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 COMBINED REPLY
IN SUPPORT OF SECOND FEE ALLOCATION MOTION

In response to the Receiver's Second Fee Allocation Motion (Dkt. 1321), the objecting institutional lenders (the "Objectors") offer the same objections the Court rejected when it granted the Receiver's First Fee Allocation Motion, affirmed Magistrate Judge Kim's previous rulings and recommendations, and overruled all objections. (Dkt. 1443 at 4; Dkt. 1450; Dkt. 1469) In doing so, the Court specifically found:

> Judge Kim did not misapprehend his task and did not commit clear error. … Judge Kim's references to benefits to the estate or references to this process were not error. Part of the objections are just a rehash of the narrow view that objectors have taken of the categories of approved lien-related work. And Judge Kim's language in the overall context of his hearing and rulings demonstrate to my satisfaction that he gets it and he understood both the lien categories and the need for property-specific benefit.

(**Exhibit A**, 4/26/2023 Tr. at 22-23) The Court also stated it is "satisfied that the receiver is tracking things with sufficient accuracy to charge the secured creditors who benefited from the work." (*Id.* at 23)

Argument

The Objectors offer six categories of objections.[1] But they concede previous rulings overruled similar objections. Consistent with the Court's prior rulings, the objections offered now should be overruled as they were before.

A. None of the Objectors' Six Categories of Objections Identified in Their Response Brief Should Be Sustained.

1. Claims-Adjudication (other than Group 1).

The Objectors argue that claims-adjudication fees, other than Group 1 fees, "should not be awarded at this time because the Court cannot currently make a determination as to whether Receiver's work provided a benefit to the properties…." (Dkt. 1443 at 5 (citing *Elliott*)) However, the Objectors have previously objected to allocation of fees for claims work (other than Group 1) and their objections have been overruled. (*E.g.,* Dkt. 1030 at 14 ("the Court grants the Receiver's request that he be given a first- priority lien for his work developing *and implementing* the claim-priority adjudication process" (emphasis added)) In so ruling, the Court also made clear that it is appropriate for the Receiver to allocate fees against the Objectors' alleged collateral for "untangl[ing] the morass of competing claims created by the Cohens, and the Institutional Lenders

[1] Just like their objections to the First Fee Allocation Motion, the current objections are rife with arbitrariness, inconsistencies, and lack of specificity. For example, Exhibit 4 to the Objectors' Response sets forth allocated tasks associated with the Second Fee Allocation Motion, but this exhibit unnecessarily repeats tasks allocated to more than one property multiple times, resulting in 13,393 entries. In contrast, Exhibit C to the Receiver's motion (Dkt. 1321), which lists *all* tasks specifically allocated to properties in fee applications 14-16, contains only 3,500 entries. In any event, the Objectors did not raise any objection to approximately 45% of those specific allocations (6,024). Exhibit 3 to the Objector's Response contains 550 general allocations, of which 152 (or 27%), have not garnered an objection. And there is frequently no apparent reason why one task was selected for objection and another nearly identical task was not. (*Compare, e.g.,* Exh. 4, line 7839 & line 11200) Further, the District Court itself has noted that the manner in which the Objectors have set forth their objections are insufficient. *See* Ex. A, 4/26/2023 Tr. at 20 ("Many of the objections, the color-coded objections, are not specific enough, and other objections don't apply to any specific proposed allocation or line items."). And this Court has described their objections as "nitpicking." **Exhibit B**, 2/10/2023 Tr. at 136-37.

will reap the benefits of the process." (*Id.* at 13-14) They also made this objection to the Receiver's 17th and 18th fee applications.[2] (*See, e.g.,* Dkt. 1346 at 2-3 (referencing and incorporating previously overruled objections: Dkt. 777 at 3 n.2, 9-10; Dkt. 792 at 2-3; Dkt. 960 at 4; Dkt. 1000 at 3-4; Dkt. 1188 at 5-6; Dkt. 1210 at 14, 19); Dkt. 1394 at 7 (sixth bullet))

The Receiver has previously responded to this objection on numerous occasions, including most recently in response to their objections to the 18th fee application. (*See* Dkt. 1424 at p.6 ("General review of claims")) And the Court has overruled those objections. (*See also* Dkt. 1353 at 3-4 (compiling court orders)) The result should be the same here.

2. <u>Claims Adjudication – Group 1 Litigation</u>

The Objectors also object to claims adjudication work for Group 1 claims. But they previously made this objection with respect to the Receiver's 17th and 18th fee applications. (Dkt. 1346 at 5; Dkt. 1394 at 7-8) And the Court overruled all objections to those fee applications. (Dkt. 1366, 1452) The Court has repeatedly found that the type of work in which the Receiver was engaged during the Group 1 claims process was beneficial to the claimants, irrespective of who ultimately is determined to have priority. (*E.g.,* Dkt. 1030 at 13) And the Court has already overruled a similar objection by the institutional lenders with respect to such work. (S*ee, e.g.,* Dkt. 1312 at 2; Dkt. 1366 at 1, 2 ("Managing the claims process includes giving notice to interested

[2] The claims work described in Fee Applications 14-16 is the same type of claims work in Fee Applications 11-13. (*Compare* Dkt. 1443 at 8 (Objectors' examples of analyzing Group 1 claims) *with, e.g.,* Dkt. 1107 at 10 ("the fees which the Receiver has allocated to properties for purposes of this motion fall into the following three categories … [including] Claims Administration … [which includes] analysis of claims") & Ex. 1, Part 5 of 7 (p.1794 of 2796) (Property 3074 E Cheltenham Place) (1/8/2021 billing entry by JRW in Claims billing category ("continued analysis of [Group 1] claims")); *id.*, Ex. 1, Part 5 of 7 (p.1826 of 2796) (Property 3074 E Cheltenham Place) (8/3/2021 billing entry by ED in Claims billing category ("Review and analysis of documents, correspondence, and notes relating to loan history and claims analysis with respect to five [Group 1] properties")). These same billing entries appear in the Receiver's fee applications. (*See* Dkt. 993, Ex. G, RDP January 2021 Invoice, at 19; Dkt. 1087, Ex. G, RDP August 2021 Invoice, at 14)

parties, locating and preserving records, and handling creditor inquiries. The 'Group 1' issues for which the Receiver seeks payment in this application are compensable as claims administration.")).

While the Receiver's preparation of his Group 1 submission (Dkt. 1201) was not before the Court in the First Fee Allocation Motion (because that work occurred later in time), the submission itself is the same type of work that the Court has approved for allocation to the properties. Put another way, the Receiver's claims submission is part of the claims process implementation which the Court has approved for application of the receiver's lien[3] and the Court allowed the Receiver's submission in connection with the claims process for Group 1, finding that such a submission would be a beneficial part of the Court's process for Group 1 claims.[4]

The Objectors argue that a reversal on appeal will demonstrate a lack of benefit. That is inaccurate including because it ignores the fact that the Court allowed such recommendations because they (i) "would help assist the court in its efforts," including "facilitat[ing] the Court's review of the record in the case, and assist the court in coming to its determinations," and (ii) entailed efforts by the Receiver in regards to his review of claims for the Group 1 properties.

[3] *See, e.g.,* Dkt. 1030 at 13 ("By developing and implementing the summary claim-priority adjudication process, the Receiver has conferred a similar benefit here, regardless of which claimant is determined to be the first-priority secured lienholder at the end.").

[4] *See, e.g.,* **Exhibit C**, 9/23/2020 Tr. at 34 ("[T]he Court finds, that efforts by the receiver to provide a recommendation to the court … would help assist the court in its efforts to fairly distribute the assets of the estate."); *id.* at 37-38 ("allowing the receiver to provide recommendations to the Court, will facilitate the Court's review of the record in this case, and assist the Court incoming to its determinations"); Dkt. 801 ("Receiver's request that he be allowed to make priority recommendations to the Court during the claims resolution process is granted"); Dkt. 941 at 7; Dkt. 638, at 21-22; Dkt. 718 at 12 (SEC stating: "Here, the Court has repeatedly affirmed that the Receiver's work has 'benefitted and will continue to benefit the Receivership Estate.' … Given the Court's finding and guidance that the Receiver's work is beneficial, the Receiver should be allowed to continue his work and be compensated for his efforts.") (citing, *e.g.,* Dkt. 710 at 3; Dkt. 614 at 3).

Additionally, there is no credible reason provided to support the Objectors' argument in regards to their ability to prevail on appeal. (*See, e.g.,* Dkt. 1470, 1479)

The Objectors also argue that the Receiver will have disproportionately assigned fees to Group 1 because the Group 1 work will invariably benefit other groups. Initially, the argument ignores that no other claimant in Group 1 has opposed this allocation of fees; nor do the Objectors propose any alternative, let alone a better alternative. Relatedly, the objection ignores that Group 1 claimants are, unlike other groups, obtaining the benefit of having resolution and distributions made at this time, versus later. They also fail to distinguish or account for the fact that the Receiver undertook work for Group 1 properties because the Court ordered him to implement the disputed claims process for Group 1 properties, and the work allocated has been devoted to such properties. Moreover, the majority of the work at issue related to: (1) the Receiver's analysis of specific claims against the five Group 1 properties (whether submitted by BC57, the investor-lender claimants, the City of Chicago, or other trade creditor); (2) written and oral discovery from claimants, loan originators, title companies, and BC57's expert, that related to the loans against these five properties; (3) motion practice initiated by BC57; and (4) joint status reports ordered by the Court. This work benefitted these five Group 1 properties and these claimants; it is difficult to see any benefit to the other properties from this Group 1 specific work in a light that supports the objection. Nor have the Objectors' identified it.[5] In any event, the Objectors' argument is merely theoretical. While some of the Court's rulings may benefit other properties, the Receiver's work implementing the Group 1 claims resolution process specifically involved and benefitted the Group 1 properties.

3. <u>Non-Adjudicatory Claims-Related Fees</u>

[5] Even if there were substance to this objection – which has not been shown – all but one of the objecting institutional lenders whose properties will be in later groups would be beneficiaries.

The Objectors next argue that certain fees in the Receiver's Second Fee Allocation Motion "are not adjudicatory in nature" and thus are not covered by the Court's order applying a receiver's lien to the Receiver's work. (Dkt. 1443 at 10-11) But the Objectors do not point to any such limitation in the Court's orders and rulings. In contrast their argument, it is well-established that the Court has applied the receiver's lien for payment of fees to the Receiver's work "developing and implementing the summary claim-priority adjudication process…." (Dkt. 1030 at 13; *see also* Dkt. 1312 (9/12/22 Order granting fee apps 13-16) at 2; Dkt. 1366 at 1 (Order on Receiver's Eighteenth Fee Application) ("Managing communications with claimants … [are among T]he Receiver's efforts [that] have benefited and will continue to benefit the Receivership Estate.")) In fact, many of the tasks to which the Objectors have assigned this objection are indistinguishable from tasks objected to as "Claims Adjudication" (both Group 1 and other). (*See, e.g.,* Dkt. 1443, Exh. 4 at line 6582 ("Teleconference with J. Wine regarding claims issue related to property liens (7201 Constance, 7625 East End, 3074 Cheltenham) (.4)"); *id.* at line 10997 ("extensive review of claims for property, update claimant spreadsheet with pertinent information (5450 Indiana) (5.3)"))

Moreover, the Objectors concede that their argument in this regard has previously been overruled both by Magistrate Judge Kim and Judge Shah. (Dkt. 1443 at 11) They have not offered any new argument or basis supporting their argument now. (*Id.*) They also ignore and do not address that the Receiver has categorized certain fees as "case administration" or has "deferred" other fees within the claims billing category. Their repeated argument should, thus, be overruled for the same reasons. (*See also, e.g.,* Dkt. 1230 at 11-13)

4. <u>General Receivership Operations</u>

In support of their argument that the Receiver incorrectly allocated certain tasks which are general receivership operations, the Objectors cite a few examples. The Receiver agrees that the

item referencing "motion to retain counsel" was "unrelated to the claims process."[6] (Dkt. 1443 at 11 (citing Exh. 3, line 271)) Although the task at issue was in the "Business Operations" billing category and not within the "Claims" billing category as the Objectors suggest, the Receiver agrees that this 0.4 hour task should not have been allocated to the properties (and indeed all other entries relating to this motion were not allocated to any properties). As the Court itself has noted, this fee allocation effort is a herculean task and perfection is not required. (Ex. B, 2/10/2023 Hearing Tr. at 157; Dkt. 1184 at 2) However, the Objectors' other examples in their brief lack merit. (*See also supra* note 1)

First, they point to a task related to "service on lienholders of record." (Dkt. 1443 at 12) In the first instance, the task at issue was only allocated to properties as to which only Midland has a claim. Of the 35 properties as to which this 0.2 hour task allocated, 32 of those properties have been resolved, with all funds having been distributed, and Midland having withdrawn its objections as to the Receiver's fees and allocations.[7] (*See* Dkt. 1289 at 5: Dkt. 1303 at 3; Dkt. 1364 at 3; Dkt. 1373 at 3; Dkt. 1391 at 3) Furthermore, while the Objectors argue that "[e]nsuring service is a quintessential general receivership task … and does not benefit the secured creditor in particular" (*id.*), the Receiver has previously noted that there is authority holding that in some circumstances the failure to comply with a court's orders regarding the filing of proofs of claim may not extinguish a non-party's pre-existing security interest. (*E.g.,* Dkt. 1244 at 13-14 (citing *SEC v.*

[6] Consistent with the First Fee Allocation Motion, the Receiver notes that the receivership team has devoted substantial efforts to present allocations that are accurate, fair, reasonable, and consistent with applicable law. And the Receiver is prepared, and requests leave, to correct allocation errors that actually exist, or to make them consistent with any ruling from the Court. (*See* Dkt. 1184; Dkt. 1230 at p.2)

[7] It bears noting that the total potential impact of this task to Midland is about $4.46; and the potential impact of this task to each the other Objectors is zero. It is fair to ask, if these are the Objectors' best examples to support their motion, how can they justify all of the resources being diverted for and devoted to this effort?

Wells Fargo Bank, N.A., 848 F.3d 1339 (11th Cir. 2017)) Thus, there is a benefit to claimants like the institutional lenders of providing notice to such lienholders. In fact, service on lienholders who have not asserted claims may enable the Receiver and others to challenge any latecomers on the basis they had notice. Unlike perfunctory service of pleadings, which may (but not always) be a matter of case administration, the task at issue that referenced "service on lienholders" was not of a similar nature but rather was work intended to protect the interests of claimants who had submitted claims from belated attacks from potential lienholders who have not submitted claims.

Second, the Objectors cite four examples of tasks related to "preserving and reviewing EquityBuild's database" that they contend provided no benefit to them. (Dkt. 1443 at 12) It is exhausting and incongruous that the Objectors now point to such work as though it provides them no benefit, when they argued repeatedly that the Receiver ought to take steps to preserve and produce records for their benefit and for them to use in connection with the claims process. (*See, e.g.,* Dkt. 708 at 11-12) The inconsistency of their objection is underscored by the fact that their own examples include work undertaken with them, for them, and at their request. For example, the June 30, 2021 time entry, which references a communication "with claimants' counsel … regarding document database and export issues," related to their efforts and requests for action by the Receiver (and subsequent actions then taken by the receivership team) in respect to EquityBuild records. (*See* Dkt. 1443 at 12 (citing Exh. 3, line 559)) Further, the entries they cite for tasks occurring in December 2021 (*id.* (citing Exh. 3, lines 159 & Exh. 4, lines 3290, 3406)) relate to work by the Receiver to preserve records and make the EquityBuild documents database available to them, at their request, after access was originally supposed to end on December 31, 2021. The Receiver's efforts to preserve EquityBuild documents and make them available to claimants, including the Objectors, not only provided a benefit to them but it provided a benefit to

them that they requested. And the Court has found similar efforts provided a benefit. (*See* Dkt. 1312 at 2 ("The Receiver has continued to locate and preserve Equitybuild records…. The Receiver's efforts have benefited and will continue to benefit the Receivership Estate.")

Third, they argue that the allocated fees should be paid from the Receiver's account and not from the property accounts. But this argument also simply retreads old ground. As the Objectors concede, this is a previously overruled objection. (Dkt. 1443 at 13 (citing Dkt. 1381 & 2/10/2021 Hearing Transcript at 137-47); *see also* Dkt. 1371 ("The point of allocating was to attempt to preserve the distinction between claimants with property−specific interests from other unsecured claimants, but not to create an opportunity for secured claimants to shift Receiver's fees onto the unsecured.")) They infuse verbiage about payment for "General Receivership tasks" into their argument, but as shown above the Receiver is not allocating fees for general administrative tasks to the properties. Judge Shah has expressly found that the Receiver has been appropriately allocating fees with sufficient accuracy. (Ex. A, 4/26/2023 Tr. at 23 ("the receiver is tracking things with sufficient accuracy to charge the secured creditors who benefited from the work"))

5. <u>Ambiguous Entries</u>

To support their argument that the Second Fee Allocation motion contains fees "for which it is impossible to know whether they fall within the two limited priming lien categories because the time entries are ambiguous," the Objectors reference the SEC's Billing Instructions.[8] (Dkt. 1443 at 13) What they ignore and fail to cite for the Court is that, for each of the fee applications at issue, the SEC reviewed the invoices and found they complied with the SEC's Billing

[8] It is not merely ironic that the Objectors' "ambiguity" objection should also be overruled because it lacks specificity. Notably, the Objectors fail to show how any of the tasks as issue is insufficient and supports their objection. This failure also contravenes the Court's admonition that the Objectors need to make specific objections. (*E.g.,* Dkt. 1182 at p.9 (citing Dkt. 710, at 4; Dkt. 1031, at 11 n.31.))

Guidelines. (Dkt. 1254 at 1 ("The SEC confirms that it has reviewed the Receiver's invoices [for the 14th Fee Application], they substantially comply with the SEC's billing guidelines, and the SEC approves of their payment."); Dkt. 1307 at 1 (same quote for the 15th & 16th Fee Applications)) Further, in approving the Receiver's 13th through 16th Fee Applications, the Court itself noted: "The SEC supports the Receiver's applications." (Dkt. 1312 at 1) The SEC has again shown its approval of and support for the Receiver's allocation efforts for the Second Fee Allocation Motion. (*See* Dkt. 1480)

The Receiver notes that the Objectors claim only 8 of the 13,393 line entries on their Exhibit 4, and none of their 557 line entries on Exhibit 3, are ambiguous (and two of these task descriptions appear twice, so there are in fact only 6 tasks garnering this objection). This alone is a concession that the Receiver's task descriptions are sufficiently detailed. And the six entries themselves are no exception:

- "Attention to property expense issue (638 Avers) (.1)" (Exh. 4, line 1)
- "Research emails regarding property and related email to K. Duff (7749 Yates) (.2)" (*id.*, line 933)
- "Review notice, prepare draft notice letter, and related communication with K. Duff (4611 Drexel) (.4)" (*id.*, line 1476)
- "attention to notices and related email with J. Wine (1131 E 79th, 6250 Mozart) (.2)" (*id.*, lines 2813-14)
- "attention to exchange regarding response to correspondence and related email to K. Duff (2909 E 78th, 7549 Essex, 8047 Manistee, 11117 Longwood, 1131 E 79th) (.1)" (*id.*, line 2870)
- "Draft response to claimant regarding secondary email issues (8100 Essex; 7834 Ellis; 638 Avers; 7748 Essex) (.1)" (*id.*, lines 3183-84)

The Receiver also has explained previously that even in instances where the description may be less detailed, there is more than ample content, context, and additional support in the fee applications and fee allocations to support the basis for the allocations. (*See, e.g.,* Dkt. 1182 at

pp.8-16) For example, lines 1396 and 2815 of their Exh. 4, which received no objection, give context to the objected-to entries at lines 1476 and 2813-14.

The Court also has repeatedly overruled similar objections arguing certain tasks lack sufficient detail.[9] (*See, e.g.,* Dkt. 1353 at pp.8-9 (and citations therein); *see also* Dkt. 1181 at pp.9-14) And, as noted, the Court itself has said that "the receiver is tracking things with sufficient accuracy to charge the secured creditors who benefited from the work." (Ex. A, 4/26/2023 Tr. at 22-23) For the same reasons, the objection about ambiguous entries should be overruled.

6. <u>General Allocations Pro Rata</u>

As an initial matter, the Court ordered that the Receiver follow the methodology by which the general allocations would be allocated *pro rata* among the properties according to their value. (Dkt. 755 at 23-24; Dkt. 824 at 5) The Receiver has followed and complied with that methodology and the Objectors make no showing that the Receiver has not done so. As a result, the objection about general allocations being allocated *pro rata* is actually a veiled effort to seek reconsideration of the Court's approved methodology. It should be rejected on this ground alone.

The Receiver has allocated such fees on the best basis as can be done under the circumstances. At some point, the slicing and dicing becomes absurdly fractional. This is not a case in which there are a handful of properties nor a handful of claimants. Nor is it the case where each claimant has a single claim that runs to a single property. Instead, there are over a hundred properties, nearly 900 claimants, most claimants have claims against numerous properties, and

[9] As the Receiver has previously noted, "the objectors had ample opportunity to complain about specific entries when the fee applications were presented, but they routinely failed to do so. Nor did they raise any specificity issue in regards to task narratives when the Receiver's lien and fee allocation methodology were presented to the Court. The District Court itself has noted that the objectors have repeatedly failed to offer specifics with their objections. (*See, e.g.,* Dkt. 710, at 4; Dkt. 1031, at 11 n.31.)" (Dkt. 1182 at p.9)

there are sundry complicating factors like buyouts, rollovers, and record inconsistencies. The Court itself has noted that this receivership "remains a complicated endeavor for the Receiver." (Dkt. 1366 at 1) The burden of additional and infinitesimal research for each 0.1 task (*i.e.,* 6-minute increments) to determine each of the properties that may be impacted substantially outweighs any benefit. As has been made clear repeatedly before, neither the Court nor the Receiver is expected "to perform the impossible," nor does applicable law require it to do so. *See SEC v. Elliott*, 953 F.2d 1560, 1578 (11th Cir. 1992). (*See also, e.g.,* Dkt. 1230 at p.1) Rather, the Court is called upon to review the allocation of cost prepared by the Receiver consistent with the District Court's previously approved methodology for the Receiver's efforts between the properties "on the best basis it can determine." *Id.* (citations omitted). (*See also, e.g.,* Dkt. 1182 at p.2 (citing *Elliott*))

The lenders have received the benefit of this allocation approach, too, and at those times, did not object. Notably, their argument on claimant communications now is inconsistent with the objections they made (or chose not to make) relative the Receiver's First Fee Allocation Motion. (*See, e.g.,* Dkt. 1255 at p.6 ("[R]eview of the Objectors' color-coded Exhibit B shows that the Objectors apparently agree that time spent responding to claimant inquiries is appropriately allocated to all of the properties.") (examples omitted)) Further, the Court has overruled objections as to claimant communications finding 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 (and citations therein)) Finally, the Court has noted that "[t]here is some approximation inherent at looking at the allocations because things, that is, tasks, happen in groups, but that's not a violation of the notion that only property-specific expenditures and benefits should be allocated to specific

property. And it's not cost-effective or equitable to be more precise on those issues." (Ex. A, 4/26/2023 Tr. at 22-23)

B. The Objectors' Other Arguments Also Should Be Rejected.

The Objectors raise additional items that can be quickly dispatched.

1. Payment Source

First, they argue that fees allocated to the properties should be paid from the Receiver's operating account. But that request and its associated arguments have been rejected by the District Court. (*See, e.g.,* Dkt. 1371 ("The point of allocating was to attempt to preserve the distinction between claimants with property−specific interests from other unsecured claimants, but not to create an opportunity for secured claimants to shift Receiver's fees onto the unsecured.")) The balance of their argument ignores their own concession that it is appropriate to allocate fees where there has been a "showing that the Receiver's acts benefitted the secured parties." (Dkt. 1443 at 2) The argument also ignores that approved fees that are not allocated to the properties are paid with unencumbered funds in the Receiver's account.

2. Holdback Percentage

Next, they describe holdbacks for fees that are allocated to the properties. (Dkt. 1443 at 3) But since their filing, the Court has clarified that the "additional 20% holdback" is no longer required "including for fees approved by earlier orders." (Dkt. 1468, 1469)

3. Claims Administration Objection

Although they do not address it in their brief, the Objectors assert a "Claims Administration Objection" with respect to 412 tasks on their Exhibit 4. The majority of work garnering this objection relates to the review of claims, and therefore it is unclear why this objection is lodged instead of one of the others for tasks that are substantively identical. (*Compare, e.g.,* Exh. 4 line 12425 & 13171) Moreover, this Court has repeatedly found that claims administration, including

the analysis of claims, is a part of the implementation and management of an orderly summary claim-priority adjudication process. (*E.g.,* Dkt. 1030 at 11; Dkt. 1312 at 2; Dkt. 1366 at 2)

4. Wrong Property

Finally, Claimants assert a "wrong property" objection in their Exhibit 4, which was inexplicably applied to a single task: "review and analyze documents produced pursuant to subpoena (5450 Indiana, 6217 Dorchester, 6356 California, 6949 Merrill, 701 S 5th, 7600 Kingston) (.8)" (Dkt. 1443, Exh. 4 at lines 8004-8007) The work related to the Receiver's review of 17,887 page production from loan originator CBRE during the single-claim resolution process ordered by the Court. The production included records about the properties to which this task was appropriately allocated. The objection should be overruled.

For these reasons and those set forth in the Court's prior orders and submissions of the Receiver, and well as the bases set forth in support of the Receiver's First Fee Allocation Motion, the objections at hand should be overruled.

C. FHFA's Arguments Should Be Overruled on the Same Grounds.

Like the institutional lenders, FHFA offers nothing new in its objections. (Dkt. 1442)[10] Each section of its submission has been argued multiple times in other FHFA briefs. (*Compare, e.g.,* Dkt. 1442, Section A.1 *with* Dkt. 1209 at 2, 3, 5-8, 9-10; Dkt. 1235, Ex. A at 3-4; 1246, Ex. A at 3-4; Dkt. 1266 at 7-8; Dkt. 1335 at 5; Dkt. 1412 at 4; *compare, e.g.,* Dkt. 1442, Section A.2 *with* Dkt. 1335 at 4-7; Dkt. 1209 at 5-6, 7, 8; Dkt. 1266 at 6, 9; *compare, e.g.,* Dkt. 1442, Section B.1 *with* Dkt. 1209 at 10-11; Dkt. 1266 at 13-15; Dkt. 1279 at 5 & n.2; Dkt. 1335 at 8-10; Dkt.

[10] The FHFA states that "FHFA would have welcomed—and still welcomes—a dialog with Mr. Duff on how best to manage the Enterprise Properties (now, the corresponding accounts) in light of the Conservator's statutory powers and protections, but none has materialized." In response to this overture, the Receiver reached out to FHFA's counsel on April 24, 2023 to start a dialogue, but to-date such discussions have not moved forward.

1412 at 5-6; *compare, e.g.,* Dkt. 1442, Section B.2 *with* Dkt. 1209 at 10-11; Dkt. 1266 at 13-15; Dkt. 1279 at 5 & n.2; Dkt. 1302 at 1; Dkt. 1335 at 1-2, 7-8; Dkt. 1412 at 3, 5, 6. In response, the Receiver refers the Court to the sundry filings (and citations therein) made in response to FHFA's previously overruled objections. (*E.g.,* Dkt. 1275, 1349, 1353, 1416, 1420 & Ex. C, 1424)

FHFA acknowledges the Court has overruled its previous objections in pertinent part. (Dkt. 1442 at 2) The Court should overrule its objections again, here, for the same reasons and those set forth in the Receiver's responsive filings. (*See also* Dkt. 1236, 1247, 1257, 1258, 1312, 1325)

Conclusion

WHEREFORE, the Receiver respectfully requests that: (i) his second motion for allocation of fees be granted; (ii) the objections of the objecting institutional lenders be overruled; (iii) to the extent any objection is sustained, or any correction is required, that the Receiver be given leave to address and reallocate such fees as appropriate and consistent with this Court's rulings; and (iv) for such other relief as the Court deems equitable and just.

Dated: May 19, 2023

Respectfully submitted,

KEVIN B. DUFF, RECEIVER

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CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing Receiver's Combined Reply in Support of Second Fee Allocation Motion, through the Court's CM/ECF system, to all counsel of record on May 19, 2022. I further certify that I caused true and correct copy of the foregoing Reply to be served upon all individuals or entities that submitted a proof of claim in this action (sent to the e-mail address each claimant provided on the claim form) and their counsel.

I further certify that the Reply will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

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Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 18 C 5587
EQUITYBUILD, INC., EQUITYBUILD FINANCE, L.L.C., JEROME H. COHEN, SHAUN D. COHEN, and CITIBANK, N.A., as Trustee,	)	Chicago, Illinois April 26, 2023 11:05 o'clock a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS -
Motion Hearing
BEFORE THE HONORABLE MANISH S. SHAH

APPEARANCES:

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Also Present:	MS. SUSAN KALISIAK-TINGLE, Investor MR. DAVID MARCUS, Investor

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(Proceedings available by phone/heard in open court:)

THE CLERK: 18 CV 5587, United States Securities & Exchange Commission versus EquityBuild.

THE COURT: Good morning, everyone.

We've taken attendance, and so we have everyone's appearances for the record, so I am not going to make you state your appearances. When you do speak, though, identify yourself, please.

My agenda this morning is to talk about a few of the pending issues: the second-amended proposed order approving the distribution of proceeds from the Group 1 properties; the 18th interim application and motion for Court approval of payment of fees and expenses; the objections to Judge Kim's ruling granting the first fee allocation motion; the recently filed motion to adjudicate a lien for properties 10 through 15.

And also I want to talk about the third motion for reimbursement and restoration of funds. I don't think there's much to do with that one pending, but I want to make sure I have talked about that.

The receiver's second motion for approval of fee allocations, that was referred to Judge Kim, and I think he has a schedule that's not complete on that, so I am not going to address that motion this morning.

I wanted to start first to ask, if I may, the receiver or receiver's counsel to give me a bit of context on,

where are we in terms of claims? And how many claims are still pending? I think it's still about 2400 or so. But have any claims been actually resolved?

I know we have had some disbursements and settlements and things like that. I am trying to get a handle on, what's our universe? If someone could help me with that, please.

MR. RACHLIS: Good morning, Your Honor. Michael Rachlis on behalf of the receiver. With me is Jodi Rosen Wine, who also -- who's been involved in-depth on many of the claims issues, so she may have some additional comments. But I will try and address Your Honor's question. It may be a little bit broad, but I think I can help.

Your Honor knows that there have been several individualized properties that have had numbers of claims associated with them that have been resolved. That includes a host of single -- what were styled single-lien or sole-lien properties that have been resolved.

There were probably approximately 20 of those?

THE COURT: My number is --

MR. RACHLIS: 28.

THE COURT: -- 32. I thought --

MR. RACHLIS: 28.

THE COURT: I thought claims against 32 properties have been resolved.

MR. RACHLIS: That's -- so there's -- there's

actually, I think, a little bit more than that. There's the 28 single-lien properties.

In addition to that, Your Honor had referred to -- Magistrate Judge Kim made a referral about trying to work through some other claims that involve properties that had less than five claims basically associated with them. And seven of those properties have also been resolved. And so the claims associated with those have been resolved.

So there are 35 properties out of approximately -- 108?

(Co-counsel nods.)

MR. RACHLIS: 108. So we've been styling it more like that, if you will.

And then, of course, Your Honor knows with the Group 1 -- with BC57 Group 1 claims, there are five properties that have been -- that are now -- been, generally speaking, resolved, and the order will finalize that.

So that would leave a total of 40 properties that have been resolved.

There remain before Judge Kim approximately nine properties that are in that category of five claims or less that we are happy to continue working on. And so we think that that could be part of the plan moving forward.

So -- but as of right now, 40 properties out of 108, and claims associated with those 40 properties have been

largely resolved, Your Honor.

THE COURT: And the vision has been to resolve the property claims or the properties as the only secured claims before we figure out what to do with the unsecured claims?

MR. RACHLIS: That's correct, Your Honor.

THE COURT: That's the vision? That's -- okay.

Let me ask first if the receiver can -- we received a few -- a couple of letters and then a request by an individual claimant to be heard.

I want to first address the letter from Mr. Young which largely expresses his views about BC57. And I don't take -- I appreciate his comments. And I have read his letter. I don't think he is asking at this point for any relief from the ruling in which I have already ruled about BC57's claims.

But let me just at least confirm from the receiver's perspective that Mr. Young's letter is a statement of his position-in-interest, but doesn't require any further action at this time?

MR. RACHLIS: Yeah, the receiver agrees with that.

That letter somewhat mirrored his position statement that was submitted during the claims process. So that is -- we agree with Your Honor.

THE COURT: Then let me ask -- Ms. Kalisiak, are you here?

(Person in gallery raises hand.)

THE COURT: Good morning, Ms. Kalisiak. If you could -- could you step up to the microphones here?

(Person approaches.)

MS. KALISIAK-TINGLE: Good morning, Your Honor.

THE COURT: Good morning. Could you state your name, please?

MS. KALISIAK-TINGLE: Susan Kalisiak-Tingle. I'm here representing myself as an EquityBuild investor.

I had about $350,000 invested in about six different properties. I think I'm involved in three or four different tranches, one of those being the first tranche.

THE COURT: What would you like me to know --

MS. KALISIAK-TINGLE: Okay.

THE COURT: -- about where things stand --

MS. KALISIAK-TINGLE: Okay.

THE COURT: -- with you?

MS. KALISIAK-TINGLE: Well, thank you for giving us the opportunity to be here today, and what I spent, you know, over $2,000 to be here today, and got on an airplane at 4:30 yesterday morning, was just maybe for you to understand the gravity of us that were investors, what we lost, the blows that came to us. Not just losing the initial 350,000, which would -- on an annual yearly salary, would take a person ten years of their life, working every day a normal job, to make that up; which at my time, back in 2018 when I lost that, I was a single

mom of two girls, and that was my means of income for continuing to be a stay-at-home mom for them. And it was about 95% of my net worth at that time.

I was in the process of moving to a new location, a new city. I wasn't able to buy a home because the money that I was going to use to purchase a home was tied up in this mess. And I had to rent just a small townhome for the girls and I at, you know, $1500 a month for two years.

So that was on top of the loss that we'd already sustained. That was another, you know, $36,000 loss, if you multiply that out.

Another blow that we have sustained is that -- I understand you're not a criminal judge, but that these guys have continued to go scot-free. They haven't even had a slap on the hand of any kind.

My understanding is the father has passed away, maybe from cancer, but that the son has been allowed to flee to another country. So there was no justice done in that, in that, you know, his passport wasn't taken him -- taken away from him.

Another large blow to it was the future earning power. I am a real estate agent by trade. That's what my daily income is for the last eight or so years.

And so, just as an example, I'm working with a client right now that bought a property around the same time in 2018.

Paid around the same amount of money, $300,000. He's closing on that property with me here in a couple weeks for $540,000. So he was able to take that same amount of money and grow it by, you know, 200-and-something thousand; that we could have done that as well if we had access to our funds that were -- I hate to use the word "victim," but kind of -- that's what we were -- that was taken away from us. A crime was committed to us, and, you know, it just seems like nothing's been done about it.

And I appreciate all of these people being here today. I know they've spent countless hours on it. But this has been dragging on -- we're coming up on the end -- or close to the five-year mark, and we're still just in the first tranche.

And, like I said, I'm in several other tranches. I feel like the average investor -- I know there were 900 of us. We don't feel like we know kinda what's going on in all of it. We do sometimes get filings and notices from the court, but a lot of times we either don't have the time to read through those lengthy things or we don't have the legal knowledge to really know what's going on. So we feel like kinda maybe what we're getting is secondhand or incorrect information.

Every time one of the lenders that comes in and appeals a decision you've already made -- I think one of 'em, it's like nine or twelve times that he's appealed a decision

you've already made -- that's another blow to us.

And so I think that -- I'm just -- I'm representing myself today, but I think that what the average investor would just want us to say is we're just ready to see some results. We're ready to see some justice done on the matter. We know we're probably not going to get back, you know, pennies on the dollar from what we had invested.

I know you were not on the case back when -- I think it was Capital Title -- and, like I said, I'm a real estate agent. When Capital Title -- no, Chicago Title. Chicago Title was subpoenaed, I believe, by Max Stein, and came in and did a deposition on them. They admitted that they didn't do their due diligence to make sure those of us in the first-lien position were actually paid off at that time like we were supposed to be. So it seems like there should be some kind of title policy insurance that should be able to come in and make us whole.

So that would be kind of -- I just want you to know, we're real people, we're real lives, we're real families. I know there were other people that were investors. I'm, like I said, in my 40s, a single mom of teenagers. There were other people that were investors, that that was their life savings, what they had worked their whole life to save. And right now, they should be out enjoying the good life, their retirement, but they've had to continue going back to work or whatever

because of this.

And so it feels like we're being -- I know that they're working on it. But it feels like we're being punished for a crime that we didn't commit, and that the real criminals, they've just -- nothing's really happened to them. And we don't even really know, I mean, even where he's at, for sure.

THE COURT: Thank you. You can go ahead and have a seat.

(Person returns to gallery.)

THE COURT: I do appreciate those comments. And I suspect you're not alone in your opinion. And it's important to me to hear that point of view and that expression. And I do know, even though I am one of the newer players in this case, I do know how frustrating the process is and has been.

And what is unfortunate on top of all of the unfortunate circumstances here is that ultimately this process, however long it takes and however it ends up, is not going to be satisfying. That is just where things have ended up because of the nature of the collapse here. So to get to an end, when it happens, that you can tell and know already is not going to be a satisfying one adds to the frustration of the whole process. And, unfortunately, all I can say about that is I get it. I know that that's what's happening. But we will do what we can to keep things moving along.

But I appreciate the fact that there was real loss

here and that people have not been able to recover from it. And, unfortunately, I am not so sure anyone will ever recover. But we will do what we can to keep things moving along.

Let me turn to the proposed order for the Group 1 properties, and I wanted to, in that context, ask a couple of questions.

The proposed order does anticipate that there might need to be additional adjustments after I resolve the 18th fee application, the pending objections to the first allocation motion. So I wonder, is there value in processing the proposed order as drafted or should we wait until I resolve those, which I probably will this morning, at least some of those?

And then related to that question is the issue of BC57's appeal. And if the Group 1 distributions, even if I enter this proposed order, if there is still going to be distributions down the road to some of those -- related to some of those properties, would even this order be an appealable order from BC57's perspective?

That might be a question for BC57, but I do think it's something that everyone ought to be thinking about.

So -- and related to the proposed order for the Group 1 properties is the letter -- is, I think, the letter from Mr. Nuspl, N-u-s-p-l, who, I think from my understanding of his letter, objects to the treatment of his claim as being unsecured.

So I wonder if -- let me start with the receiver on reactions to those issues with the proposed order for the Group 1 distributions.

MS. ROSEN WINE: Your Honor, Jodi Wine for the receiver.

Mr. Nuspl is objecting to the receiver's recommendation his claim be treated as unsecured. And he submitted a position statement in January of 2022, which was filed with the court by the receiver, which essentially said the same thing, that he transferred his interest in this particular secured property to the Southside Development Fund 4, which he claims he had a mortgage interest pursuant to that fund; but if you look at the actual fund documents, he was getting a membership interest in an L.L.C. and, you know, he agreed to, you know, basically sell his interest in the properties and purchase membership shares in this L.L.C.

THE COURT: And that is why the receiver continues to recommend that his claim be treated as an unsecured one?

MS. ROSEN WINE: That's correct, Your Honor.

THE COURT: Then with respect to the proposed order and the fact that the proposed order anticipates that there might need to be additional adjustments in light of rulings on pending issues, can you address whether I should rule on some of those now and then hold off on entering this and giving -- and do another one? Or do you think it would make more sense

to do this and then adjust from there? And then what does that mean with respect to BC57's ability to have a final order that it can take up?

MS. ROSEN WINE: Right. I mean, one of the issues, too, is that the monies from the sales of these properties are in interest-bearing accounts, so that amount available for distribution continues to change and increase because of interest paid. And then there has been allocations of some fees of these properties.

So to know exactly the amounts that each claimant will get will really be as of the day of distribution. And if there's an appeal, that could be quite a ways down the road, where there continue to be fees accruing and continue to be interest accruing. So --

THE COURT: And related to that, the holdback would also prevent a final distribution that actually closes the property accounts.

MS. ROSEN WINE: Your Honor, we've recommended that on a final distribution, that there would be no holdback. So the order that we propose does not have a holdback.

MR. RACHLIS: Your Honor, and that's also consistent with the way we've handled other properties that have been resolved in this matter. Those have just been closed out, and no holdback was remaining.

THE COURT: But it won't be -- I guess in terms of

the proposed order which says this is a final distribution, it can't be a final distribution if there would still be adjustments pending the 18th fee application, for example. Or do you think it is final?

MR. RACHLIS: I think, Your Honor -- I guess there's twofold interests, of course. I mean, we have always -- the desire is to try and get a distribution out as quickly as possible. And so the finality point of that and the concerns for it are well-taken.

I would believe that if we had a date certain -- if everything was resolved, the 18th fee application is resolved, there is no other issues that would remain in a final distribution with no holdbacks, like the other accounts have been held, I would believe that that could be a somewhat clean cutoff.

But, of course, there is, Ms. Wine notes -- I mean, in any appeal, if there is something that occurs associated with -- if there's no distributions, they're going to continue to accrue interest and things of that nature.

But I would think that we could do it as a date -- whatever date Your Honor, you know, chooses for -- you know, the date that it's entered could be the date that we conclude interest and other things, and make calculations of that date.

THE COURT: Other than Mr. Nuspl's letter and then issues that have been addressed through my ruling on the

priority issue, there are no other issues or objections to the proposed order. Am I right about that?

MR. RACHLIS: Yeah. Not that we have received.

And, in fact, you know, Your Honor, after receiving some of those -- of comments or contact, we had made effort to go back through and do what we could in order to basically re-look at everything. And, of course, Your Honor had seen the amendments as a result -- resulting from that.

So we're not currently aware that there is anything further that would be addressed on the claims, Your Honor, in Group 1.

THE COURT: And why is there an expectation of excess proceeds for 7625 South East End? Do you --

MR. RACHLIS: I believe it was just as a result of the sale -- after the amount of the sale and taking the amount that's in the account minus the recommended distributions consistent with what's in the exhibit, there is a small amount that would be remaining.

THE COURT: Thank you.

I do agree with the receiver that Mr. Nuspl has an unsecured claim. And that while I appreciate his perspective, that is probably one that other similarly-situated investors have thought or believed about their investments. It is nevertheless correct that what happened with his interest was that it was converted to an unsecured one through a different

investment vehicle, and that treatment by the receiver is appropriate.

And I have reviewed the second-amended proposed order and its exhibits and attachments, and I do find that it is consistent with my conclusions and findings with respect to this case and the Group 1 issues, and that the receiver has, as accurately as can be expected, arrived at a distribution calculation that is consistent with the goals of this receivership.

And I will enter the proposed order approving the distribution of proceeds from the sales of Group 1 properties, 74, 75, 76, 77, and 78. Whether that is a final appealable order for BC57's purposes, I will leave BC57 to figure that out.

Is someone here from BC57? I see Mr. DeVooght is here.

Mr. DeVooght, do you want to chime in on that issue?

MR. DeVOOGHT: Thank you, Your Honor. Good morning.

I do believe that we would proceed as if we believe it was a final order. I understand what you're saying, and we do plan to address that point. I appreciate you flagging it.

But I think we do believe, given the combination of the two orders and this order effectuating that first order, that we'd be proceeding as if it was a final order.

THE COURT: Thank you.

MR. DeVOOGHT: Thank you, Your Honor.

THE COURT: I am going to turn next to the receiver's 18th interim application and motion for Court approval of payment of fees and expenses.

That application is granted, and the objections are overruled.

The FHFA's objections are overruled for the same reasons that I held in an earlier ruling that the receiver's conduct and expenses are not a restraint on the conservatorship.

I do want to add, for purposes of the record, to the extent it becomes important, that if I am wrong about the statute being jurisdictional -- and I do think there is perhaps a trend on interpreting statutes to not be jurisdictional. So if I am wrong about whether the statute is jurisdictional, I do agree with Magistrate Judge Kim that the FHFA waived objections to this process by sitting on the sidelines while the receiver got up and running.

So I will make that comment, for what it's worth, for the record.

The objections -- the other objections to the 18th interim application are overruled. The objections based on the categories being outside the categories previously approved for the lien are overruled for the same reasons those objections have been overruled before.

I do find and conclude that the receiver has a handle on these categories that the Court has approved and is following that methodology. The task descriptions are -- when considered in the context of the history of all of these fee applications, those task descriptions are sufficiently detailed.

Many of the objections, the color-coded objections, are not specific enough, and other objections don't apply to any specific proposed allocation or line items.

I do continue to conclude that fielding claimant inquiries are part of the claims adjudication process. I am not going to refer the allocations in the 18th application to Judge Kim. I have reviewed them. I have looked at these spreadsheets. I am satisfied that the receiver is following an approved methodology here.

I am going to keep the 20% holdback on fees, not expenses, but I am not requiring the additional 20% holdback that has been required in the past on sale proceeds from encumbered real estate. I don't think that's necessary anymore. We're past that point. And the 20% holdback on fees is enough of a check against either unreasonable billing or overbilling or errors to serve that purpose.

And I do think it continues to have some value to keep that 20% holdback on fees, understanding that that might continue to complicate things in terms of resolving everything

and finding a date certain when certain things are complete and over. But we might get there sooner rather than later. I am hopeful that we will.

But for those reasons, the receiver's 18th interim application is granted. I do think I need a proposed order on that one as well, so if the receiver could submit that?

MR. RACHLIS: We can prepare that, Your Honor.

THE COURT: Next, I can take up the objections to Judge Kim's oral ruling and minute order granting the receiver's first fee allocation motion.

MR. RAYMOND: Before you do that, Your Honor, may I be heard?

THE COURT: You may.

MR. RAYMOND: Thank you, Your Honor. I'll come to a microphone. Sorry.

THE COURT: Thank you.

MR. RAYMOND: This is Daniel Raymond on behalf of Arnold & Porter for FHFA.

I just wanted to ask a clarification to Your Honor. So for this -- when you approved the 17th fee application, you also, in the proposed order that was entered, withheld from immediate payment the fees and expenses allocated to the properties at issue. And FHFA's objection, I think the logic of that was that the appeal was still pending, which is still true today.

So I just wanted to ask the Court to clarify whether that should be part of the proposed order as well for the 18th.

THE COURT: Thank you.

MR. RAYMOND: Thank you, Your Honor.

THE COURT: Thank you for speaking up and reminding me.

I do want to keep what is effectively a stay on the distributions attributable to the FHFA-related properties in place and let that continue to get sorted out by the Court of Appeals.

So thank you for that.

Okay. So turning to the objections to Judge Kim's ruling on the first fee allocation motion.

The objections are overruled.

I have read the transcript. I have reviewed the submissions. Judge Kim did not misapprehend his task and did not commit clear error.

There is some approximation inherent at looking at the allocations because things, that is, tasks, happen in groups, but that's not a violation of the notion that only property-specific expenditures and benefits should be allocated to specific property. And it's not cost-effective or equitable to be more precise on those issues.

Judge Kim's references to benefits to the estate or references to this process were not error. Part of the

objections are just a rehash of the narrow view that objectors have taken of the categories of approved lien-related work. And Judge Kim's language in the overall context of his hearing and rulings demonstrate to my satisfaction that he gets it and he understood both the lien categories and the need for property-specific benefit.

I have now looked at the allocations, the methodology used, and the history of the case, the nature of the original business, and the fallout from the collapse of the fraud, and I am satisfied that the receiver is tracking things with sufficient accuracy to charge the secured creditors who benefited from the work.

So the objections are overruled. I suspect we'll need a proposed order now to implement.

(Receiver's counsel nod.)

THE COURT: I don't know if Judge Kim asked for a proposed order. And did he ultimately enter one?

MR. RACHLIS: No. We -- he did ask for a proposed order. One was provided to him. And he basically entered his own minute order.

So we will go back and we will be happy to submit a proposed order to Your Honor.

THE COURT: Since I have now ruled on the objections, I think it's now on me. So go ahead and send a proposed order to me --

MR. RACHLIS: Yes.

THE COURT: -- to implement that.

MR. RACHLIS: Yes.

THE COURT: And, again, with respect to the FHFA's objections, they're overruled for the same reasons I have overruled its objections before. But I will keep any distributions related to the FHFA properties stayed.

Next on my agenda is the third motion for reimbursement and restoration of funds.

I just want to make sure we're all on the same page. I think I -- I did enter relief except as to the FHFA properties.

Fannie Mae's motion to withdraw its objections is granted. So those objections are withdrawn.

I don't think there's anything further I need to do on that because I am keeping any distributions as to the FHFA properties stayed.

So I just wanted to make sure we're on the same page.

MR. RACHLIS: Yeah, Your Honor. Your Honor is correct. There is an order in regards to -- call it everything other than FHFA properties.

Do I understand Your Honor, then, is granting the motion but keeping the stay as to the FHFA properties in place? Is that correct?

THE COURT: Yes, yes.

MR. RACHLIS: Okay.

THE COURT: So to the extent I had it under advisement, I do overrule the FHFA's objections, but I am not going to have a distribution occur.

MR. RACHLIS: Okay.

THE COURT: So, again, it is an accounting mark in the ledger, but the money's not going out as to those properties.

MR. RACHLIS: Okay.

THE COURT: I think that leaves the motion to adjudicate the lien that was just filed recently.

Do I have counsel who filed that?

MR. CROTTY: Good morning, Your Honor. Jerome Crotty on behalf of LMJ Sales and Kirk Road Investments.

THE COURT: What's the receiver's position on this? Why now? Are these properties ready for resolution?

MR. RACHLIS: Well, there is a couple comments receiver has on this.

So this effort was -- did kind of jump the gun, so Your Honor's correct in that statement. But we have been -- you know, knowing where Your Honor was in terms of completing Group 1. And when you go back to -- I believe it's docket No. 938, which set forth the proposed groupings for the tranches, the properties that are subject to this motion are in Group 3.

And so we have been looking at and are working on

Groups 2 and 3. And so the -- while jumping the gun, we believe that it is appropriate that -- we're prepared to basically proceed with Groups 2 and 3.

And the motion, in some sense, I would suggest, is moot because we believe that we can initiate the process that's in place, that Judge Lee had put in place for claims handling, with regards to Groups 2 and 3.

We are prepared to propose a schedule to Your Honor which would basically start both Groups 2 and 3 essentially in the beginning of May or -- like May 10th or 12th. And then as to Group 2, that would run the process through approximately November.

For Group 3 which involves the properties that are subject to the motion here, because those are not really -- there's not really a priority type of dispute, we were going to propose a slightly modified and streamlined process for that one. That would conclude by the end of July.

So -- and we can present a proposed order or schedule to Your Honor in conjunction with our proposed orders that we are going to be submitting to Your Honor.

So we -- that's where we believe it's appropriate to handle this motion in the context of the claims process.

THE COURT: Mr. Crotty, what do you think about that?

MR. CROTTY: So if the suggestion is, Your Honor, that these issues that we raise in the motion would be

addressed and then ruled upon by the Court during the process for Group 3, that's fine.

THE COURT: Okay. Let's do that, then.

(Laughter.)

THE COURT: So I am going to terminate the motion to adjudicate the lien without prejudice to pursuit of that adjudication through the claims process with the receiver.

MR. CROTTY: In lieu of terminating the motion, Your Honor, could it just be entered and continued for the process in Group 3?

THE COURT: I am not so sure there's a huge formal difference except for my tracking of a docket that has nearly 1500 entries on it. It's better and easier for me to terminate it without prejudice.

MR. CROTTY: Okay. Thank you, Judge. Thank you, Mr. Receiver.

THE COURT: So we'll -- that will get folded in. And I appreciate the receiver's efforts to get Groups 2 and 3 up and running and move those along.

How many groups are there?

MR. RACHLIS: They divided out into ten groups. Yeah, that was what the proposed -- you know, Your Honor, as we've been going through this process, there is going to be -- and we'll come back to Your Honor to propose -- there may be some modifications on how those groupings work based on what we

now know versus when this was submitted back in 2021. And we can present that to Your Honor.

But, generally speaking, this does divide out still, as you've seen it -- and some of these things have clearly been resolved since Your Honor has -- since this was submitted as well.

MR. DAMASHEK: Judge, may I address at this point?

THE COURT: You may.

MR. DAMASHEK: Ron Damashek, D-a-m-a-s-h-e-k, on behalf of several lenders, Citibank, Thorofare, and Liberty Federal.

When the group designations were entered, Judge Lee made a determination -- because we raised this issue -- as to Group 1 was going to go first, essentially, as a test and then we were going to look and see, do any modifications need to be made?

We were also going to look at the subsequent order of the groups because I don't know if there was any rhyme or reason to the order that was established.

I certainly have no problem with Group 3 because the receiver and counsel are on the same page on that, and there may not be any problem with Group 2 being the next one, but I would like to have an opportunity to discuss this issue with the receiver, the order, what's involved. So that if we could essentially have some period of time to meet and confer as to

the groups other than Group 3, that would be helpful.

THE COURT: I encourage you to do that.

And similarly, my understanding was that once I issued the opinion on the Group 1 issue, that that would have some effect on other groups, other claims, and that you all would have been talking about that since I've issued this opinion.

And so, counsel, go ahead, but I -- you should do that is pretty much all I can say at this point.

MR. HANAUER: Yeah. Good morning, Your Honor. Ben Hanauer for the SEC.

Along the lines of what the Court just suggested, the SEC agrees, the original design of the claims process was to see if efficiencies could be gained after the Court rules on Group 1.

After the Court did, the SEC's been in frequent communication with the receiver about this. And I have encouraged the receiver to try and do some work to see and advise both the Court and the other claimants if -- what groups may look like, the first group in terms of the issues that were important in the Court's ruling. And I think the receiver can elaborate.

But counsel's advised me that the receiver should be in a position in a certain matter of time to go through the records and make some recommendations to the Court in terms of

what claimants may look similar in terms of the releases or the authorizations or the other issues where there could be some symmetries going forward.

THE COURT: So I think what I am hearing is that what would be helpful is if I imposed a deadline for everyone to make a proposal as to what we're doing next as to the groups.

MS. ROSEN WINE: Your Honor, if I may? Jodi Wine for the receiver.

We've -- the schedule that Judge Lee put into place for these claim groups started with the receiver filing what's called a framing report, which is just identifying which properties and which claimants are involved in a group.

We're prepared to file framing reports on Groups 2 and 3 next week, by the end of next week, proposing a schedule that would start the following week, on May 10th, assuming Your Honor could enter the order that kicks off the schedule.

We would like to have the discussions that Mr. Damashek and Mr. Hanauer have mentioned with regard to the remaining groups, but really don't want to delay getting started on Groups 2 and 3 as soon as possible.

THE COURT: That's fine with me. So let's get the receiver's framing report for Groups 2 and 3 on file by May 5th.

And assuming it tracks the general framework that's worked to a degree in the past, I will likely adopt it and get

it entered, and you'll have deadlines to get things done.

In the meantime, then, how about another deadline with a proposal for any redefinition of groups and at least a rough timetable for groups by the end of May? Do you think that would work?

MS. ROSEN WINE: It works for me as long as the discussions that have been proposed can happen in that fashion. But I think that would be just fine.

I also want to add that the process we're proposing for Group 3 departs from what Judge Lee entered, which was a fairly long process. These claims do not have institutional lenders. There's not the same priority disputes. So it's a much more truncated schedule, as Mr. Rachlis mentioned.

THE COURT: Okay. Well, I'll see it when I see it. And that sounds good.

So a proposal for a schedule with respect to other groups that may include a redefinition of other groups is due June 1st.

MR. RACHLIS: That's --

THE COURT: And that will come from the receiver.

MR. RACHLIS: That's more than fine, Your Honor.

A couple of other points.

(Receiver's counsel conferring.)

MR. RACHLIS: That's okay. We'll get that done.

A couple of things. The reason we are noting for you

that the Group 3 process might be different is because there's an order that's been entered by Judge Lee about the process which was subject to -- you know, there was a lot of discussion. It's an effort to streamline it. But nevertheless, it was really -- that was the import we wanted to make to Your Honor, so it was clear.

Secondly. In terms of some of the issues that are being discussed by the SEC and by counsel, we have been trying to give that some thought, too. And perhaps as part of this submission, what one of the things that we have been -- we thought would be helpful to Your Honor would be some breakdown where we are best estimating the overlap of the Court's rulings in terms of some of the factual overlap there with some of the other circumstances and some other property-related claims.

And we may try and break that down by property or in some capacity so Your Honor may be able to utilize that information for one of the other goals that was hoped for as part of this process, namely to have further discussions in terms of trying to reach a more expedited resolution based, at least in part, by the guidance that Your Honor has given in your ruling on Group 1.

And we can certainly -- we are trying to work through that and do that, and we can submit that as well as part of that submission on June 1st.

THE COURT: That's fine. And I would encourage

people to continue to have the discussions. And if there's an alternative side process to adjudication of groups, that is, while you're doing that, here are a few other discrete properties or discrete issues that might benefit from either a settlement referral or an even entirely different kind of adjudication process, if you can put your heads together and figure out a way to do that.

I am all ears on any method we have to chip away at this, and I will do what I can to help. But it continues to be on you all to get things in shape for me to weigh in. And that sounds like a fine idea.

MR. RACHLIS: Okay.

MR. DAMASHEK: Judge, Ron Damashek again.

May I suggest, with respect to the Group 2 framing work, that the receiver attempt to meet and confer with the parties involved before submitting the framing report on May 5th?

And if everybody's in agreement, the receiver can indicate that in the report. But if there was some disagreement, perhaps the other parties could have an extra week to respond? And that way, we cover both bases. Try and reach agreement on the framing report, but if there is an issue, at least the other parties should have an opportunity to file a brief response.

THE COURT: Fair, fair enough.

Any objections to the receiver's framing report are due May 9th. So you'll get a couple of days.

But I think it's, of course, a great idea to talk. And if you can file an agreed framing report, that would be helpful as well.

Mr. DeVooght, I saw you pop up.

MR. DeVOOGHT: Yes, Your Honor. I just -- if there's a more appropriate time to go back to the second-amended proposed order? I just had a housekeeping point. If I may?

Given the nature of the order -- I know we've had a bit of a dress rehearsal on this, Your Honor -- we will be filing a motion to stay the order. And just -- I came here from the airport. We will get it on file in the next three days. We're going to be quick about this.

Is there any way, when Your Honor enters that order, it could be that it's not actually executed pending -- and I can formalize this in our motion, Your Honor. But just -- if you enter the order, that the actual execution of the order by the receiver in terms of the funds be stayed pending the consideration of the motion?

THE COURT: Any objection to an administrative stay of the order?

MR. RACHLIS: Yeah, I would -- if I'm understanding his request right now before Your Honor, before you even enter the order, to execute -- for the stay? Yeah, we would object

in that context for a couple of reasons. One, I want to -- we all want to read what's going to be submitted.

And second, based on the last motion that was filed, to my recollection, the stay was a little more limited than what I've just heard.

I mean, the stay -- for example, Your Honor's granted the third restoration motion. Your Honor's granted the fee allocation awards and things of that nature. The administrative -- the rulings associated with those administrative issues, we don't think those should be stayed. We think --

THE COURT: Mr. DeVooght is only talking about the second-amended proposed order approving the distributions of the Group 1 properties that I have today said I'm adopting and I am prepared to enter it.

MR. RACHLIS: Okay. So --

THE COURT: He wants me -- if I sign that and enter it, he doesn't want you to follow through on those distributions until he's filed his motion to stay.

MR. RACHLIS: Oh, I see. Okay.

THE COURT: Am I missing anything, Mr. DeVooght?

MR. DeVOOGHT: That's exactly right, Your Honor.

MR. RACHLIS: Okay. Then that would be okay, as long as it's an understanding that it strictly is associated with the distributions to claimants that you're -- that's being

proposed, and subject to, of course, the submission of an actual motion that Your Honor will then see and that we can respond to, et cetera. That would be okay.

THE COURT: That's fine. I'll include language to that effect in the order when this is entered.

MR. DeVOOGHT: Thank you very much, Your Honor.

THE COURT: Okay. That is taking us to the other issues that counsel wanted to raise with me this morning, since we're all here together. I think I have gotten through my agenda.

But let me start with the receiver. Are there any other issues or housekeeping issues you want to raise with me or ask for further direction on?

MR. RACHLIS: I am looking through my list. I don't believe so, Your Honor.

Do you see anything?

MS. ROSEN WINE: No.

MR. RACHLIS: No, no, Your Honor. Thank you.

THE COURT: For the SEC?

MR. HANAUER: Regarding the issue we just talked about, the SEC will be opposing the -- or very likely will be opposing the stay motion. But the SEC does not oppose holding off the distribution until this Court has ruled on the upcoming stay motion.

THE COURT: Any other issues the SEC wants to bring

to my attention this morning?

MR. HANAUER: No. Thank you, Your Honor.

THE COURT: For the institutional investors?

(Counsel nod.)

MR. DAMASHEK: No, Your Honor.

THE COURT: Okay. Then I think I have given you enough direction and deadlines.

In terms of proposed orders, you'll send them in --

MR. RACHLIS: Yes.

THE COURT: -- and I'll take a look at those.

And so then I do have one last issue. Mr. Marcus?

MR. MARCUS: Yeah. Permission to speak?

THE COURT: Yes. Mr. Marcus, you can come up and step up to the microphone.

(Person approaches from gallery.)

THE COURT: Could you state --

MR. MARCUS: Good morning.

THE COURT: Could you state your name, please.

MR. MARCUS: David Marcus from New York City.

THE COURT: Mr. Marcus, hold on, before you start.

We had a process. If someone wanted to speak at this hearing, you were required to file something through the Clerk's Office on to the docket that stated your request to appear.

E-mail communications to the court clerk is not an

approved method to take advantage of the opportunity to be heard at this hearing. That's why I didn't call you up at the beginning of this hearing.

But I know you're here, and I see that you're here, and I will give you an opportunity to speak briefly. But you need to understand that if you don't follow the rules, you're not going to be allowed to speak.

MR. MARCUS: Uhm.

THE COURT: Having said that, I will hear what you have to say about where things stand, understanding that I have seen your e-mails, I have seen your communications. I have a good sense of your frustration with this process, and I understand that. But you also ought to be heard, and so I will give you an opportunity to be heard.

MR. MARCUS: Thank you, Judge Shah.

And I just want to say, the reason I did it is because -- I was here four years ago when Magistrate Kim was here, and I had sent a letter certified receipt, and he allowed me to speak. In fact, I had -- someone else was supposed to speak, and, unfortunately, she refused to show up. So I didn't know that we were so firm on this procedure.

I'm a senior citizen. For me technologically, technology is just a -- it's a problem. But that's -- having said that, I'm sorry that -- and I'll know in the future, I guess.

This is a tough situation. I want to say a lot more, but I don't know if you'll let me -- give me the time. I'm just glad you have me speaking now.

It's just a terrible thing. It's almost -- and to back up, like what Susan said, it's nice to see another investor here. You know, 900 investors, two show up, that's a disgrace.

And it's a shame that it happened. There are a lot of people suffering. They're not here in the courtroom. I've spoken to 60 or 70 of them. And they have reasons for it. And one of the reasons is it's almost like the court does not want -- we're second-class citizens, third-class citizens.

It's nice for me to be here, you know, in front of all these lawyers. I feel like it's a David-and-Goliath deal. And some of it has to do -- and I hate to say it -- with the receiver. It's not -- a lot of people don't even know what's going on. They just don't. They ask me because I happen to be the most active investor out of 900 investors.

Eventually, I plan to write a book on this. I plan to grate people on this. If you asked a hundred thousand people in Chicago about EquityBuild, not one person would know. Not one.

Now, here, you have Bernie Madoff went smooth. This is going to take a long time. I'm in the eighth tranche. What does that mean? I'll be lucky if we get to this by 2030.

So, I mean, it's beyond frustration. There are people are going to be dying -- who die before this is resolved. People will be financially crushed, devastated because of this.

Now, unfortunately, we had a situation. We get back to this. Because you have two people, Jerry and Shaun Cohen, that were evil geniuses. And the thing was -- I don't know if you're aware of this, but ten years ago, they came here. They picked Chicago out. They were in Philadelphia. They moved to Chicago, for whatever reason. I have my ideas about that.

And what happened was they had a lawyer, Mr. Hirsch, who told them ten years ago, "Please do not do this Ponzi scheme. I'm afraid I may have to go to jail." And they laughed at him.

And what happened was before he -- Mr. Hirsch told his daughter, "Do me a favor. I'm afraid of these people. Go to the SEC, go to the FBI, and see what they can do for us." Okay? She went. They told her, "Keep quiet. We'll take care of it. We'll investigate it." Zero was done, zero.

So what happened was this Mr. Hirsch, he committed suicide. And what happened was -- he also documented everything that would happen. He even stated that Mr. Cohen will flee to Israel and nothing will be done with 'em. They won't spend a day in jail, not a minute and whatever. It's fantastic. They get a free pass.

What a country this is, that you can do these things, you can harm 900 people of $135 million and get totally away with it. Now, I know God took care of Jerry Cohen, he'll take care of Jerry Cohen. And eventually in this other world, God will take care of Shaun Cohen.

I had dinner with Shaun Cohen twice. I mean, this guy, when I say evil -- I mean, this whole court has been touched by Shaun Cohen. When I say evil, I --

THE COURT: Sir, Mr. Marcus, I'm sorry to interrupt, but I want to give you an opportunity to make productive use --

MR. MARCUS: Okay.

THE COURT: -- of our brief --

MR. MARCUS: I've waited to get --

THE COURT: -- time together.

MR. MARCUS: I'm ready to get to my point.

THE COURT: That is, the history of this tragedy is --

MR. MARCUS: Understand.

THE COURT: -- well-documented.

MR. MARCUS: Understood, understood.

THE COURT: What we are doing today is attempting to administer the assets that the receiver has been able --

MR. MARCUS: Okay.

THE COURT: -- to collect. And we are working towards the end of the goal being, let's administer these

assets and get them out the door.

MR. MARCUS: I appreciate that. Now --

THE COURT: The thing that would be useful to me --

MR. MARCUS: Okay. I'll -- let me explain.

THE COURT: Let me just interrupt and I'm just going to ask you a question, and that's the question that you can answer, and that will then conclude our time together. And that is just, what do you want me to know about how to administer this process going forward?

MR. MARCUS: Well, two years ago in May, when Judge John Zee Lee decided to do eight tranches and all this stuff, it was proposed it was going to be six to nine months at the most and then the other tranches would be done a lot more rapidly.

We're entering the second year. My feeling about that is -- and it's a little radical. I know we have all these institutional lenders. But what I would say to you is we gotta -- it was a good idea then. It's not a good idea now, with the tranches. It's a bad idea. It's a terrible idea. And it's only gonna have more suffering.

I feel that the investors have been treated like second- and third-class citizens. And I believe that that should be wholly wiped out, with the tranches, number one. You do a flat, kind of, percentage thing. Let's get on with it.

See, there's no sense of urgency here at all, zero.

You have the power, you have the authority to do a tremendous thing. You could snap your fingers and, like with a magic wand, you can make things better for 900-plus investors.

So what I'm saying to you is if you could do -- within the -- you know, maybe next six months or so, you -- if you could disburse the monies, start something, do -- it would be -- in Jewish, we say it would be a mitzvah, it would be a great deed. And I tell you something. A lot of people would be -- it would help their lives.

Now, what happens is people -- these 900 people, they need a hero. And I just want to let you know, Judge Shah, I want you to be my hero.

Thank you very much. And God bless you.

THE COURT: Thank you, Mr. Marcus.

(Person returns to gallery.)

MR. STEIN: Your Honor, if I may?

THE COURT: Yes.

MR. STEIN: Good morning, Your Honor. Max Stein on behalf of a group of individual investors.

And I just want to make clear that there are a number of individual investors who are represented here in the courtroom today by me. That we are -- we share many of the frustrations that you have heard from the two individuals who have spoken today.

We agree that there is a lack of urgency, especially

from the institutional lenders in this case. And we have suspicions as to why that is, most notably the absent title insurance companies.

All that said, we're willing to work with the parties and with Your Honor through the process that has been established, and we hope that some of the urgency that has been urged will begin to be demonstrated.

Thank you.

THE COURT: Thank you, Mr. Stein.

Are there any other issues that counsel would like to raise with me this morning?

(No response.)

THE COURT: Thank you for all of your time and attention and hard work, and we are in recess.

(Proceedings concluded.)

C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the Hearing proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on April 26, 2023.

/s/ Colleen M. Conway, CSR, RMR, CRR — *04/27/23*

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date

Exhibit B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiffs, vs. EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, AND SHAUN D. COHEN, Defendants.	) Docket No. 18 C 5587) Chicago, Illinois) February 10, 2023) 11:00 o'clock a.m.

VOLUME TWO
TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE YOUNG B. KIM, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	U.S. SECURITIES & EXCHANGE COMMISSION BY: MR. BENJAMIN J. HANAUER 175 W. Jackson Blvd., Suite 900 Chicago, Illinois 60604
For the Receiver:	RACHLIS, DUFF, PEEL & KAPLAN, LLC BY: MR. MICHAEL RACHLIS MS. JODI ROSEN WINE 542 South Dearborn, Suite 900 Chicago, Illinois 60605
For Freddie Mac, BC57, UBS, Thorofare, and 1111 Crest Dr., LLC:	DYKEMA GOSSETT BY: MR. BRETT J. NATARELLI 321 North Clark Street, 26th Floor Chicago, Illinois 60654
For Citibank, U.S. Bank, Wilmington Trust, Sabal, and Fannie Mae:	FOLEY & LARDNER BY: MR. ANDREW T. McCLAIN 321 North Clark Street, Suite 2800 Chicago, Illinois 60654
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Also Present:	MR. KEVIN B. DUFF, Receiver
Court Reporter:	MR. JOSEPH RICKHOFF Official Court Reporter 219 S. Dearborn St., Suite 1728 Chicago, Illinois 60604 (312) 435-5562

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PROCEEDINGS RECORDED BY
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(Proceedings had in open court, in part via telephone conference:)

THE CLERK: 18 CV 5587, United States Securities and Exchange Commission vs. Equitybuild, Incorporated, et al.

THE COURT: Good morning.

Do we have someone from SEC?

MR. HANAUER: Good morning, your Honor, Ben Hanauer for the SEC.

THE COURT: And the receiver?

MR. RACHLIS: Good morning, your Honor, Michael Rachlis on behalf of the receiver.

MS. WINE: Good morning, Jodi Wine also on behalf of the receiver.

MR. DUFF: Good morning, your Honor, Kevin Duff, the receiver.

THE COURT: And on the institutional lenders' side.

We've already gone through the names of the institutions. So, today, just let me know your name and I'm sure we can match it up later if necessary.

Go ahead.

MR. DAMASHEK: Ron Damashek, D-a-m-a-s-h-e-k, for Liberty.

I also would note that Brad Anderson was here yesterday for some other institutional lenders. He is out of town, but he is listening in by phone today.

MR. McCLAIN: Good morning, your Honor, Andrew McClain, M-c-C-l-a-i-n, appearing on behalf of the same entities noted on the record on Wednesday. And I would also note that Mike Johnson is appearing by phone, and he represents FHFA.

MR. NATARELLI: Good morning, your Honor, Brett Natarelli, N, as in Nancy, a-t-a-r-e-l-l-i, on behalf of the same institutional lenders referenced on Wednesday.

THE COURT: Thank you.

Oh, yes.

MR. FULLERTON: Good morning, your Honor, Tom Fullerton, F-u-l-l-e-r-t-o-n, for Midland Loan Services.

THE COURT: Thank you.

I think that we still have -- again, I'm referring to lenders' objection, Document No. 1210. We still have Objection Nos. 1, 2, and 11 left. But before we move forward to the specific objections, I have a question based on our last discussion.

So, based on the lenders' perspective, it sounds to me like the lenders would oppose any fees incurred by the receiver in connection with this particular motion practice to be charged to the properties for which the lenders have security interest.

Would that be fair to say?

MR. McCLAIN: Yes, your Honor, I believe that is fair

to say.

THE COURT: Even though the institutional lenders are causing the receiver to incur these fees?

MR. McCLAIN: Your Honor, yes, we are opposing the fees requested by the receiver. And the basis for opposition to that is what we believe the well-established case law and our rights. So, it's kind of a chicken-and-egg game, your Honor, because we need to preserve our rights and we need to assert our rights. But then we're also getting charged back for defending those rights by virtue of the receiver fees from challenging our liens and our rights.

And that goes to the Elliott case, where the case law says the properties and the secured lenders -- and what I mean by secured lenders, it's not necessarily just the, quote-unquote, group of institutional lenders. If some of the, quote-unquote, Equitybuild investors are deemed secured lenders, they're also paying for this.

And, so, the Elliott case stands for the proposition that the receiver is not entitled to surcharge any secured creditor's collateral for work associated with opposing or taking adverse action against those secured interests.

And, so, I want to make it clear that it's not just the so-called group of institutional lenders that are getting surcharged here; it's any secured creditor who's deemed a secured creditor that's going to ultimately pay for this.

THE COURT: Well, many claimants have not posed an objection. So, those claimants have nothing to do with forcing the receiver to file a reply brief and also to attend two days of hearings.

MR. McCLAIN: That is correct, your Honor.

THE COURT: Including -- including -- those with a secured interest.

MR. McCLAIN: That is correct, your Honor. Many of the, quote-unquote, investor -- Equitybuild investors are also not represented by counsel. So, in essence -- and I'm trying to be careful of professional responsibility, but we are almost advocating on behalf of all secured lenders because if it's determined that our clients are deemed subordinate and another institutional lender is deemed the senior secured lender, that institutional -- that Equitybuild investor is going to lose because the proceeds will have been depleted by whatever the Court's going to award from this motion.

THE COURT: So, where would the -- this is out of curiosity, obviously, because the issue isn't before the Court. Where would the fees come from if we were to take that position forward?

MR. McCLAIN: Your Honor, that issue is before the Court because the fees would be paid out of the unencumbered assets of the estate. And what I mean by that is -- as your Honor knows, this estate is massive. And there's a lot of

parties that assert secured interests. So, we have funds in which parties assert a secured interest, and then we have funds in which no party asserts a secured interest. And those latter funds are the unencumbered assets, and that's where the payment would come from if the Court determines that a particular fee should not be surcharged to the encumbered funds.

THE COURT: See, the idea that certain properties are encumbered and certain properties are not encumbered, I'm not sure that that distinction really applies in this particular case where many folks were victimized by the Cohens' fraud.

So, what difference does it make whether a property's encumbered or not encumbered? The purpose of the process is to liquidate and then to administer the assets to those who are, in fact, victimized.

I do understand that some claimants would have different rights -- well, let me -- I don't want to go down this path too much. This particular issue is not before the Court because the attorneys have not -- the allocation motion doesn't include any fees associated with filing the motion, replying to the motion, in support of the motion, and attending these hearings. And I'll let somebody else deal with it. Or maybe I'll have to deal with it at some point.

But I'm just curious. Let me ask this question of the receiver. And I certainly handle parts of the case, but

what's the genesis of maintaining separate accounts based on separate properties?

I ask this question because having read through the Elliott case, in that particular case, it was much simpler. All assets belonging to the estate were sold, liquidated; and, once we had a cash account, the receiver then had to help, essentially, allocate those funds to various claimants. But here, we have silos, essentially, of funds.

What's the genesis for that? Why not just sell all the buildings, put it into one account, and figure out who is entitled to what?

MR. RACHLIS: Your Honor, my recollection of that would lead back to the ruling on the rent -- the issues about -- associated with how rents were going to be utilized. So, this so-called rent allocation issue that your Honor dealt with on Wednesday.

Your Honor had ruled in February of 2019 that those rents were to be not used from Property A for Property B's repair. So, once there was -- and I'll go back to say that Judge Lee, prior to that point, also was well aware of that being the case and didn't -- and was fine with that until a ruling had come down associated with this rent allocation question.

So, once there was the rent -- the rent issue was resolved such that there would be -- rent for Property A would

be kept with Property A, there was then an effort to go ahead and do all the accounting and all the other -- whether -- irrespective of what was going to be happening, everything was going to be done property by property. That's really what was -- so, I would say that was the genesis.

And, then, of course, it's not that complicated when you have a sale of Property A when the proceeds of that would be available after expenses and things of that nature to go to that silo.

So, it was really, I think, at that point in time that we had basically the Court's indication as to what it wished to occur, and we followed that through -- up until this point. And, then, every order, for example, on a property sale or whatnot then would have an order saying that those proceeds would be kept in a separate account.

MR. McCLAIN: Your Honor, if I may just respond to that, because I do think that this issue is very pertinent to this motion.

Mr. Rachlis' position is partially correct, your Honor. The nexus of where the siloed sale proceeds came from and why they're, quote-unquote, encumbered is because when the receiver started to sell all 100 properties, we filed objections because we had liens on the properties. And, again, this isn't just the institutional lenders that had liens. It's anyone who claimed a secured interest in that

property had a lien on that property.

And we objected to the sale because if there was a sale, then our lien from the actual real estate properly flows through and sticks to the sale proceeds. And, so, Judge Lee recognized all parties' security interests -- not just the institutional lenders, but every party that claims a security interest -- recognized their secured rights in those sale proceeds and said, I want every single sale proceeds to be segregated; the liens that attach to the real estate will flow through and attach to the sale proceeds.

And, so, that's why we're here today. Because what the receiver wants to do is pay money out of the sale proceeds, all 100 accounts, that are encumbered by everybody's secured interest. So, it is very pertinent to this issue because, in essence, what the receiver is now doing is jumping ahead of every single one of the parties in one of those siloed accounts and saying, sure, you might have a secured interest, but I'm going to get paid above your secured interest and before you get any money.

THE COURT: Yeah, which has been litigated.

MR. RACHLIS: Yeah.

THE COURT: And the receiver prevailed on that particular issue.

MR. McCLAIN: Well, not fully, your Honor. And that's why we're here today.

THE COURT: Let's go to Objection No. 1, improper allocation. And we may have touched on this when Ms. Wine gave us the line numbers from the reply exhibit where the receiver found some errors. But let's go through this.

So, the first one I want to take a look at. Again, I'm getting these exhibit letters and line numbers from the objection document, Document No. 1210. Let's take a look at Exhibit C, Line No. 1840.

So, Line No. 1840 says -- it's categorized as asset disposition. Entry date is December 12, 2019. And the task description: .3 hours, exchange correspondence with E. Duff relating to a discrepancy in the financial statements. And it looks like .3 hours were allocated to all 103 properties in the amount of 41 cents.

MR. RACHLIS: Your Honor, may I ask one more time to repeat the line number. We're looking at 1840? Is that what your Honor had --

THE COURT: 1840, Exhibit C.

MR. DAMASHEK: Judge, Ron --

THE COURT: No, I apologize. I read the wrong line. I'm glad you caught that.

So, 1840, asset disposition, Entry No. -- I'm sorry, entry date December 16, 2019, .2 hours, teleconference with receivership broker regarding current status of closings, status of remediation of fire-damaged properties, and effect

on current offers, and timing of future motions to approve sales. .2 hours were then allocated to 95 properties in the amount of 82 cents per property.

Do I have that right?

MR. DAMASHEK: Ron Damashek.

That's correct.

THE COURT: Okay.

So, tell me, from the lenders' point of view, what is the objection with respect to this line entry.

MR. DAMASHEK: There are really two problems with it --

THE COURT: Oh, I'm sorry. Can I just stop.

Ms. Wine, is this one of the lines where the receiver said, hey, we made an error?

MS. WINE: It is not, your Honor.

THE COURT: Okay.

Go ahead, Mr. Damashek.

MR. DAMASHEK: So, there are two problems with this. The first problem is that this entry relates to the status of remediation of fire-damaged properties. This entry is being allocated against 95 properties. I am not sure of the number of fire-damaged properties. I know it's not 95. I believe it's a very small number of properties. And, therefore, it is improper to allocate charges related to fire-damaged properties across all of the properties because the work does

not relate to the secured -- to each of those 95 properties, nor does the work benefit each of those 95 properties. That's the first prong of this.

To the extent that the balance of this entry may refer to future motions to approve sales, for instance, this is a compound entry. And I liken this to any trial where a compound question is asked. You need to break the two parts out, and you can't have compound entries here -- and the receiver's task allocations are replete with such entries -- where you say this relates to everything, but the other half of it relates to something. How do we know which is which?

But in any case, either prong supports the objection.

THE COURT: Response from the receiver?

MR. RACHLIS: Your Honor, we did put that in writing, as well.

THE COURT: Hold on a second.

Mr. Rachlis, can you take the base of the microphone and just pull it closer to you.

MR. RACHLIS: Yes.

THE COURT: Thank you.

MR. RACHLIS: Is that better? I apologize.

THE COURT: Just making it easier on you.

Go ahead.

MR. RACHLIS: Thank you, your Honor.

THE COURT: What's the response?

MR. RACHLIS: So, we did -- it's in writing, as well, for your Honor in Exhibit 1, Row 4, of our Exhibit 1 to our reply brief. But it is basically that if you read the entirety of the narrative, it deals with the status on all unsold properties. The fact that there is some fire-related properties, which clearly is correct that there were less than 95, does not eliminate the fact that the purpose of the call was to discuss the status of all the unsold properties and strategies regarding same. And it seems that the task narrative is pretty clear about that.

And, so, when you consider both the narrative, as well as the law governing this in terms of they're not going to -- it would be virtually impossible to take four seconds or ten seconds of that call and somehow then separate it out. This is an earnest effort to properly allocate to those properties that were the subject of the call.

THE COURT: Thank you.

Let's go to a different number, see if we can get a better understanding. 2176, Exhibit C. And let's see what this says. So --

MR. DAMASHEK: Judge, the receiver agreed on this one.

MR. DUFF: Yeah.

THE COURT: Oh, okay.

Let's go to 2355.

So, 2355 Exhibit C says -- it's classified as asset disposition, entry date June 6th, 2020. The task description says: Begin preparation of spreadsheet listing all properties, associated litigation matters, judgment amounts, judgment dates, and payment status. 3.2 hours. And these hours were allocated among 79 properties, totalling $15.80 per property.

What's the objection here?

MR. DAMASHEK: Ron Damashek.

It's the same issue, just different type. Here, the focus of this task is litigation matters, judgment amounts, judgment dates, and payment status. All 79 properties that are the subject of this item do not have litigation against them, do not have judgments against them.

And the concept that Mr. Rachlis said, which is it's impossible to break these out, as the receiver, the receiver has an obligation when it's making its time entries initially to say, here are the 12 properties that have litigation matters; I can charge those for them, if that's an appropriate charge.

And to come back later and say, how do we break it out, well, the focus of this entry is the litigation matters. And we don't have any evidence which says there were ten, there were twenty, or how much of my time was just preparing a spreadsheet for all properties and how much was related to

litigation matters. But, certainly, the focus of this entry is litigation matters and judgments.

THE COURT: Let's take a look at one more exhibit. Let's go to Exhibit D. Just give me one second. This one I'm going to have to upload from the docket. I think I have -- so, Exhibit D is 150 pages, right?

MS. WINE: That's correct.

MR. McCLAIN: Yes.

THE COURT: So, let's go to -- it just says Page 109. So, Exhibit D, Page 109. And I guess it's dated July 1, 2010. Did I -- maybe I miswrote that down, miswrote the date. Page 109. This particular exhibit was harder to follow.

So, I'm on Page 109 of Exhibit D and July 1. So, are we looking at -- there's one entry dated July 1, 2019. Is that the entry we should be looking at?

MR. McCLAIN: Yes, your Honor. Andrew McClain on behalf of Exhibit D, I'll say.

THE COURT: So, here is the confusion. When I looked at the response, the response says, quote, confer with brokers M. Rachlis, A. Porter, and K. Duff relating to sale of the second and third tranche, 1.5 hours. But Exhibit D, Page 109, July 1, 2019, doesn't say that. So, I need to find out where I should be looking to get a better understanding.

MR. McCLAIN: Your Honor, I'm not sure what the technical difficulty is. But the time entry that you just

read is the correct time entry that we're objecting to.

MR. RACHLIS: Your Honor, we had indicated, I believe, on Wednesday that this is one that we had agreed that the allocation is incorrect.

MR. McCLAIN: And, your Honor, that highlights a point that permeates our entire objection on this point, is that specifically as related to Exhibit D, the receiver has conceded that over 50 percent of the fees that were allocated to the property in Exhibit D were improperly allocated. And we briefly touched on this on Wednesday, your Honor, where the receiver also acknowledged of all the objections that are identified in their reply brief, there is an error rate of 17 percent.

And I recognize that this provides an inherent dilemma for the Court. How do we go about determining what the mathematical error rate is? And I recognize without going through all 20,000 pages we won't be able to do that.

However, there is case law to support your Honor and your Honor's ability to apply an across-the-line percentage deduction for these fees. There's a case -- it's an SEC receivership case. It's the SEC vs. Capital Cove Bancorp, and it's 2016 WL 6078324. And within that case, the court was required to analyze a, quote-unquote, massive fee application. And the Court located various time entries that were of issue and were objectionable. But due to the restrictions on

reviewing every single line item, the Court imposed an across-the-board 3.6 percent reduction in the fees.

And that's what we would request here, is that the Court apply some sort of percentage reduction. And I recognize at the last hearing the Court voiced a concern, well, if we reduce those fees, is the receiver never going to be paid for those fees? And we have a proposal that any percentage of the fees that the Court reduces -- and this is separate and apart from the holdback --

THE COURT: Well, hold on. Let me stop you.

I don't think I ever voiced that objection because the only issue here is whether the receiver should be paid now.

But go on.

MR. McCLAIN: Your Honor, the issue here is where the receiver is going to be paid from. And, so, if the Court agrees with our objection that there is some sort of error rate, which the receiver has already conceded, then we would request that the Court apply some across-the-board percentage deduction in the receiver's fees.

And to alleviate the Court's concern that the receiver won't get paid for those fees, instead of that percentage of deduction getting paid out from the secured proceeds, that percentage deduction can be satisfied using the proceeds of the unencumbered assets. So, the receiver still

gets paid. It's just the source of the payment isn't from the secured creditors' collateral. The source of the payment is from the unencumbered assets.

So, for instance, if the Court were to apply a three-percent reduction on the receiver's fees, then that three percent reduction wouldn't come from the secured creditors' collateral. It would, instead, come from the unencumbered assets.

And this is not to acknowledge or waive our rights that these are proper fees. It's just a solution that we're trying to come up with to help the Court resolve this inherent dilemma of where we're at.

THE COURT: I understand that to be your alternate argument.

But let me go back and ask the receiver whether the receiver agrees with Mr. McClain's representation that the receiver has admitted to a 50 percent error rate to the entries represented in Exhibit D.

MR. RACHLIS: No, your Honor, we do not agree that that's accurate.

I believe that there is in Exhibit D 2,186 objected-to entries. So, if that were the denominator, the percentage is significantly less. It's probably -- I believe they said there were seven corrections that we agree with. So, the amount would be --

THE COURT: No, that's what I needed. That's fine.

MR. RACHLIS: So --

THE COURT: You dispute it. That's fine.

MR. RACHLIS: Absolutely. And, in fact, on the disputing part, I mean, there are 2100 -- 2186 objections on Exhibit D, 2800 objections in Exhibit C, 51,000 total objections that were made through these -- through their objections.

And I would also note that the ones that they've identified were, you know -- from their perspective, you would believe that they would have examined this closely and found some that had some potential issues. They cherry-picked a few totalling -- I believe there were 16 or so that were out there. So, the sample size that they're saying, we dispute wholeheartedly. Not just on Exhibit D, but with respect to the entirety of the objections that have been raised.

MR. McCLAIN: And, your Honor, I just want to clarify. I wasn't attempting to misrepresent anything. When I said 50 percent error rate, I meant specifically to the 13 examples we identified in the response brief, to which the receiver acknowledged in the reply brief that at least seven -- or seven of those, in fact, were improperly allocated.

THE COURT: Let me ask this question of the receiver -- well, before I ask the question, let me ask you,

Mr. McClain. I haven't read this case that you just cited. How did the Court arrive at 3.6 percent? What's the rationale?

MR. McCLAIN: I actually don't know, your Honor. But the facts of the case are that the court was reviewing a SEC receiver's fee application. And this actually goes back to your question on Wednesday about the purpose of holdbacks. The Court imposed a 30 percent holdback on all fees and then on top of that reduced it by this 3.6 percent. And it doesn't say in the opinion how the court came to that very precise percentage, but the court does note within the opinion several times about having issues with entries.

THE COURT: Mr. Hanauer, I'll give you an opportunity.

But I'm still having trouble looking at the right exhibit entry. Like I said, the response says Page 109. I'm on Page 109.

So, is the response incorrect in describing this particular entry as, quote, conferred with brokers M. Rachlis, et cetera, et cetera?

MR. McCLAIN: No, your Honor. That is the correct line item that we're objecting to. And if we're looking at Docket 1210 and it's Page 111 out of 150, that is where the entry appears.

THE COURT: So, this is a practice that you all can

rely on. When we're talking about a document, 1210-5, the page number you should be using -- and maybe I need to learn this. You don't get to see the page number anyway. The Court -- never mind. That's where the mistake is.

So, I go to 109 that's listed on the bottom of the page.

MR. McCLAIN: I see the confusion, your Honor. It's 109 of --

THE COURT: I see it now. I see it now. So, it's actually Docket No. 1210-5, Page No. 111. And it is July 1, 2019, and it's for $15. That's the one, right?

MR. McCLAIN: That is correct, your Honor.

THE COURT: So, this is something that the receiver has said that was in error?

MR. McCLAIN: That is correct, your Honor. And the issue here is this property 5001 South Drexel was sold in May 2019 as the, quote-unquote, first tranche of properties sold. But this time entry relates to the sale of properties in the second and third tranche. So, the time was allocated against this property in error for two reasons. One, this line item is two months after the sale occurred; and, second, it applies to a tranche of properties in which this property was not in.

THE COURT: Ms. Wine, that's accurate?

MS. WINE: That's accurate, your Honor. The fees were actually allocated to the first and second tranche

inadvertently. It should have been the second and third tranche. So, that's in our reply brief on the chart, we conceded that on -- it's Page 45 of 157.

THE COURT: All right.

Mr. Hanauer -- please have a seat. Go ahead and just pull the mic closer to you.

MR. HANAUER: Thank you, your Honor.

The SEC has stayed out of the individual allocation disputes, and we're not going to get into them. But as I'm listening to this, hearing this fight over, you know, 45 cents a property, $15 a property, one, the SEC would just note that for a task this large, I think one would reasonably expect there to be some errors in the process, given the tens of thousands of entries and the need to allocate over a hundred properties.

But I think this all comes back to the 20 percent holdback issue. It was the lenders that requested the holdback. And the rationale for requesting it, you can look in Docket No. 648. It's the lenders' objections to the receiver's sixth fee allocation -- or application. What the lenders are saying is, we need that 20 percent holdback because at this early stage we can't be sure that all of the receiver's efforts benefitted the specific properties. That's what the lenders are saying the reason is for the holdback.

And what I'm hearing about the errors now is that

they're below 20 percent. So, this is actually in the -- it just goes to the very reason that what the lenders were requesting in the first place, and it just seems to me there doesn't need to be an additional three-percent holdback or anything else like that.

These fees, as the Court is well aware, have been approved. It's not an issue of whether the fees were unreasonable or unwarranted or anything like that. It's just did a particular effort from the receiver benefit a particular property such that those fees trump the -- any secured creditor's right to payment. That's what we're here about.

And the 20 percent holdback already solves this problem. And I just don't think there's any need for additional holdbacks at the time just because the Court has already envisioned at the very end of the process there should be room for cleanup such that it just doesn't seem we should be fighting over these 45 cents or $15 entries or using them to necessitate further holdback of approved fees.

MR. McCLAIN: Your Honor --

THE COURT: I mean, I agree largely with what you said. But we're only dealing with a few cents or a few dollars only because we are looking at several line entries. When you add up those line entries, they do total something significant.

MR. HANAUER: And I was not trying to suggest that in

total they don't. But what I'm hearing is in total, they're less than 20 percent. And Judge Lee has already baked in the solution to that problem.

MR. McCLAIN: Your Honor, if I may address the holdback?

THE COURT: All right, Mr. McClain.

MR. McCLAIN: Thank you, your Honor.

I would just note that the Capital Cove case, the court imposed a 30 percent holdback plus the 3.6 percent. So, the fact that there's a holdback in place here doesn't nullify the ability of the Court to further reduce it.

I would also note that the holdback in this instance is actually 40 percent, not 20 percent, because the district court judge did rule that there's an across-the-board 20 percent holdback, and then any fees that are paid out of encumbered properties will be further held back by 20 percent.

But the purpose of the holdback isn't just to bake in an error or to give some sort of cushion. That definitely applies. The reason would also be to pay any trailing expenses or something like that or emergency expenses. But the other issue is there's also the need to hold back funds for any appeal.

If there's an appeal and an appeal is successful and the funds have already gone out the door to the receiver and the appellate court determines that not all of those funds

should have gone out the door to the receiver, well, then we have an issue of clawing back funds that likely have already been spent, and there is an inherent issue with that. So, that's another reason why there should be a holdback.

And the general basis for the holdback is that when the Court is awarding interim fees, which it's doing here, the Court doesn't have the ability to determine the full impact and benefit that the receiver has conferred on the estate. And the Capital Cove case discusses that specifically. And it says in the case even when it's awarding the fees there, it's simply too early to tell the extent to which its efforts will benefit the receivership estate.

And we are still in that phase, your Honor. Although this is an old case, there is a long way to go and we still don't know the full extent of the receiver's benefit to all the estate.

And I really want to emphasize that point because I think we're getting -- we're losing the forest through the trees here. This isn't just our group of clients that would be impacted by this. This is any secured lender that would be determined to have a secured interest in these properties.

And I would agree with your Honor that a few cents here and there adds up. Exhibit D property, they want to surcharge over a hundred thousand dollars of fees. So, these dollars and cents really do add up. So, I would agree with

your Honor on that.

THE COURT: Yes?

MR. RACHLIS: A few points. Thank you, your Honor.

As to the holdback issue, your Honor, the first eight applications Judge Lee actually -- there's no holdback on the approved fees. It's only Applications 9 through 16, I believe. And the 17th -- yes, Judge Shah on the 17th had also did a 20 percent. So, I think it was important to make that clarification.

Second, they're relitigating. The idea that Capital Cove somehow supports their views is just sort of dress-up for relitigation of the court's approval of the fees. In that case, actually the case they're citing, involved the application for fees, like the, you know -- like our 1 through 17, which have already been ruled upon. It wasn't so much of an allocation issue.

And in that context, the court said the following: When combined with our finding that the firm also engaged in the inflationary billing practices identified above, namely, the creation --

THE COURT: I'm sorry, when you read, you go faster.

MR. RACHLIS: I apologize.

THE COURT: Can you say that one more time.

MR. RACHLIS: I will.

I'm reading from star Page 4 of that decision. And

quote: When combined with our finding that the firm also engaged in the inflationary billing practice identified above, namely, the creation of specific separate billing events for brief, mundane tasks, the Court imposes an across-the-board reduction of 3.6 percent, which reflects a 20 percent cut in the hours claimed for receivership team communications.

So, it was focusing on an activity, focusing on a fee petition.

So, this is just another effort to now relitigate Applications 1 through 13 that Judge Lee has long approved. It's another way of relitigating the issue of benefit, which should not be relitigated. So, I would suggest that all of that should be put aside.

THE COURT: All right.

I'm ready to rule on the first, No. 1 objection, improper allocation. The receiver has admitted to certain errors, and they have committed to making those changes or corrections to make sure that certain allocations are not made. However, I have certainly gone through the line entries myself. And this is Exhibit 1 to the motion for allocation. I admit I didn't look at every single line, but I did look at a good chunk of those lines. And I don't get the sense that the Court should not rely on the receiver's representation.

And to your objection, Mr. Damashek, that there was block billing -- I think that's what you're saying, they're

block billing. The problem there is this: We only know what we see. In other words, what would have happened if Mr. Duff decides, oh, my God, I'm going to get objections left and right; I need to deal with one building at a time. So, let's talk about Building 56; okay, now I'm going to stop my clock, let's talk about Building 58.

My point is I don't get the sense from the billing that there was sort of capricious assignment of fees to various properties. It appears to me from reviewing the time sheets that Mr. Duff and his team did the best that they could under the circumstances to allocate these fees.

If you were to actually separate the block billing, the probability that the fees will be much more than 3.2 hours is high. In other words, the receiver may be spending more time as a result of having to not block bill.

And my guess is that everyone in this room has engaged in block billing. There's no way that you're talking to a client on the phone about various matters that's going on and you are actually billing this particular telephone conversation with .2 hours for motion for summary judgment, .3 hours for settlement. Probably not. I wish that were the case because I have to deal with fee petitions all the time. But that doesn't happen. I accept that as part of acceptable practice in the billing department.

In terms of these little problems that we are having,

again, under the circumstances they amount to no more than nitpicking. And I'm not saying that in a disparaging way that the lenders are nitpicking. But it doesn't change the fact that when we are talking about these various errors, it does amount to nitpicking.

And perhaps if the system was different, we would have a better accuracy. In other words, when we have 108 properties, maybe we should have had four receivers dedicated to specific buildings. But that's not the case. It is what it is. We only had one receiver having to deal with 108 properties.

And, again, from my review, I don't see how the objection should hold and deny the motion for allocation, at least based on the improper allocation objection. That's my ruling as to No. 1.

Let's move on to No. 2, general receivership activities.

So, here, I think, if I understand the argument correctly, there's not enough details to the task description to say whether these line entries actually fall within the two categories approved by the Court. The first category being the preservation, management, liquidation of real estate belonging to the estate, and the second category being the implementation and management of an orderly summary claim-priority adjudication process.

Do I have that right?

MR. DAMASHEK: Ron Damashek.

Yes, that's correct.

THE COURT: All right.

MR DAMASHEK: And it's also sort of the breadth of the reporting, which comes up in other categories, as well. But there really is no specificity that ties the entries to particular properties. They're really general administrative --

THE COURT: Let's go to an example. Exhibit C, I have 2184. Again, these line numbers are coming from the response brief. Exhibit C, 2184.

So, if I'm reading this correctly, it's for asset disposition, entry date April 15, 2020. Task description: Calculate prorated property taxes for various properties and update settlement statements regarding same, 1.4 hours. This is divided among 36 properties. Each property being charged $5.44.

Number one, I read the right line, correct?

MR. DAMASHEK: Correct.

THE COURT: Now, tell me, what is the objection to this particular line entry?

MR. DAMASHEK: Which of the secured properties of the 36 included in this task had taxes being allocated or prorated for them? This says various properties. Has the receiver

submitted evidence that all 36 of these properties were having taxes prorated for them? Similarly, with respect to the settlement statements, were the settlement statements for all 36 properties or were these some within this particular tranche?

We just don't have the specificity. It's, again, across a larger group of properties.

THE COURT: So, why isn't it specific enough that this line entry appears for the statements pertaining to the 36 properties?

MR. DAMASHEK: Well, the entry, like many others, says: Prorated taxes for various properties and updated settlement statements regarding those properties.

Is there any evidence submitted to this Court -- I don't believe so -- that the property taxes and the settlement statements were for these -- all 36 properties as compared to some within the tranche?

THE COURT: Mr. Rachlis?

MR. RACHLIS: We believe --

THE COURT: So, the idea here -- so, the objection here is, Mr. Damashek says, look, if you look at the entry, it just simply says various properties. How do you go from that description to 36 properties that you are dividing the fees among?

MR. RACHLIS: By having the timekeeper go back and

looking at what was going on on that date at that time and the reviews that were ongoing, and then having that process being reviewed by the receiver, who was also involved with those issues, or with others that were involved, in order to determine which properties, to the best of our ability, had these issues at that time.

THE COURT: So, tell me, you said timekeeper. Timekeeper is making this entry and then identifying 36 properties. How are you going from this entry to 36 properties?

MR. DUFF: Your Honor, Kevin Duff. May I respond?

THE COURT: Yes.

MR. DUFF: So, for those tasks that did not have an allocation in the original narrative, we asked all of the timekeepers to go back and look at every single one of those task items incrementally; to then provide an allocation for that task.

So, in this instance, the timekeeper, which I believe is Ms. Rack, who is one of our paralegals, went back, looked at what she was doing that day. I can't sit and tell you right now what exactly she looked at, but I presume she was looking at her notes from her timekeeping, her e-mails, the date -- any date stamps on documents she was working on and she came up with the allocation to confirm that the various properties was not all of the properties in the estate, but

was these 36. And, then, that allocation was then reviewed by either Ms. Wine or myself or both of us.

THE COURT: So, when we're billing files, usually the program that you're using, you have to put in the client code first, the task, and the time to be billed. What exactly -- what program is your office and your team using to track time entries?

MR. DUFF: We have a very manual process, your Honor. So, we don't have a time and billing system that allows us to, say, pull a dropdown where we can select, for example, which properties were at issue. We had to go in and add that manually. So, what we ended up doing over time was we adjusted the manner in which we were providing the allocations.

If you look at the later-in-time fee applications, you'll see that the task narratives always include the properties to which each task is allocated. Earlier in time, in the early days of the receivership, that wasn't being done as consistently. And that's why we had to go through the process of going back and making sure that those allocations were provided.

So, when your Honor's looking at the fee allocation reports that we've provided for the Court, that's because a determination was made to confirm which properties each of those tasks should properly be allocated to. We spent

hundreds -- frankly, more than a thousand hours of our firm's time to make sure that we got that right.

THE COURT: Let's go to a different entry. Take a look at Exhibit D. So, it's Page No. 133. June 6th, 2020. I think it's the second entry, right?

MR. McCLAIN: There are two entries, your Honor. Are you referring to the "assemble all files"?

THE COURT: Well, I mean, we can do that one, too. I don't really care. I was looking at the first blue line. But we can look at the second one, too.

So, the third entry on this page -- so, this is Docket No. 1210-5, 135 is the page number. The page number on the bottom of the document, it says 133 of 148. So, the third entry says: Assemble all files relating to any administrative or housing court proceedings pertaining to any receivership properties between 2018 and the present, 2.4 hours. And this is for 5001 South Drexel Boulevard, specifically for this property, right?

MR. McCLAIN: It's been allocated against this property, your Honor, as well as --

THE COURT: Oh, I see. Not all 2.4 hours.

MR. McCLAIN: Right.

THE COURT: A fraction of -- well, I guess .03.

So, tell me what is wrong with this entry?

MR. McCLAIN: Well, your Honor, this is --

THE COURT: Mr. McClain.

MR. McCLAIN: Yes. Mr. McClain.

This property was sold in May 2019, your Honor. So, this property was sold over a year prior to this. And, so, we just don't believe that this should be properly allocated to this property. And, then, in the receiver's response, he actually makes reference to the receiver needed to provide notice --

THE COURT: I'm sorry. Can you get closer.

MR. McCLAIN: I'm sorry.

In the receiver's response -- it's Docket No. 2030, Page 47 of 157 -- part of the justification for allocating this property -- or this entry to this specific property was the work -- excuse me, the receiver needed to provide notice of pending cases to prospective purchasers of each property.

There is no prospective purchaser here because this property was sold over a year prior to this time being incurred.

THE COURT: Response?

MR. RACHLIS: Your Honor, there are many times from the City of Chicago that notices are provided months -- months, if not longer -- with regard to violation notices. We've had that happen consistently throughout the receivership where we got notices associated with properties already sold, and those had to be dealt with, as well.

So, when we were looking to have a comprehensive review go on, there was -- it took care of both the fact that we were looking at current properties that weren't sold, as well as anything else that we'd be able to locate or deal with associated with notices that were out there, or judgments or anything of the sort, regarding properties that we ultimately would need to deal with. So, that's the situation. And that's been a constant not just for Drexel, but for other properties, as well.

MR. McCLAIN: Your Honor, this is a prime example of the type of work that would qualify under general operations administration of the estate. This type of work provided absolutely no benefit to this property. The property was already sold. Money was in the door for the sale proceeds. The work the receiver is doing isn't going to advance or benefit this property at all. This is just general administrative-type tasks that should not be surcharged to a specific property.

THE COURT: Yeah, but it's related to asset disposition. It's related to sales. I mean, one can't have a very -- too narrow of an interpretation as to what is considered management and sales. I mean, we have to take into account whatever task is -- whatever task needs to be performed that touches on these topics of sales, management, administration, those fees are proper, at least according

to -- at least the way I look at it.

But go ahead, Mr. McClain. You wanted to say something else.

MR. McCLAIN: Thank you, your Honor.

But that's not the standard that's promulgated in Elliott. The standard that's promulgated in Elliott is the secured creditors should only be charged for the benefit they actually receive.

THE COURT: I think you don't have to say that anymore, because I think we've discussed that issue at the last hearing, that there is this fundamental difference of an opinion as to how the objecting lenders see the nexus required and how the court -- at least the way this Court sees it -- based on prior rulings of the Court.

So, again, that's been said on the record multiple times, and that doesn't need to be repeated.

MR. McCLAIN: Understood. Thank you, your Honor.

THE COURT: Let me look at one more. Let's take a look at Exhibit D, January 5, 2021, Page No. 143. So, on the docket, it is Document No. 1210-5, Page 145, and it bears the page number of 143 of 148. We're looking at January 5, 2021.

So, if I'm reading the right entry, it's the blue entry, January 5, 2021. It says: Organization and research property information related to original Equitybuild purchase dates, recording dates, purchase price, Equitybuild debt, and

mechanic's lien regarding properties in receivership and previously acquired and sold properties and update Equitybuild portfolio spreadsheet.

And it looks like from the apportionment -- or I should say, allocation of .02 -- was this divided among all 103 properties? It's hard to tell from Exhibit D.

Anyway, let me ask the lenders, what is the objection here?

MR. McCLAIN: Well, your Honor, there's several issues here. One, the entry is extremely ambiguous. It is entirely unclear what is actually even happening, let alone which properties this applies to. And this is also charged to 5001 South Drexel, which was sold in May 2019. And, so, what work is the receiver doing related to mechanics liens or -- this entry just doesn't make sense in the context of the property it's getting charged against.

THE COURT: Mr. Rachlis?

MR. RACHLIS: I would say it's very similar to the prior -- to the rationale in the prior entry. Keeping in mind that these properties, these secured -- these claimants -- the process is ongoing still. So, there still hasn't been resolution of City of Chicago claims that could be filed or other types of things. So, 5001 Drexel was still part of the claims process, as were virtually every property. The claims process that Judge Lee ordered hadn't even begun yet. So, we

were -- it was still in negotiation.

So, we are still working on a host of things in order to be sure that what is there is correct, dealing with all the types of issues that you'd normally deal with associated with properties. Ongoing notices that are received and then dealing with claims, as well, so that we have that information as we're approaching working on the claims process.

THE COURT: Thank you.

I do understand the lenders' objection. It seems to be pretty clear on the surface: Hey, this property was sold in 2019, so why are you billing us for things that are happening two years later?

But I do accept the receiver's explanation that just because a property is sold doesn't mean that the receiver's job has ended with respect to that property, as explained by Mr. Rachlis.

And this kind of ties in nicely with what we discussed on Wednesday regarding title examination. It seems to me that it does -- it did make a whole lot of sense to really look into the properties in order to make sure that if there are any aftershocks, that the damage isn't going to be too great.

I overrule No. 2 objection in response 1210 titled, "General Receivership Activities."

Let me go to Exhibit -- let me go to Objection 11. I

think this is somewhat related to Objection No. 2.

Is that right?

MR. DAMASHEK: Ron Damashek --

THE COURT: Hold on.

Objection No. 11 is inadequacy of the receiver's explanation. This is again Response Document No. 1210 on Page 20.

Mr. Damashek?

MR. DAMASHEK: Yes, Judge. This relates to 2, as well as many of the other entries. Essentially, we have the receiver responding --

THE COURT: I'm sorry. Can I just -- hold your thought. Let's just go ahead and take a ten-minute break.

(Brief recess.)

THE COURT: We're back on the record.

Mr. Damashek, please. Sorry for the interruption. Go ahead.

MR. DAMASHEK: No problem, Judge.

This last category really comes up in the reply brief related to the receiver's explanations. We've had -- and I'm just going to ballpark -- let's say, a hundred objections. Receiver's come back and said 17 percent of these are incorrect, 40 percent of these -- and I'm now only talking about the entries, the hundred -- are incorrect. And we have explanations.

But there really is no evidence throughout a lot of our objections, the responses and the receiver's report itself as to the basis for them. So, for instance, where the receiver says, oh, that one that we said had 36 problems in it, it really only applies to six or seven properties. That's just the receiver concluding that without evidence to support it.

We've had a lot of explanations in court as to how 1.4 hours of time really apply to 36 properties rather than otherwise. But the essence of this Category 11 is we should have evidence. We should have detail.

As Mr. Duff stated, in the later entries, for instance, they put down every property to which a particular problem applied. But for the first year or so or more or less exactly, the receiver didn't do that. So, there's just this lack of detail and lack of evidence from which the Court or the other parties can make a determination.

Another example -- and I'll finish up here -- is the entry that might say "call" or the entry that might have a little bit more. The receiver said, well, you should go back and look at 10,000 pages of invoices to see what the balance of that entry said. And that's just not a burden that this Court should have to undertake or that we should have to undertake. The entries should have been detailed in the first place, properly supported in the first place.

THE COURT: Response, Mr. Rachlis.

As I understand the objection, many of these entries simply do not have enough information to allow a level of comfort for the claimants that these hours were, in fact, expended for the purpose described.

MR. RACHLIS: Your Honor, that argument in some sense is an effort to relitigate Judge Lee's and Judge Shah's ultimate approvals of every one of the fee applications. Every fee application that was provided was, of course, itself provided to the SEC, then provided to the Court. The Court approved each of those applications.

In addition, of course, every one of those applications was objected to by these same objectors. Those objectors could have and did try and argue with Judge Lee about every possible item. I mean, it's -- the docket speaks for itself. But nevertheless, the Court ruled on those. Not only found those to be appropriate, but also found that they were -- ultimately found that there was benefit that was provided to these properties.

So, in many respects, this is simply an effort to relitigate 17 -- ultimately, 17 different applications. So, I would suggest that that itself is inappropriate. But it also is -- it ignores a few other things.

The first thing that it ignores is the fact that the receiver has taken a big burden on. The receiver has gone

back and spent -- it's well more than a thousand hours of time on the after -- taking nothing but approved entries -- nothing but approved entries -- and going ahead and --

THE COURT: Let me stop you.

When you say you "burden," are you eating these fees?

MR. RACHLIS: There is -- we have not filed -- there is no -- none of the entries or issues before the Court are for recovery of any of the fees that have been --

THE COURT: I'm sorry, go on.

MR. RACHLIS: -- that's been present.

So, we've taken that burden. So, the idea somehow that there's been no burden that has been placed on the receivership in order to provide the information to the Court is absolutely false. I think the Court can see that just from all of the exhibits, all of the work that was done to go back through and create these allocations, these exhibits, everything of this nature.

The only party that hasn't executed a burden here is -- at this point in time would be these minority of objectors. The other secured creditors are -- alleged secured creditors and others have not filed their objections, have not -- told the Court they don't have an objection. After 17 different applications where these objectors go ahead and file whatever they wish to file and make their objections, now they're saying that they really don't have to do anything specific

about it, it's really our burden.

We have come forward and provided an extraordinary amount of information and they're still saying that, well, it's not really their burden, they don't have to do anything about it. And the Court can just reject everything based on that. Don't find that to be a very persuasive type of position to take.

But I'd go a step further, your Honor. What they reject is the practical nature of where this is at. They well know because they've been the most active participants in the building in terms of every step of the way, every action that has been taken. So, in 2019, when there was litigation about credit bidding or about sales of properties or about their sales process, our time is all entered and you can look chronologically at everything that was going on. The docket mirrors everything that was going on --

THE COURT: Let me stop you.

MR. RACHLIS: -- all with respect to their activities.

THE COURT: Let me stop you.

Mr. Damashek's objection really is the lack of evidence that certain entries should, in fact, be divided among 35 properties. In other words, I don't necessarily understand the argument to be re-litigating the reasonableness of the charges or the tasks performed are reasonable for

purposes of this case, but the lack of nexus between the apportionment of the charge over 35 properties and the task performed.

MR. RACHLIS: I would say that there's still -- the two responses that I provide are still applicable. One is the work that was being done in order to create the allocations themselves. I mean, we went back on the bills that were approved, all approved time. So, it's not like there was new things that were added. So, these were all from fee entries that Judge Lee had approved. And we have gone back to -- taken the burden of looking back in time. We have gone back and looked at the docket. We've gone back and looked at e-mails in order to make an earnest effort -- which is what the case law talks about -- in order to try and allocate. I don't know how that can be disputed.

But I also think that the docket itself, the activities that were going on -- which we reviewed in order to help provide the best allocations that we could, to make an earnest effort to do so -- those are all embodied within here.

So, the idea somehow that there's not evidence before the Court to tie that nexus, I don't think that's accurate. I actually think that the docket -- that the effort, the burden that we've provided and set forth in our pleadings that was done along -- that is objectively tied to all of the work and activity done by event, if you will, many of which were

created by these same lenders, is something that I think helps with that nexus that the Court is asking about.

THE COURT: Let me ask this question. Has the court ever -- in dealing with the fee applications, has the court ever cast doubt on the receiver's credibility?

Mr. Rachlis?

MR. RACHLIS: No, your Honor.

THE COURT: Was there ever an order questioning the veracity of any of the bill entries?

MR. RACHLIS: No, your Honor.

THE COURT: What about from the lenders' side? Any orders you can think of or any statement from the court?

MR. DAMASHEK: Ron Damashek.

Judge, I'm not aware of any statements questioning the credibility of the receiver with respect to the entries.

But the entries and the fee petitions were all viewed in the context of the estate, not allocation to the secured properties. And, so, the entire argument that Mr. Rachlis is making -- which is there were 17 fee applications and they could have reviewed the invoices -- the purpose of those fee applications were, were the fees proper or not. The court has ruled and granted whatever fees the court has ruled. What the court has never addressed is whether they should be allocated to the secured properties, and that's the purpose of this hearing.

MR. RACHLIS: Your Honor, may I just have one brief response?

THE COURT: Yes.

MR. RACHLIS: Actually, disagree that the court has not discussed the allocation rulings. I think that the court actually has said that with regards to fees that were incurred that benefitted the property -- and he found that there -- that these did benefit these various properties and such -- that those are properly allocated. I mean, he is -- I think there's absolutely -- that issue has been addressed not only by Judge Lee, who's had much -- a lot more time involved, but Judge Shah in his most recent rulings, as well. So, I don't think that that's a fair characterization.

Of course, it's fair that Judge Lee did not look at the allocations as your Honor's doing right now, but Judge Shah actually did on the last application and found those allocations to be appropriate.

THE COURT: Well, I don't know what that particular application had, so I really can't rely on that.

In terms of this particular objection, I am overruling the objection. I don't think that the Court can ask the receiver for the impossible. When we talk about evidence -- so, we have two, three standards. Even if we were to use a preponderance of the evidence, I mean, we don't want to have a trial within a trial. We don't want to have a

mini-litigation within a litigation. And I think the burden would be too great for the receiver to actually submit invoices and receipts showing the names of the buildings or the addresses of the buildings that pertain -- that are related to the task performed.

In our system, I think it's fair to say that there is a great degree of an honor system when it comes to accepting the representations of the attorneys -- not just the receiver, but attorneys -- as officers of the Court. For example, when we do discovery under Rules 33 and 34, oftentimes a signature is just good enough to actually accept that he or she made reasonable efforts to comply with the discovery obligations. When we talk about evidence, it can take various forms. The application itself is considered evidence. The allocation tables themselves are considered evidence.

I admit that I am not as informed as the attorneys in this room, but the task is before me to decide whether allocations are proper. And all I can do is to go through the briefs and the tables, the Excel spreadsheets the parties have submitted. And I'm not seeing anything for me to say, my gosh, we need to do this all over again because I don't trust it, I don't believe it, there are many problems with it.

And I am benefitting from the hearings on Wednesday and today to get a better look at what the objections are. But at the end of the day, I do believe that the receiver has

shown sufficient evidence and information to the Court to say that the allocations are proper. Proper enough, right?

And in terms of actually applying a wholesale discount rate -- if I understand that particular concept, what we're saying is, look, this particular fee allocation requests a sum certain. We should slash that by 3.6 or whatever percentage, put that amount on the back burner and we'll deal with it later. And on top of that, we should take 20 percent of that sub-total, put that amount in a different category so that we can deal with it at a later time.

I'm not willing to do that not only because Judge Lee has already ruled as to what exactly the protocol is going to be. I am to review whether the allocations are proper. I am to review whether those allocations are related to the two categories of fees to be awarded. Then only 20 percent of that is to be held back. So, I don't have the authority to apply this across-the-board discount rate.

Perhaps in that case you mentioned, SEC vs. Capital -- I forget the full name. But perhaps that judge is a district judge who had the authority to do whatever he or she wanted. I don't.

I do accept the receiver's representation that they have undertaken a substantial and herculean effort, quite frankly, in terms of going back and trying to figure out, okay, we have this entry, how do we divide it?

If you look at Exhibit 1 -- by the way, I was looking at the Excel spreadsheet native document, not the one on the docket -- you can tell that there was effort made to make sure that these tasks are divided in the right way. I'm not seeing a pattern where simply saying, oh, let's just put in ten properties for this task; we'll put in 103 for this task. I'm just not seeing that. And having gone through, understanding better the objections, my perception hasn't changed.

So, for those reasons, the receiver's first motion for allocation is granted.

So, what now has to happen is the receiver has to go back, redo the math, take out the amounts that have been resolved, reallocate the erroneous entries. And, then, what I need from the receiver is, I don't know what you would call it, a supplement to the fee allocation showing me what was asked for before, what is the correct amount now, what amounts have been fixed, and what amounts I need to approve in terms of distribution and holdback.

How much time do you need to prepare that supplement?

MR. DUFF: Your Honor, Kevin Duff.

I believe that that -- we need to check with a vendor that supports us on this effort and Ms. Wine is out next week. So, I'm going to say I believe we can do it in 21 days.

THE COURT: March 3rd.

Now, in terms of -- and I also need a draft order to

be e-mailed to the Proposed_Order_Kim@ilnd inbox, and I'll put that in the order today.

We also have to deal with the second motion for fee application. This is Document No. 1321.

And I take it that the lenders would like to file a response?

MR. McCLAIN: Yes, your Honor.

THE COURT: Okay.

How much time do you want?

MR. McCLAIN: Can we have 60 days, your Honor?

THE COURT: April 14.

MR. McCLAIN: Thank you, your Honor.

THE COURT: Reply?

MR. RACHLIS: 30 days, your Honor.

THE COURT: That's May 12.

I'm going to set a hearing so I don't lose track of this case.

Can you check your schedule for June 6th at 1:00 p.m.

MR. RACHLIS: Which day, your Honor?

THE COURT: June 6, 1:00 p.m.

MR. DAMASHEK: Judge, Ron Damashek.

Would it be possible to push it back a week further? I may be out of town that first week of June.

THE COURT: June 15, 1:00 p.m.

MR. RACHLIS: Your Honor, that's fine.

I'm reminded by my colleagues that we have a trial in May that may stretch into that week of May 12th. Would it be all right with your Honor if we had until May 19th to --

THE COURT: Yes.

MR. RACHLIS: Thank you, your Honor.

THE COURT: We'll keep the hearing date as is, June 15 at 1:00 p.m. in this courtroom.

Anything else from the receiver?

MR. RACHLIS: No, your Honor.

THE COURT: From the objectors?

MR. McCLAIN: Your Honor, I do just want to clarify the issue of the holdback and just to clarify what the Court's ruling is on that, and to respond to the statement by the SEC attorney.

If I understand it correctly, the district court judge has already ruled that there's an across-the-board holdback of 20 percent on all fees, and then there's an additional 20 percent holdback on any fees paid out from these secured properties. So, that's effectively a 40 percent holdback.

And the basis that the SEC took for basically opposing our objections and saying the holdback protects us in some way because there's still going to be these excess funds, well, we are concerned if the Court is overruling our objections right now, is the Court also taking the position

that we can never seek turnover of those funds at a later date?

THE COURT: I'm glad that you mentioned that because one thing that I forgot to mention is that when there are errors, the receiver has said, yes, we made those errors and we'll fix them.

And as you said, unfortunately, this case will go on for months, if not -- hopefully not, but years. And as I see it, the holdback is a way to have security that if more errors are located, the receiver will correct those errors and those funds will be essentially withdrawn or I should say pushed back to the back burner from that holdback.

That also reminds me we probably should have -- I'm sorry, when did I say -- oh, the supplement is due on March 3rd. We probably should have a hearing just to make sure that the holdback calculation and the other calculations are accurate.

Can you all check March 9 at 2:30.

MR. HANAUER: Your Honor, I will be out of town that day the following week. I don't necessarily need to be here if -- because I've been staying out of --

THE COURT: Let's see what the others say and then --

MR. NATARELLI: Brett Natarelli.

I have a conflict that day, Judge, I can't move.

MR. McCLAIN: I also have a conflict, your Honor.

THE COURT: Let's pick another date.

How does March 15th look, 1:00 p.m.?

MR. McCLAIN: Works for me, your Honor. And it looks like --

MR. NATARELLI: Your Honor, I have to be in DuPage County that day for another hearing.

THE COURT: Well, I'm not sure that we need everyone from the lenders to appear. This is really for us to have an opportunity for me to hear from the lenders whether the numbers are incorrect. Because the supplement is not going to be merit based. It's simply -- it's going to be just mathematical calculations as to what properties have been resolved. You know, this is the total some of the fees we're looking at and here's the holdback, right?

So, I probably just need one or two representatives from the lenders to be able to voice any concerns about the numbers. Does that make sense?

MR. NATARELLI: Yes. And I can send a colleague from our firm, your Honor.

THE COURT: So, I prefer to have that hearing as quickly as possible. So, if March 15 works for the receiver and Mr. McClain said he's okay with March 15, I'd rather do it on March 15 at 1:00 p.m. We'll do it in court.

Obviously, please feel free to notify our courtroom deputy if there aren't any issues with the numbers. And I'm

not saying that by saying that you don't have any issues with the numbers, you're somehow waiving any rights to object.

I'm sorry, going back to Mr. McClain's question, my ruling is limited to what I just ruled in terms of the fee allocation. I am not barring the lenders from doing whatever they need to do to protect your interests. And I don't know how else that I can answer that question. It's hard for me to say what you're foreclosed to do because I'm not sure what issues you're going to be raising.

But the first step is to get this supplement done, get the numbers right, get the order issued granting the motion in specific sums. Then the lenders can go to Judge Shah and deal with the objections.

MR. McCLAIN: Thank you, your Honor.

One other point of clarification. The supplement that the receiver is going to prepare, which entries are they supposed to correct? Are they supposed to conduct a review of the ones --

THE COURT: No.

MR. McCLAIN: -- we objected to or just the ones --

THE COURT: Correct. Just the ones they admitted to for the time being. Again, if there are other entries that are in error, then they'll be dealt with at that point.

MR. McCLAIN: Thank you, your Honor.

THE COURT: Okay. Thank you, all.

MR. RACHLIS: Thank you, your Honor.

MR. McCLAIN: Thank you, your Honor.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph Rickhoff February 20, 2023
Official Court Reporter

Exhibit C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	Docket No. 18 C 5587
Plaintiffs,	)	
vs.	)	
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, AND SHAUN D. COHEN,	)	Chicago, Illinois
	)	September 23, 2020
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - TELEPHONIC STATUS
BEFORE THE HONORABLE JOHN Z. LEE

TELEPHONIC APPEARANCES:

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For Shatar Group Farsaa, Inc., Hamid Esmail, Pakravan Living Trust:	CHERNY LAW OFFICES, P.C. BY: MR. WILLIAM D. CHERNY 111 East Jefferson Avenue Naperville, Illinois 60540

APPEARANCES (Cont'd):

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Also Present:	MR. KEVIN B. DUFF, Receiver MR. DAVID MARCUS
Court Reporter:	MR. JOSEPH RICKHOFF Official Court Reporter 219 S. Dearborn St., Suite 2128 Chicago, Illinois 60604 (312) 435-5562

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

THE CLERK: Case 18 CV 5587, United States Securities and Exchange Commission vs. Equitybuild.

THE COURT: Good afternoon.

So, first of all, who is appearing on behalf of the SEC?

MR. HANAUER: Good afternoon, your Honor, this is Ben Hanauer. And I believe also appearing on the call is Tim Stockwell for the SEC.

THE COURT: Good afternoon.

And who is appearing on behalf of the receiver?

MR. RACHLIS: Good afternoon, your Honor, Michael Rachlis and Jodi Rosen Wine will be appearing on behalf of the receiver. And Kevin Duff, the receiver, is also on the line, as well.

THE COURT: All right.

And with regard to the other people on the phone, there's really no good way of going about this as far as entering their names to the telephone conference. So, why don't we just go ahead and proceed. Let's see.

So, to those representing other investors or institutional lenders, we'll just -- particularly the people that are going to take the lead today, let's start with them -- please go ahead and state your name and state the client that you're representing today.

MR. GILMAN: Good afternoon, your Honor, my name is

Michael Gilman. I represent several of the institutional lenders, the mortgagees.

MR. DAMASHEK: Judge, Ron Damashek also representing several of the mortgagees: Citibank as trustee, Liberty EBCP, Thorofare Asset Based Lending, and Midland Loan Services, at least with respect to some of their loans.

And I think Mr. Gilman and I are going to take the lead today, with Mr. Gilman addressing discovery and confidentiality order-related issues. And I'll probably be addressing the other issues, depending on what the Court would like to hear.

THE COURT: Okay.

MR. MARCUS: Good afternoon, Judge Lee, this is David Marcus, a major Equitybuild investor, calling you from New York City.

THE COURT: Good afternoon.

MR. MARCUS: Good afternoon.

MR. CHERNY: Good afternoon, your Honor, my name is Bill Cherny. I represent several of the mortgagees we collectively call the Indiana Yates mortgagees.

THE COURT: Anyone else?

MR. BROWN: Kevin Brown, your Honor. I represent the investors Martha and Leroy Johnson.

MS. LaGROTTA: Good morning, your Honor, Michelle LaGrotta. I represent Capital Investors, along with a few

other of the claimants.

MR. KURTZ: Good afternoon, your Honor, my name is Michael Kurtz, K-u-r-t-z. I represent 1831 Fund I, LLC, which is a non-institutional lender.

MR. CLARK: Good afternoon, Judge, Zack Clark representing creditor Thorofare Asset Based Lending REIT Fund IV, LLC.

THE COURT: Good afternoon.

Anyone else that wishes to enter an appearance today?

(No response.)

THE COURT: So, I have taken a look at the status report that was filed late last night giving me an update on where things stand.

So, here's what I intend to do. I'm going to address some of the issues that are described in the joint status report first. Then I'm going to follow up with some of the open issues that need to be addressed after our last call on August 13th. And, then, I'm going to enter my ruling with regard to the dispute as to the receiver's proposed and proper role during the claims resolution process, to wit: Whether or not the receiver should make recommendation to the Court as to the priority of the liens for a particular property in the estate. And I'll also address the receiver's motion for approval of retention of additional counsel.

So, let's first start with the discovery.

So, I understand that everyone is still looking at the proposed discovery. I took a look at the redlines of the discovery requests that went back and forth.

At this point in time, are the parties still talking through some of the discovery -- I guess the scope of discovery requests? I see some of the notations that the parties have made.

Mr. Rachlis, at this point in time, are discussions continuing?

MR. RACHLIS: There are -- the answer is yes. There may be some areas where some guidance from the Court may be of assistance to help those conversations along, and probably those are reflected in some of the redlining that you've seen in the drafts that were attached to the status report.

THE COURT: Okay.

And from your standpoint, how much more time do you think you need for you and the lenders to figure out to come to a final determination as to what things you agree on and what things you can't agree upon?

MR. RACHLIS: If we get to the point of sort of like being at issue, to the extent that we're not there with any further comment from the Court, I would say that we'd be there very quickly, probably -- I don't know it would be longer than a week or so. Probably one more review of these various documents, along with any comments or guidance from the Court,

I would definitely think we are -- we're very close to being sort of at a point where there's -- as your Honor's seen, there has been a lot that has been, generally speaking, agreed upon. But the last rounds have focused on a few more centralized issues.

THE COURT: Mr. Gilman, anything to add?

MR. GILMAN: No. I think that there are maybe three or four issues that we need to work out. Perhaps the next step -- well, we'd like some guidance from the Court. But perhaps the next step would also be to, you know, hammer out -- have a conference call and hammer out particular issues in terms of what's being requested and the scope of the requests.

THE COURT: Okay.

My preference would be that the parties go ahead and have those meetings, and then just -- the parties can file a motion attaching their various proposal and identifying where they're at issue. And, then, I'll have a separate hearing where I just go through and make rulings with regard to what the final discovery requests should look like.

Before we proceed, I forgot to ask, Mr. Hanauer, whether the SEC has any particular thing to add to this issue.

MR. HANAUER: Thank you, your Honor. This is Ben Hanauer.

We don't at this time. We've been working with the

receiver and the institutional lenders; and, as long as we continue to be part of the conversation, then we're satisfied with the progress of things.

THE COURT: All right.

So, with regard to the outstanding discovery requests, I would like the parties to finish up their meet-and-confer in the next seven days and file a joint motion -- let's see -- by October 2nd attaching the various proposals and identifying for me what issues need to be ruled on.

And, then, the -- hold on for a second.

(Brief pause.)

THE COURT: And, then, with regard to when I'm going to set that hearing, I'll figure that out after we address some of the other issues. But I anticipate that I'll set the hearing probably sometime in mid -- early or mid-October, so that we can get going on this.

All right. So, let's now -- unless there's anything else that anyone would like to add with regard to discovery?

(No response.)

THE COURT: Okay. Let's now move to the protective order.

Mr. Gilman, what's going on with the protective order?

MR. GILMAN: It looks like we've reached an agreement as to -- to the protective order, other than with respect to

Paragraph 15(c), which is the provision concerning retention of documents once this litigation closes, as well as any related litigation closes. And our position is that we believe that counsel and the title companies should be entitled to retain all discovery that was exchanged during the course of the proceeding.

I believe the receiver's position is that only discovery that was filed with the Court should be retained.

The reason why we don't want that limitation is because, among other reasons, title companies have to report to their regulators, insurers and re-insurers with respect to -- you know, with respect to this matter. And, so, we don't want to foreclose them from using those documents or providing those documents to the insurers, re-insurers when necessary.

THE COURT: Mr. Rachlis?

MR. RACHLIS: Our concern is the breadth of the request. I mean, I think that we're -- the protective order itself has provisions which are agreed upon that require, essentially, the return of the documents at the conclusion of this litigation. And there's already an allowance -- a "notwithstanding" provision in 15(c) that allows certain materials to be held by counsel and the title insurer.

But the breadth of seeking all discovery materials is our concern, given -- you know, there's -- there doesn't seem

to be an articulated need for all that type of information. As your Honor knows, there's PII in there and there's records that can be, you know, revealed in some capacity.

And, of course, it's just inconsistent with the requirement that it be used just for this litigation. We understand that there's some exception. But the exception here that they're seeking to have seems to swallow the rule.

So, it's, essentially, an overbreadth type of concern that we've lodged.

THE COURT: Is the concern only with regard to the personal identifying information?

MR. RACHLIS: No. I mean, their -- the request -- discovery materials as defined in the protective order is very broad.

THE COURT: No, no, I mean --

MR. RACHLIS: It means all the --

THE COURT: I mean what is your concern with regard --

MR. RACHLIS: Oh.

THE COURT: -- to -- why not just let them keep it?

MR. RACHLIS: Yeah. It is definitely related in -- I would say in good measure to the PII-type of information that will be in there. And there's all kinds of that information that floats around with these potentially financial documents, whether they be bank accounts, whether they be home security,

loan documents. There can be all kinds of other financial-related documents that will have that PII. So, that's definitely a concern.

There's also sort of its overbreadth anyway, but the PII is definitely one of the major concerns and how that can be -- remain out there unnecessarily.

THE COURT: But doesn't the protective order address that by prohibiting the dissemination of the information produced in this litigation except for specific purposes?

MR. RACHLIS: Well, actually, the protective order does provide for its protection and then provides for its return at the conclusion of this litigation.

So, this is -- what we're talking about is an exception to that ultimate -- to what is supposed to be the conclusion and the narrowness of utilization for this purpose -- for this litigation, which is also a means of protecting that from being disseminated unnecessarily or being open to risk for its release unnecessarily.

So, it's, again, sort of the concern over the exception swallowing the rule.

But the answer is, yes, directly. We certainly are -- the protective order does protect that PII information.

MR. GILMAN: Your Honor, if I may speak to that.

That protection still remains once the case is over. Any material that's kept by either an attorney or title

company still must adhere to the terms of the confidentiality order and protect the material. So, the same protections would apply as would apply from the get-go.

THE COURT: Right. And there's nothing that the lenders or any other parties that has in the discovery can do with it beyond what is set forth in the protective order without getting further permission from this Court.

Is that correct, Mr. Gilman?

MR. GILMAN: That's my understanding, your Honor, yes.

THE COURT: So, if that's the only dispute, with regard to the issue of the protective order, I believe that a complete set of all discovery materials can be retained by the parties in this case, including those filed under seal. Obviously, they continue to be bound by the protective order.

But given, number one, the discovery in this case is going to be -- not every party is going to get all the discovery in this case because of the fact that the claims resolution process is going to be by property and by tranche. And, so, therefore, I don't think there's a danger in, for example, one lender getting all sorts of extraneous or irrelevant information, whether -- or related to people that aren't claimants with regard to the properties in which they have an interest.

And, so, I think that the concern, that somehow

allowing the discovery to be retained by the parties that they acquire through this litigation will be disseminated willy-nilly and really cause a lot of injury to people out there, is overstated. And, so, the protective order -- with regard to that dispute, I agree with the institutional lenders that that provision filed with the Court is not necessary.

Mr. Gilman, is there any other disputes between the parties with regard to the protective order?

MR. GILMAN: That was the only thing that we were not able to work out, your Honor.

THE COURT: Okay. All right.

Let's then proceed to talk about the Equitybuild documents.

Mr. Damashek, are you going to address that?

MR. GILMAN: Your Honor, I'm --

MR. DAMASHEK: No, I'm sorry --

MR. GILMAN: -- going to address that.

MR. DAMASHEK: -- Judge. Mr. Gilman was going to deal with that, as well.

THE COURT: Okay.

Go ahead, Mr. Gilman.

MR. GILMAN: Right.

Well, we've had meetings and reviewed proposals from many vendors, and we've narrowed it down to two. At this point, it's really kind of a pricing issue and a cost-sharing

issue in terms of how to go forward. And I guess we could use some guidance from the Court. We raised this issue before that there's a large cost to host these databases. And we would like to -- the mortgagees would like to have some of that cost shared by both the receiver and the investors, lenders. And the question is how to do that.

Some of the vendors that we're looking at, they don't -- there's not necessarily a fee for every group of users. It's just one fee. Then you might be able to have multiple users. Others, they would charge us a separate fee for each group of users that want to create and maintain private and protected documents.

And so, what we're wondering, if there's a way that, regardless of which vendor we use, anyone that wants -- the receiver or investor lenders who want to use the system have to pay a charge per month during the term that they need to use the documents. And we're talking about, I guess, a relatively nominal sum, especially when you consider some of the amounts at stake, of perhaps 2 or $300 a month for the use. And that's what we could use some guidance from the Court on.

THE COURT: Guidance in the sense of whether or not a monthly fee in that kind of ballpark, whether I would consider something like that to be reasonable?

MR. GILMAN: Yes, your Honor.

THE COURT: Mr. Rachlis?

MR. RACHLIS: You know, I guess I have two points. As to the receivership, I don't know that the receivership should be paying a charge to see its own documents. I understand that it's being housed and being done in this way. But I think that that in and of itself --

THE COURT: Mr. Rachlis --

MR. RACHLIS: -- I think, poses an issue.

THE COURT: Mr. Rachlis, we've gone through this around and around and around. The receiver thinks it's too cost prohibitive and the documents aren't relevant. So, if the receiver wants to use it, the receiver is going to have to pay some charge for it. That's just the way it is.

MR. RACHLIS: Well, that was what -- fair enough, your Honor.

The other point in terms of 2 or $300 a month, I mean, in terms of an amount, it does not sound to be, you know, horrible. If you annualize it, I mean, it certainly comes out -- it depends on how long a -- thinking about it from all the claimants' perspective, how long those claimants would need to have access. If they only need access for a couple of months, a two -- you know, $400, say, for two months does not seem to be, you know, a large sum to have that access. You know, it's simple and can -- you know, they can actually utilize it. It does not seem -- I mean, it's an

extra burden, but it does not -- on an individual claimant, but it does not -- appear to be an un -- a wholly unreasonable one or insurmountable because it's a low three-figure number.

But I do think it does depend a little bit in terms of how long. Assuming that it's for a short period -- short duration, that makes it much more -- it seems much more reasonable in that regard.

THE COURT: So, Mr. Gilman, with regard to those vendors that would have a program where a user would be charged a hundred, two hundred- -- something in that neighborhood -- -dollar fee to access the database, would a user then be able to, for example -- if I paid a subscription for it, can I then conduct all the searches that I want and just download the documents and print them out or save them into my own hard drive in some sort of useable format, PDF -- or maybe I can just print them out -- within that month, and then if that's the universe, if that's all the documents I need, then I don't have to subscribe beyond that month?

Is that more or less kind of how it's going to work, as opposed to the documents always being on the system of the particular vendor?

MR. GILMAN: My understanding is that anyone can download a document and save it to their own hard drive or print it out. So, they will have access to it. They initially gain access to it through the database, but once

they have access to it, they are free to download it onto their own hard drive or at least print it out. I'm assuming they can download it to their hard drive.

Or the program will allow them to maintain their own folders or files, if you will, on the system that are confidential. So, only that user would be able to look at them.

THE COURT: Okay.

Mr. Hanauer, anything to add to this discussion?

MR. HANAUER: No. Thank you, your Honor. As long as the investors are able to pay as you go as has been described, the 2 to $300 a month sounds reasonable.

THE COURT: All right. I agree.

So, Mr. Gilman, if the proposal is -- I mean, I haven't seen the rest of it, but if the question is whether I believe that a monthly fee of 2 or $300 a month for complete access to a database from which someone can search and download relevant documents is reasonable, then I agree the answer is yes.

MR. GILMAN: Okay. Thank you.

THE COURT: Okay. So, what I would suggest, the -- well, anyway, so does that help narrow down the vendors? Where are we with picking the vendors and the various actual proposals?

MR. GILMAN: As I said, we narrowed it down to two.

We're working on the pricing. I think at this point -- and I'm waiting for some other issues to be resolved. But I think that by the next status, by early October, we'll have -- you know, we'll have a vendor tied down and we'll have a written proposal in terms of the contributions to users and how they would access the system and things of that nature. We'll put together a comprehensive proposal before the next status hearing.

THE COURT: Okay.

It is the 23rd. Do you think you'd be able to submit a concrete proposal by the 9th?

MR. GILMAN: We can try. We might be able to, yes. We'll have to --

THE COURT: Okay.

And, then, if the proposal, itself, needs to be, you know, for -- I don't know -- for trade secret information or for business purposes of the vendor, if they would like the actual proposal and pricing to be placed under seal, that's fine. And, in fact, if you have two different proposals from two different lenders because they're structured differently and you want to submit both in the alternative, that's fine, too. And we can just talk about it at the next hearing.

MR. GILMAN: Okay. Very good.

THE COURT: Okay.

MR. GILMAN: Thank you.

THE COURT: All right. The next issue that I want to talk about is Mr. Marcus' request with regard --

Mr. Marcus, do we still have you on the line?

MR. MARCUS: Yes, I'm here, Judge. Thank you, your Honor.

THE COURT: -- that there be some way for other investors who are interested in exchanging information and talking about the case to get together, whether through counsel or not.

During the last hearing, the SEC and the receiver raised some justifiable concerns with regard to providing Mr. Marcus with that information. But I think as the discussion evolved, Mr. Marcus said that it would be sufficient if his name and contact information was simply circulated to the other investors and with some information to the effect that Mr. Marcus is an investor at such-and-such property, and that he is interested in speaking with other investors and/or their counsel with regard to the issues in this litigation. And while the SEC and the receiver and the Court do not endorse Mr. Marcus in any way or, you know, whatever language we need to make sure that the recipients don't think that Mr. Marcus has some sort of imprimatur of the Court or the SEC or the receiver, that the investors, if they want, should feel free to contact Mr. Marcus at his contact information, which would be a phone number and e-mail.

That's more or less the proposal; is that correct, Mr. Marcus?

MR. MARCUS: Yes, exactly right, your Honor. Thank you.

THE COURT: Okay.

After considering the arguments everyone contributed at the last hearing, I think that proposal is reasonable. And, in fact, I think it's a good one. I think it's a good one because to the extent that there are lenders who don't have their own -- for example, if there are lenders who don't have their own attorneys and they are not in the same tranche, so they don't have any conflict or have liens on the same property, lenders may want to pull together and hire joint counsel who can familiarize him or herself with the overall facts of the case, so there could be some economies of scale with regard to hiring counsel.

The receiver's proposal or observation that, well, all the claimants -- all the investors in a particular tranche or particular property will know one another's names, I don't think it's sufficient because it really doesn't address that issue, which is: To the extent that sharing information might assist the investors in learning more about the case and proving up or setting forth their own claims, I think that it's reasonable that the investors may want to talk to one another about it. And Mr. Marcus is willing to be at least

one point of contact in those efforts.

So, I'm going to direct the receiver to send out an e-mail to all of the investors for whom the receiver has e-mail information. Basically, an e-mail stating just that. That Mr. Marcus is an investor at such-and-such property; this is his phone number and e-mail; and, he has expressed an interest in talking to other people who have invested in the properties that are part of this litigation; and, that the investor -- the recipients of the e-mails can make up their own minds whether or not they want to contact Mr. Marcus; and, that Mr. Marcus is not endorsed in any way by the SEC, the receiver, or the Court.

MR. MARCUS: Your Honor, you said it better than I could.

I just want to say that if -- that the receiver, if he wants to, he could also put in the amount of money that I have invested, so that people know exactly that I have a major interest in this for myself, as well as for all the other investors, you know, that I invested $1,370,000 in this, and that I have a tremendous interest, and also want to see what we could do pooling our resources together.

So -- because right now, most of the investors don't even know what's going on. That's why you have so few involved in a call or -- I've been to Chicago twice last year. Unfortunately, because of the virus, I can't go to Chicago and

courts are closed. But this would be very helpful, your Honor, and I would deeply appreciate it. And I'm sure a lot of investors would appreciate that, as well.

THE COURT: So, Mr. Marcus, I don't think it's necessary to set forth the amount of your investment. But I think just identifying you as an investor who is interested in speaking and communicating and perhaps coordinating with other investors would be sufficient.

MR. MARCUS: Okay.

THE COURT: So, Mr. Rachlis --

MR. MARCUS: Fair enough.

THE COURT: Mr. Rachlis, can you make sure that that takes place, please, that the e-mail --

MR. RACHLIS: Yes.

THE COURT: -- goes out.

MR. RACHLIS: Yes. Yes. Absolutely.

Our only request while we're on the line right now is that Mr. Marcus provide us with the phone and e-mail address that he wishes be included. And he can just e-mail all that information to us directly, because I don't want --

MR. MARCUS: Okay.

MR. RACHLIS: --I want to have that all accurate and correct. And once we have that, yes, your Honor, we will follow through and get that accomplished.

THE COURT: All right.

MR. MARCUS: Thank you, your Honor. Thank you very much.

THE COURT: All right. Thank you, Mr. Marcus.

So, then a couple of other issues, getting back to the proposed claim resolution process.

By the way, my goal is to have the first tranche -- and we keep kind of setting the dates out, but I would like the first tranche of properties to start by January of next year at the latest. So, that's our goal. Okay?

With regard to the proposed claims process, the receiver provided a proposed claims process, along with a nice chart of how the receiver thought the process would go.

The primary objection by the investors and really the only objection -- by the lenders -- was that to the extent that the receiver was going to seek to avoid a lien based upon some sort of theory of either fraudulent conveyance or some other theory under applicable law, that the lenders wanted a process where they would know that the receiver would be pursuing such a theory in time to be able to conduct discovery with regard to that particular theory, so that they can address it during the briefing once discovery is completed and the parties are setting forth their arguments as to lien priority.

Mr. Gilman, Mr. Damashek, I think I characterized that correctly. Is that correct?

MR. DAMASHEK: I'm not sure, Judge -- Ron Damashek.

I'm not sure it's the only or primary issue. It's certainly a very significant issue, and you are categorizing that correctly. The concern being that we would be starting the process, conducting discovery without knowing whether the receiver was or was not going to assert claims.

THE COURT: Okay.

And the receiver's point was that, well, they need to conduct discovery to figure out whether or not such a claim is viable.

And, so, what I think we should do is after discovery -- we should just proceed with discovery, and then 14 days after the discovery deadline, the receiver must provide a disclosure to the lienholders for that particular property at issue if he wants to assert a claim of fraudulent conveyance or other sort of claim that would act to void or nullify a particular lien. And that is before he submits his opening brief.

Seven days thereafter, any of the lienholders can request leave of the Court to take additional discovery relevant to that particular theory. And, so, this way we're not going into -- the parties won't feel obligated to go conduct discovery with regard to such issues, with regard to properties and lienholders where the receiver really has no intentions of asserting such an issue.

Once the receiver -- once regular discovery is conducted, the receiver can then evaluate whether or not it is going to assert such a theory against a particular lienholder, provide the parties with a disclosure at that time; then that particular lienholder can decide whether or not they need additional discovery and what that is and request -- and seek such discovery from the Court; I'll take a look at it; and, then, if it looks reasonable and relevant to the theories, then I'll allow that discovery to take place, all before any sort of briefs are filed with regard to the liens related to that particular property.

MR. DAMASHEK: Judge, Ron Damashek again.

And I'm also going to potentially ask Michael Napoli, if he's on the phone, if he has any additional comments -- or any of the other mortgagees -- on this particular point. But I have a number of questions regarding this ruling.

First, when you say 14 days after the discovery deadline, I think contemplated in the receiver's proposal was written discovery, as well as oral discovery, and if you could clarify whether you're talking about all discovery or just written?

THE COURT: I'm talking about all discovery.

MR. DAMASHEK: The second question would be, what is meant by disclosing a claim?

As we set forth in our pleadings, when you're talking

about avoiding a lien, particularly when you're talking about fraudulent conveyances, rules require that allegations of fraud be set forth with particularity. I know that the Court has not wanted to put a burden on the individual investors to file complaints in form typically required by the Federal Rules. But if you're talking about claims of this type, it seems appropriate -- and we argued in our brief -- that the receiver should provide a formal pleading setting forth the details with particularity.

And a related issue would be in a normal context, again, as a claim of this magnitude, that you would not only just do discovery, the parties against whom such claims would be asserted would typically have the right to respond to those claims, including moving to dismiss if there's a lack of particularity, and giving them the fair opportunity for hearing and protecting their positions.

THE COURT: Basically, the disclosure will be -- will consist of identifying the lien that the receiver will seek to nullify or void and the factual basis for that claim, for lack of a better word -- for that legal claim. That's what disclosure is going to require. And, so --

MR. NAPOLI: And you --

THE COURT: -- the receiver is going to have to be responding to an interrogatory.

You know, the receiver should -- one way to think

about it is as though the parties in the case sent the receiver an interrogatory saying, "Are you going to seek to nullify a lien with regard to the property at issue; and, if the answer is 'Yes,' set forth the factual basis for such a theory."

MR. DAMASHEK: And will the parties against whom such claims are asserted have an opportunity to challenge those claims prior to discovery, such as by a motion to dismiss or other procedure, as they would normally have an opportunity to do.

THE COURT: No. They will at the end, but they won't initially.

MR. DAMASHEK: Meaning prior to discovery?

THE COURT: Yes, that's correct.

MR. DAMASHEK: Those were my questions. I would like to give, whether it's Michael Napoli or other members of the mortgagee group, an opportunity to ask other questions if they have any at this time.

THE COURT: That would be fine.

Mr. Napoli?

MR. NAPOLI: Yes, your Honor. This is Michael Napoli, N-a-p-o-l-i. I also represent Midland Loan Servicing. I've got questions.

You said that you would consider leave to take additional discovery. Do you have some idea of what the

parameters of that would look like?

And the reason I ask, your Honor, is a fraud- --

THE COURT: Mr. Napoli, I don't at this time. It depends on how --

MR. NAPOLI: Okay. I mean --

THE COURT: -- involved the theory is?

MR. NAPOLI: Yeah, I mean, is there -- is there any way that we could have a right to take discovery within some set period of time?

I'm concerned that we would feel that we would need to begin this process before actually hearing it by reviewing documents and undertaking a fair amount of work before we know for sure. Because I'm very concerned the latter part of the process we may get time limited. We may get discovery limited. And, you know, we may need to bring in expert witnesses if we're talking about insolvency theories.

THE COURT: Mr. Napoli?

MR. NAPOLI: I'm just concerned -- yes, your Honor.

THE COURT: All I can say is that if the receiver asserts such a theory, then to the extent the lenders need discovery -- that is, of facts relevant to that theory -- that they'll be given a reasonable amount of time to do so. That's all I can say because I don't know what those theories are. I don't know how far -- how broad the receiver is going to -- those allegations will be or how narrow it's going to be or

what the basis of that theory is going to be.

So, that's just going to have to be tailored to the process as we go forward, depending upon the particular lien and the particular property.

MR. NAPOLI: Another question, your Honor.

It strikes me that some of the theories that the receiver may assert -- for example, if it's a fraudulent transfer theory and there's a question of insolvency, that would be something that various parties might wish to do it once rather than facing this challenge of it comes up in one tranche, I can't take discovery; so, either I'm stuck with someone's discovery, which I didn't think was particularly -- I'm not saying it would be, but, you know, may not be what I thought would be appropriate, but being limited later.

Would you consider if there is such a fraudulent transfer theory -- something like that, that would cover various tranches -- allowing all of the investor lenders to participate?

THE COURT: At this time, I do not know.

MR. NAPOLI: Okay.

THE COURT: Because, again, I would have to see what the issue is before me.

MR. NAPOLI: Just to be clear, when I said "investor lenders," I really meant the institutional lenders and mortgagees.

THE COURT: Yes.

There are lots of different possible scenarios out there. But it would not be fruitful for me or us to try to ferret out to track that -- you know, run after each possible ball to see how we can address it. It's going to be -- it's a flexible process by law, and I think this is why.

So, all we can do is create a general framework, so the parties have some expectation of going forward. And the Court needs to be mindful of the fact that before I adjudicate any of these claims, that everyone must be given their right of due process with regard to their investments and their liens.

But as to what that means, what is reasonable with regard to one claim might not be reasonable with regard to another. And, so, Mr. Napoli, while I understand the concern and your desire for some sort of certainty, what I can tell you is I can say something now and once we get there, if I don't think it makes sense, I'm just going to say, you know what, what I thought before doesn't really make sense, so we're going to do it this way.

MR. NAPOLI: Understood, your Honor.

THE COURT: Okay.

MR. NAPOLI: I have no other questions, your Honor.

THE COURT: All right.

Mr. Rachlis, anything?

MR. RACHLIS: No, your Honor.

THE COURT: Okay. Very good.

MR. WELFORD: Your Honor, this is Jay Welford on behalf of Liberty.

One question?

THE COURT: Yes.

MR. WELFORD: I understand that the receiver will be providing this summary to us, you know --

THE COURT: I would call it disclosure.

MR. WELFORD: Disclosure.

Will we ever receive it -- for example, the disclosure of a fraudulent conveyance claim. Will we ever receive a complaint with -- that complies with Rule 9?

THE COURT: No. The receiver is not going to be required to file a complaint.

MR. WELFORD: Thank you for the clarification.

THE COURT: You're welcome.

All right. So, the next thing on my list is the receiver's motion to retain additional counsel.

With regard to that -- that is Docket No. 759 -- that motion is granted. As stated in the order appointing the receiver, "The receiver, subject to Court approval, may engage and employ attorneys as the receiver deems advisable and necessary in the performance of his duties." That's ECF No. 16, Paragraph 54.

Having reviewed the submissions, the Court is persuaded that the retention of additional counsel is appropriate here to assist the receiver with regard to the claims -- type of claims -- that it wishes to bring, particularly because: Number one, the claims are of a nature to try to maximize the value of the estate; and, two, with regard to the compensation as to attorneys' fees, the retention agreements would define that relationship as a contingent fee-based relationship. And in the end, it's also subject to the review of the SEC and the approval of the Court. I also note that the SEC does not object to the motion.

And, so, given that, the receiver's motion for Court approval of the retention of additional counsel, Docket No. 759, is granted.

The last thing I had on my list before we set another status hearing date is my ruling with regard to the dispute that the parties have identified with regard to the proper role that a receiver may take during the claims resolution process. Specifically, certain claimants -- here the institutional lender claimants -- argue that the receiver should not provide any recommendations to the Court regarding the priority of claims or liens for any property that is part of the estate.

For his part, the receiver disagrees, arguing that

providing the Court both with evidence that the receiver deems relevant to various priority disputes, as well as non-binding recommendations on those disputes, are within his role as a receiver and an officer of the court.

After reviewing the briefs submitted by the parties, considering the arguments from counsel, and exercising the discretion to manage the case in a way that would both maximize the amount of the estate, to the extent possible, and to create a procedure by which all claimants can advocate for their own claims and interests in accordance with due process, the Court finds that efforts by the receiver to provide a recommendation to the Court as to claim priority are legally permissible. And, in fact, in this case, it would help assist the Court in its efforts to fairly distribute the assets of the estate.

Accordingly, the receiver's request that he be permitted to provide recommendations as to claim priority as to any particular property to the Court for the Court's consideration is granted.

First, the receiver's proffered assistance would be within the scope of his legally recognized duties. Federal equity receivers, who are officers of the court, have multiple duties, including preserving receivership assets, administering receivership property suitably, and assisting in any equitable distribution of the estate -- of the assets,

rather. That's SEC vs. Schooler, 2015 Westlaw 151094 at Page 1, Southern District of California, March 4th, 2015.

As such, the receiver is obligated to advocate to the Court what he or she believes to be the best course of action to distribute the receivership estate's assets. That's the same case. See also Liberty Capital Group vs. Capwill, 462 F.3d 543 at 551, Sixth Circuit 2006, explaining that a receiver's duties includes, if needed, assisting the district court in the distribution of assets.

In arguing that the receiver's proposal is legally improper, the institutional lenders cite to a line in Scholes, S-c-h-o-l-e-s, vs. Lehmann, 56 F.3d 750 at 755, Seventh Circuit 1995, that the "only object" of the receiver in that case was "to maximize the value of the asset for the benefit of their investors and any creditors."

However, reading that passage in context, this statement merely juxtaposed the intentions of the mastermind of the underlying Ponzi scheme -- who was earlier in charge of the estate and did not have the estate's best interest at heart -- with the role of the receiver, who sought only to maximize the estate's value. That case does not and did not speak to the propriety of the receiver's efforts to facilitate the distribution of an estate's assets.

The lenders also contend that the receiver's proposal would amount to improperly serving as the investors' --

individual investors' -- advocate. But the receiver is more accurately regarded as serving and helping this Court, rather than the individual investors, in reaching a fair distribution of the estate's assets. For example, in SEC vs. Elliott, 953 F.2d 1560 at Page 1577, Eleventh Circuit 1992, the Eleventh Circuit rejected the appellant's argument that the receiver was an adverse party, and that his work was intended to deprive them of their secured interest. Instead, the court noted that, "the receiver is an officer of the court," and thus "even though the receiver may at times take adverse positions to certain claimants, the receiver acts under the supervision of the court; for the court must independently approve the receiver's legal and factual findings."

Relatedly, the lenders note that the receiver will be conducting discovery as part of the claims process, which they believe can have no purpose other than advocacy. Their support here is a line from Bond vs. Utreras, U-t-r-e-r-a-s, 585 F.3d 1061 at 1075, Seventh Circuit 2009, stating that, "discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." But Bond was simply explaining why unfiled discovery materials were usually withheld from the public; namely, that the purpose of discovery is to help resolve legal disputes rather than to promote public disclosure of information. Bond does not stand for the proposition that

anyone conducting discovery to help resolve the dispute is necessarily an advocate of any one party or the other.

The lenders also argue the receiver lacks standing to assert the rights of legal interests of others. There's a substantial difference, however, between presenting relevant evidence or recommendations with regard to lien priority or claim priority to the Court for the Court's consideration than asserting the rights and legal interests of the investor claimants. Here, the Court finds that the receiver's role is the former and not the latter.

The case that the lenders cite, Troelstrup, T-r-o-e-l-s-t-r-u-p, vs. Index Futures Group, 130 F.3d 1274 at 1277, Seventh Circuit 1997, merely holds that a receiver does not have standing to file a lawsuit on behalf of an entity outside of the estate. That is not what is at issue here.

Additionally, the lenders argue that the receiver, by recommending the resolution of priority disputes, will, in effect, serve in a judicial role similar to a Rule 53 master. But, again, providing mere recommendations to the Court for the Court's consideration is distinct from a report provided by the master, which is automatically granted and entered if no objection is filed. That's Federal Rule of Civil Procedure 53(f).

Additionally, the receiver is an officer of the court. And, so, engaging in activities that would assist the

Court in arriving at a fair and appropriate distribution of the assets is appropriate and, again, legally permissible.

Finally, the institutional lenders assert that the receiver will be conflicted because he may recommend to the Court to void certain liens but not others. But, again, this is in the context of recommendations to the Court with regard to the distribution of the assets of the estate. And, again, this is permissible.

Finally, the Court finds that in this particular context, given the type of investors at issue in this case -- which include both institutional lenders, as well as individual investors -- and the wildly disparate amount of investments that each individual investor made in the various properties that were involved in the underlying scheme, that allowing the receiver to provide recommendations to the Court will facilitate the Court's review of the record in this case and assist the Court in coming to its determinations.

Now, to be clear, the Court will be considering much more than just the receiver's recommendations. And the Court will not give any additional weight to the recommendation of the receiver merely because it is coming from the receiver. The Court will consider, as set forth in the claims resolution process, the views of all of the claimants that would be involved with regard to a particular property at issue in this case. And it's after considering all of the records available

to it and the arguments presented by the parties that the Court will arrive at its final determination with regard to lien priority as it relates to the properties that are part of the estate.

So, for those reasons, the receiver's proposal that he be allowed to provide the Court with his recommendations as to priority of liens as they pertain to the properties that are within the estate is granted.

So, that's all I had on my list for today.

Mr. Rachlis, was there anything else that I could address other than setting another status hearing date?

MR. RACHLIS: No, your Honor. Setting another status date is more than fine.

Your Honor knows that there are a few other pending motions in regards to some items associated with -- there are two properties that are still subject to the ninth motion for approval of sale. There were two -- there's one objection on the second motion regarding rent restoration.

There are issues associated with the intervention motion. Your Honor will recall that that's just a file associated with three other properties that were subject to a motion to confirm sale.

Those are all pending. But we know that your Honor will be ruling on those in the coming days, weeks, what not.

So, a status date, I think, outside of those issues,

is more than fine.

THE COURT: Mr. Hanauer?

MR. HANAUER: Nothing from the SEC. Thank you, your Honor.

THE COURT: Mr. Gilman, anything else?

Mr. Damashek, Mr. Napoli?

MR. DAMASHEK: Judge, Ron Dama- --

MR. NAPOLI: Go ahead.

MR. DAMASHEK: Oh, go ahead, Mike. Michael, go ahead.

MR. GILMAN: I was going to say I think that there are other issues pending but -- I mean, other issues out there. But I think this is fine for now and set the matter for further status in October.

MR. DAMASHEK: Judge, Ron Damashek.

In terms of other issues, I believe that at least one of the mortgagees has filed a couple of motions for distribution of funds related to sales where there were no competing priority lien claimants. So, I know those are out there and the process is being briefed.

I believe the receiver has seventh and eighth fee apps that are out there, and I believe the receiver may have filed his reply brief on that today. We filed objections to those, which we understand that the Court will consider both as to the fees and as to the receiver's request for liens in

those fee apps.

In addition, I believe there are additional issues related to the dispute resolution process that will have to be addressed. And I don't know if at some point the Court contemplates a comprehensive order addressing that disputed claim process. But, certainly, one of the issues in there that has not yet been addressed is the request for a receiver's lien that's included in that motion, which is in addition to the receiver's lien requested in several other motions that are on file. And, respectfully, the institutional lender/mortgagees respectfully disagree with the Court's ruling that its just made in terms of the receiver's role. But we clearly have a receivership that's drowning, that's under water, that should not be incurring fees, and certainly the individual -- I think all parties should object to the receiver's request for a lien when there is no value to the estate being added by his conduct. And we set that forth, in part, in the response to the disputed claim resolution motion and, then, also, in much greater detail in the seventh and eighth fee applications.

So, we just wanted to make sure that that issue of receiver's lien is somewhere on the Court's mind in the context of a receivership that doesn't have any money and the receiver is now going to be spending more time and energy. And the mortgagees certainly object to any attempt to assert a

lien or assess those charges against them, especially in light of the adversarial nature of the relationship as it comes to the briefing and the issues before the Court between them and the receiver.

THE COURT: Okay.

MR. NAPOLI: Your Honor, this is Michael -- sorry, your Honor.

THE COURT: Go ahead.

MR. NAPOLI: I was just going to say I've got nothing else --

THE COURT REPORTER: Name, please, sir?

MR. NAPOLI: Michael Napoli.

I've got nothing else other than to follow up briefly with something Mr. Damashek said.

Does the Court plan to enter an omnibus procedural order, and is that something you would like the parties to begin work on a form of order?

THE COURT: Not at this time.

MR. NAPOLI: Thank you, your Honor.

THE COURT: Not at this time to both questions.

What I'd like the parties to do, however, is by October 2nd -- I think I have a comprehensive list of the open issues that I still need to rule on. But counsel on the phone, obviously you guys are living with this case every day and I have 360 other cases. So, what I would like the parties

to do is meet and confer, and by October 2nd I would like you to file a joint status report identifying all the motions and/or issues that are raised in motions that the parties believe I still need to address. Okay?

And if you can reference -- put docket number references in there, that would be helpful, just so that I am sure that I cover all of the different disputes that the parties have raised so far and that I'm not missing anything. Okay?

And it's my hope that by the next status hearing, which will take place on October 27th at 2:00 p.m., that I will be in a position where I will have ruled on all of those issues that the parties have identified on October 2nd.

If past is prologue, between October 2nd and 27th, there may be other issues that come up; but, by October 27th, I will have tried to address all the open issues that are identified by the parties in their October 2nd submission.

All right. Unless there's anything else, thank you very much.

MR. RACHLIS: Thank you, your Honor.

MR. GILMAN: Your Honor.

MR. MARCUS: Thank you, your Honor.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph Rickhoff September 28, 2020
Official Court Reporter