, Business Operations, Claims, and Distributions billing categories, not contesting the appropriateness of the fees charged, but solely on the grounds that they are not within the categories of the priming lien approved by the Court. But the allocation exhibits submitted with the fee application clearly show that the Receiver already *excluded* from allocation to the properties all of the work in the deferred billing categories (106 out of 814 tasks, which exceeds 13% of all tasks). (Dkt. 1384, Exhibits J-M)[1]

As to the tasks the Receiver *has* allocated to properties in the 18th Fee Application, given that the Receivership is past the stage of managing and liquidating the properties, 79% of the allocated tasks relate to the claims process or distributions, which the District Court and Magistrate Judge have found on many occasions is beneficial to the Receivership Estate and its claimants. (*See, e.g.,* Dkt. 1353 at 3-4 (listing numerous statements about benefits by the Court)) Most of the remaining work allocated during the quarter related to the recently filed third restoration motion, which is similar to work documented and presented in the 17th Fee Application, for which the Court approved the fees and allocations and overruled the objections. (Dkt. 1393; *compare* Dkt. 1332 at 5; Dkt. 1371, 1372)

II. The Objectors' Color-Designated Objections Should Be Overruled.

The Receiver next addresses the objections, grouped by the Objectors as "red," "yellow," or "orange." (Dkt. 1394 at 5-7)

[1] The Objectors indicate that they are making such objections in order to preserve their objections to those items being allocated in any future allocation motion (Objections at 5 n.1), but make no substantive objection to the fees charged.

A. The Court Should Overrule the Objectors' "Red" Objections as They Are Unspecific, Baseless, and Ignore the Nature of the Receiver's Allocation Requests.

The Objectors offer various bulleted objections in their "red" category on the sole ground that these fees "are not covered by either of the Court-Approved Priming Lien Categories." (Dkt. 1394 at 5-7) They list a slew of objections falling into their "red" category, but they fail to identify which of the narrative objections correspond to which of the highlighted entries; and they fail to acknowledge that the Court has previously overruled similar objections on earlier fee applications. The Objectors' failure to specify in their written objections the particular tasks from the invoices that correspond to each of their objections results in a waste of the Court's and the Receiver's time. There is no legitimate reason that they could not have identified each task subject to each of their objections by date, billing category, timekeeper, and description. The failure to do so leaves the Receiver to attempt to comb through scores of invoice pages to search for tasks that might align with their objections. This deficiency violates the Court's clear admonition against objections that fail to provide such specificity. (*See, e.g.,* Dkt. 1031 at 11 n.31)

Additionally, the Objectors fail to identify the Court's orders that previously have overruled the same objection they are asserting now. The Court ordered these Objectors to stop this practice and be transparent about the fact that they are repeating previously overruled objections:

> Going forward, the Lenders are admonished that, to the extent they seek to preserve arguments the Court has already rejected, they should do so in a summary fashion that incorporates citations (**with pinpoint cites**) to previous filings that have thoroughly laid out the objection. And pursuant to their attorneys' duty of candor to the tribunal, *see* Am. Bar Assoc. Model R. 3.3(a)(2), the Lenders must simultaneously set forth citations to the Court's prior rulings **on each argument**. If the Lenders believe that an objection should be revisited in light of new facts or changed circumstances, then the Lenders must clearly set forth the reasons the Court should depart from its prior rulings. This practice will serve to redirect the resources of Receiver, the Court, and the other stakeholders in this case to the Lenders' new and potentially meritorious arguments, instead of forcing everyone to retread the same ground every few months.

(Dkt. 1031 at 11-12 n.32 (emphasis added))[2]

For the reasons discussed below, each of the red objections should be overruled.

Notice-related tasks (Dkt. 1394 at 5, first bullet). As with prior objections, this objection is a straw man. First, while the Objectors only provide one example, they acknowledge it is a task that the Receiver has *not allocated* to any of the properties. Even worse, this has become a boilerplate objection that has been repeatedly overruled.

Second, the objection ignores the benefit to all claimants of notice provided to current and potential claimants in terms of due process and in ensuring that late claims do not undermine or disrupt the claims process. (*See also, e.g.,* Dkt. 1244 at 13-14; Dkt. 1299) Although there is *not a single task* objected to in the allocated billing categories in the 18th Fee Application that references giving notice of the Receiver's appointment (Dkt. 1394), providing such notice is clearly work related to the preservation of Estate assets and implementation of the claims process, and thus beneficial to the claimants, irrespective of which among them ultimately has priority. (Dkt. 1244 at 13-14; Dkt. 1299)

Locating and preserving records (Dkt. 1394 at 6, second bullet). The Objectors' objection about tasks relating to locating and preserving records, *without identifying any tasks to which they are objecting*, continues to be wasteful and meritless for the reasons set forth in the Receiver's replies to prior fee application objections. (*See, e.g.,* Dkt. 1353 at p.7)

Factual investigation (Dkt. 1394 at 6, third bullet). The Objectors' third bullet objection, about factual investigations relating to claims against professionals, appears to only make a statement and no objection, and they concede the Receiver has chosen not to allocate the only task

[2] The Objectors' blanket incorporation of every objection they have made to any prior fee application (Objections at 4) does not comply with the Court's Order in this regard.

they identify to any property. The objection should be overruled for this reason and for the reasons set forth in the Receiver's replies to prior fee application objections. (*See, e.g.,* Dkt. 1353 at p.7)

Tax issues (Dkt. 1394 at 6, fourth bullet). This objection is also misplaced and also suffers from a failure to specify the tasks corresponding to the objection that have been allocated to any property. It should be overruled for this reason and for the reasons set forth in the Receiver's replies to prior fee application objections. (*See, e.g.,* Dkt. 1353 at p.7)

Restoration issues (Dkt. 1394 at 6-7, fifth bullet). This objection is baseless and suffers from a failure to specify the tasks corresponding to the objection. The Receiver has not sought any "fees incurred to calculate amounts owed to the Receiver." Also, there is not a single task related to "restor[ing] funds to properties because of the Receiver's commingling of property rents, income and expenses." This is simply a specious argument, resurrected from the archive of arguments made and overruled years ago, and laid bare from the failure to identify the tasks allegedly meeting these descriptions. The sole example provided by the Objectors that could arguably relate to the calculation of amounts owed to the Receiver relates to the recently filed Third Restoration motion. (Dkt. 1393, 1420) But this work was beneficial to the properties and the secured claimants through efforts to ensure each property had proper and accurate expense accounting and was not overcharged for such expenses as insurance, which were incurred and paid on a real estate portfolio basis. (*Id.*) This work undoubtedly related to the preservation, management, and liquidation of the real estate assets, and thus is subject to the priming lien. And, notably, only two of over 800 claimants objected to the Receiver's Third Restoration motion; and those objections should be overruled. (*Id.*)

Creditor inquiries (Dkt. 1394 at 7, sixth bullet). The Objectors' claimant inquiries objection fails to provide any explanation why claimant inquiries are unrelated to the claims

adjudication process. The objection should be overruled because the Court has already found that such work provides a benefit and should be paid from property sales proceeds pursuant to the receiver's lien. (*See, e.g.,* Dkt. 1353 at pp.7-8 (identifying numerous instances of the Court finding the benefit of such claimant communication efforts)) This, too, has become a boilerplate objection that has been repeatedly overruled. Again, the Objectors fail to identify the Court's orders that have overruled their objection every time. (*See* Dkt. 1031 at 11-12 n.32)

General review of claims (Dkt. 1394 at 7, sixth bullet). Although the Objectors say nothing more than that the Receiver has not shown fees from the general review of claims were incurred with respect to the management of the claims adjudication process, it is clear that a number of time entries related to such review of claims are highlighted in red. Much of the Receiver's focus at this stage of this matter is on working through the review of the numerous claims against the properties that were not in Group 1, in order to be prepared for the continuation of the claims adjudication process. This is clearly part-and-parcel of managing an orderly claims process. (Dkt. 1030 at 13-14 (the Receiver's efforts are needed "to untangle the morass of competing claims created by the Cohens, and the Institutional Lenders will reap the benefits of the process"))

FHFA properties (Dkt. 1394 at 7, seventh bullet). Despite having had its objection already overruled by Magistrate Judge Kim, followed by its Rule 72 appeal to this Court which affirmed the order (Dkt. 1258, 1325), FHFA reasserts the same objections, which should be overruled for the same reasons. Its argument also ignores that its interests and the relative priority of its interest have not yet been established. (*See* Dkt. 1031 at 12 n.32 ("[A]s the Court has previously emphasized, the Lenders are not entitled to act as first-priority secured lienholders before that status has been adjudicated in the summary claim-priority adjudication process.")) The

Receiver's work related to the FHFA's multiple objections, motions, and appeal relates exclusively to two properties in which the FHFA asserts an interest and no others, and is therefore appropriately allocated to those properties, whether paid now or deferred until a later date.

Insufficient detail (Dkt. 1394 at 7, last bullet). The Objectors' final "red" objection that the task descriptions lack sufficient detail similarly should be overruled. Ironically, the objection itself lacks detail, and should be rejected on that basis alone; it does not even identify a single task that supposedly lacks sufficient detail. (*See, e.g.,* Dkt. 1031 at 11 n.31) But the task descriptions provide sufficient detail, including without limitation for each task, who performed it, the nature of the task, the length of time devoted to the task in tenth of an hour increments, and the billing category. In addition, the SEC has reviewed the invoices in the Receiver's 18th Fee Applications, approved the payment of the fees set forth therein, and confirmed that such fees comply with the SEC billing guidelines. (*See* Dkt. 1408 at 1) Each task description also specifically identifies the property(ies) to which the task related or whether the task is deferred (and not sought to be allocated to any property pursuant to the receiver's lien). (*See also* Dkt. 755, at 23-24; Dkt. 1107, Ex. 5; Dkt. 1182, at 8-14 (describing additional information available to determine the appropriateness of the allocations)) The objection also ignores that the presentation of task descriptions and detail included in them has been consistent throughout this receivership – in fact, the nature and presentation of task descriptions has increased in detail as the receivership has progressed – and the Court has consistently approved every fee application that it has ruled on, repeatedly overruling similar boilerplate objections. And, again, the Objectors fail to identify the Court's orders that have overruled their objection every time. (*See* Dkt. 1031 at 11-12 n.32)

B. The Court Should Overrule the Objectors' "Yellow" Objections as the Court Has Overruled the Same Objection Previously and the Invoices in the 18th Fee Application Do Not Involve Avoidance Work.

Once again, the only objection offered for the "yellow" objections is that fees incurred "to litigate" Group 1 claims should not be paid at this time. (Dkt. 1394 at 7-8) It is another boilerplate objection that should be overruled for the reasons set forth in the Receiver's replies to prior fee application objections. (*See, e.g.,* Dkt. 1353 at pp. 9-10) Indeed, in granting the Receiver's 17th Fee Application, this Court agreed with the Receiver and overruled the same objection. (Dkt. 1366) Despite this fact, and the Court's rulings requiring the identification of such orders (*see* Dkt. 1031 at 11-12 n.32), the Objectors fail to cite and address such issues. If that were not enough, there was no work performed during the time period covered by the 18th Fee Application that involved challenging BC57's secured status through an avoidance claim, making the entire objection irrelevant.

C. The Court Should Overrule the Objectors' "Orange" Objections as Work to Distribute Money Clearly Benefits the Claimants.

As to distribution work, the Objectors repeat their objections as to distribution tasks in the 17th Fee Application (*see* Dkt. 1346 at 5-6) but again do not cite the Court's order on the 17th Fee Application (Dkt. 1366), which overruled their objections as to fees and allocations for the Receiver's distribution related work. Their objection as to the Receiver's distribution work again should be overruled.

As a preliminary matter, the Objectors lack standing to make this objection because the claimants who had asserted an interest in the properties to which the orange-highlighted tasks have been allocated have waived their objection to the allocations. (Dkt. 1351, 1368, 1382) In addition, the time entries and allocations have been approved by the Court without any objection from the Objectors, and the funds from those properties have been distributed, so their objections are also both waived and moot. (*See* Dkt. 1364, 1373, 1391)

Moreover, this objection ignores and does not address this Court's prior rulings that the Receiver's distribution efforts have benefited and will continue to benefit the Estate. (*See, e.g.,* Dkt. 1312 at 2 ("This case is complex, requiring the Receiver and his counsel to preserve, manage, sell, *and distribute the proceeds*…. The Receiver's efforts have benefited and will continue to benefit the Receivership Estate.") (emphasis added)) And, while it should be obvious, efforts by the Receiver to distribute money to claimants is the culmination of the claims process, a fundamental goal of the claimants (*i.e.,* to receive money from the Receiver for their claims), and, thus, an obvious benefit provided by the Receiver. *See, e.g., SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (citing *Donovan v. Robbins*, 588 F. Supp. 1268, 1273 (N.D. Ill. 1984) ("the district court awarded the receiver a fee simply *for determining how much money to release to a creditor*")) (parenthetical in original; emphasis added); *see, e.g.,* Dkt. 1030 at 10 (citing *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994) (quoting *Elliott*, 953 F.2d at 1577)).

III. The Court Should Overrule Objections to the Receiver's Allocations Because the Receiver's Allocations Comply with the Court's Prior Orders.

The Objectors purport to object to the Receiver's allocations. But they do not even address them directly. Nor do they acknowledge the Court's previous rulings on fee applications, the receiver's lien, the allocation methodology, and fee allocations that make clear that the allocations set forth in the current fee application follow, consistently, these prior rulings. (*See* Dkt. 1031 at 11-12 n.32) The Court's ruling on the 17th Fee Application and Judge Kim's overruling the objections on receiver's lien allocations for Fee Applications 1 through 13 are law of the case, and demonstrate that the allocations of the 18th Fee Application should be approved and the objections overruled for the same reasons. (Dkt. 1366, 1381; *see also* Dkt. 1255, at pp. 11-12)

IV. The District Court Need Not and Should Not Refer the Receiver's 18th Fee Application Allocations to Magistrate Judge Kim.

Nor is there any need to refer the Receiver's allocations for the 18th Fee Application to Magistrate Judge Kim. The request to do so is simply another delay tactic and, again, ignores without referencing clear precedent in this action. As noted, above, the Court should approve the Receiver's allocations for the 18th Fee Application and the objections should be overruled for the same reasons as the Court did so for the 17th Fee Application. (Dkt. 1366; *see also* Dkt. 1381)

V. The Receiver Recommends Against Any Holdback.

The Court has previously found that the Receiver's 9th-16th Fee Applications are subject to a 20% holdback, and further indicated that "if the Receiver seeks to pay fees approved by this order from the sales proceeds of *encumbered* real estate, then the amount the Receiver is entitled to draw is subject to an additional 20% holdback." (Dkt. 1031, at 14; Dkt. 1213 at 9; Dkt. 1312 at 4) In approving the 17th Fee Application, however, this Court imposed only a 20% holdback. (Dkt. 1366) *Compare* Order partially granting 13th-16th Fee Applications *with* Order granting 17th Fee Application (the language of each follows):

> The court also imposes a holdback of 20% of the fees (but not expenses) requested in the applications, and an additional 20% holdback on any fees to be paid from the sales proceeds of encumbered real estate. (Dkt. 1312 at 4)
>
> In sum, the court grants the Receiver's pending fee application in its entirety, but with a holdback of 20% of the fees (but not expenses) requested in the applications (Dkt. 1366 at 3)

The Objectors request that the 18th Fee Application be subject to the holdback orders the Court imposed for the 9-16th Fee Applications. (Dkt. 1394 at 8-9) For the same reasons set forth in his replies to objections on previous fee applications (*e.g.,* Dkt. 1206, at 4-7; Dkt. 1207 at 9-11; Dkt. 1255 at 13-15; Dkt. 1353 at pp.11-13), the Receiver requests that the Court not apply *any* holdback relative to the 18th Fee Application. To that point, there are a great many billing entries for which the Objectors have posed no objection. And the lack of specificity in the objections that are made further demonstrates why the Court should not require any holdback. (*See* Dkt. 1031 at

11 (the Court overrules non-particularized objections)) Further, for the reasons discussed above, the objections offered are increasingly boilerplate and lacking in substance.

Moreover, as previously noted, the Receiver and his firm have provided significant rate discounts which equate to a substantial savings, which is equally applicable to the invoices submitted in connection with the 18th Fee Application. The following Table reflects the extent of this discount during the fourth quarter of 2022:

Time Keeper	Value of Total Hours at Standard Rate	Value of Total Hours at Discount Rate	Value of Difference
K. Duff	43,095.00	25,857.00	17,238.00
M. Rachlis	35,880.00	21,528.00	14,352.00
E. Duff	9,180.00	5,967.00	3,213.00
J. Wine[3]	71,220.00	30,862.00	40,358.00
K. Pritchard	15,750.00	9,800.00	5,950.00
A. Watychowicz	14,152.50	8,806.00	5,346.50
J. Rak	15,412.50	9,590.00	5,822.50
TOTALS	$204,690.00	$112,410.00	$92,280.00

In addition, in Q4 2022, the Receiver and RDP devoted 205 hours to billing review efforts and the submission and defense of fee applications and allocations (referred to as "Billing Hours") (valued at $47,072.00, at the discounted rates), none of which is included in the submitted invoices or in the table above. If the amounts sought by the invoices in the 18th Fee Application are considered in the context of the discounts and unbilled time already applied, the inequity of the

[3] The Receiver has been voluntarily providing an additional discount to the rate for attorney Jodi Rosen Wine's time. Ms. Wine has over 30 years of commercial litigation experience. Whereas her standard hourly rate for 2022 was $600, and the rate approved by the Court for attorneys of her experience is $390, the Receiver has been further discounting her rate to $260.

holdback is laid bare. The following Table summarizes the primary discounts and unbilled time discussed above:

Rate Discount	Billing Hours	Total Discount & Unbilled Time	Total Fees in 18th Fee Application	% Reduction Already Applied
$92,280.00	**$47,072.00**	**$139,352.00**	**$112,410.00**	**55%**

As this chart evidences, any additional holdback only magnifies the financial impact. It also shows that there is no windfall nor any appearance of a windfall. To add yet an additional 20-40% holdback, as the Objectors have requested, would be even more onerous and inequitable under the circumstances described above. For all of these reasons, and those set forth in his replies to objections on previous fee applications (*e.g.,* Dkt. 1206, at 4-7; Dkt. 1207 at 9-11; Dkt. 1255 at 13-15; Dkt. 1353 at pp.11-13), the Receiver respectfully recommends and requests that the Court not apply any holdback, but if one is applied, that such holdback not be greater than 20% in total for fees paid from property accounts.

VI. The Court Should Overrule FHFA's Objection.

FHFA also has objected on virtually identical grounds to its prior objections. (*See* Dkt. 1302, 1347) FHFA's objections should be overruled for the reasons set forth in (1) this Court's Order overruling FHFA's objection (Dkt. 1325), (2) Magistrate Judge Kim's Order overruling its objection (Dkt. 1257, 1258), and (3) the Receiver's previous responses in opposition to FHFA's objections (Dkt. 1230 at 28-32; Dkt. 1275). (*See also* Dkt. 1420)

Additionally, while the FHFA's objections are expressly limited to the Receiver's allocation of fees to the two so-called "Enterprise Properties," and do not assert any substantive objection to any specific fee entry, FHFA also purports to reserve unasserted objections (Dkt. 1347 at 3 ("FHFA and the Enterprises may have additional objections in the future to the fees and costs

for their properties not included within this objection.")) The Court has provided an opportunity to object to the Receiver's 18th Fee Application and any objections not asserted should be considered waived. (*See, e.g.,* Dkt. 1031 at 11 n.31)

CONCLUSION

For the foregoing reasons, as well as those set forth in the Receiver's prior fee applications, the supporting briefs filed by the SEC and the Receiver, and in the Receiver's motion for approval to pay certain previously approved fees and costs, as well as this Court's prior rulings on fees and fee allocations, the Receiver respectfully requests that the Court exercise its discretion to:

(i) find that the Receiver has preserved, enhanced, or otherwise benefited the properties and the claimants in connection with the work performed and expenses incurred as reflected in the 18th Fee Application;

(ii) approve the Receiver's 18th Fee Application and payment of all fees and expenses described therein;

(iii) impose a first priority receiver's lien on the properties and proceeds of sale to satisfy certain receivership expenses, as set forth in Exhibits J-M to the 18th Fee Application;

(iv) Award the Receiver his fees for responding to objections that violate this Court's August 17, 2021 Order (Dkt. 1031 at 12 n.32); and

(v) grant such other relief as the Court deems equitable and just.

Dated: March 17, 2023

Respectfully submitted,

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I electronically filed the foregoing **Receiver's Reply in Support of His Eighteenth Interim Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. A copy of the foregoing was served upon counsel of record via the CM/ECF system.

/s/ Michael Rachlis

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