No. 23-1870

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff -Appellee,
and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.,
Defendant,

APPEAL OF: BC57, LLC.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern, Division
Case No. 1:18-cv-05587
The Honorable Manish S. Shah

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT, BC57, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: SEC, et al v. Equitybuild, Inc., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

BC57, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Loeb & Loeb LLP; Bernstein, Shur, Sawyer & Nelson, P.A.; Goldberg Kohn Ltd.; Dykema Gossett, PLLC;

Maddin, Hauser, Roth & Heller, PC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

BC57 is 100% owned by Bloomfield Capital Income Fund II, LLC.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Andrew R. DeVooght Date: 5/15/2023

Attorney's Printed Name: Andrew R. DeVooght

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

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N/A

Attorney's Signature: /s/ Alexandra J. Schaller Date: 5/15/2023

Attorney's Printed Name: Alexandra J. Schaller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

In the proceeding below, the United States District Court for the Northern District of Illinois had jurisdiction over this case under 28 U.S.C. § 1331. Jerome Cohen and Shaun Cohen ran an alleged securities fraud scheme through their real estate companies. (R.1.[1]) The United States Securities Exchange Commission brought an enforcement action against them, alleging fraud at some point in the operation of the companies. *Id.* Thereafter, the District Court appointed a receiver to take control of the companies' assets, liquidate such assets, and to advise the District Court on distributing the proceeds. (R.14.) On February 15, 2023, the District Court issued an opinion and entered an order "focuse[d] on claims to the liquidated funds from five properties (the so-called 'Group 1 claims')." (A01, the "Priority Order.") As the District Court explained, "[m]ultiple individual investors, as well as private lender BC57, invested in these properties," such that the "issue is which of the parties has priority to receive the funds liquidated by the receiver's sale of the properties." (*Id.*) The District Court concluded that the individual and entity investors' (the "Investor-Lenders") "mortgages have priority," such that the Investor-Lenders "have priority to the funds." (*Id.*) The District Court further instructed the Receiver to "submit a proposed order for disbursement of the proceeds from the Group

[1] This brief employs the following citation format, consistent with the Federal Rule of Appellate Procedure 28(e): "R." refers to docket entries in the record on appeal. "A__" refers to the short appendix bound with the brief and "SA__" refers to the separate appendix.

1 properties" implementing the District Court's decision that "[t]he individual investors' mortgages have priority." (A30.)

On March 7, 2023, BC57 filed a notice of appeal from the District Court's February 15, 2023 Priority Order, as well as a corresponding docketing statement. (R.1403 & 1404.) On March 15, 2023, the Court of Appeals for the Seventh Circuit issued an order acknowledging BC57 sought "to appeal [the District Court's order] establish[ing] a priority of claimants as to the proceeds from the sale of various investment properties." (*SEC v. Equitybuild, Inc.*, Case No. 23-1450, Dkt. 2.) The Court of Appeals further noted that the District Court's February 15, 2023 order "direct[ed] the receiver to 'submit a proposed order for disbursement of the proceeds.'" (*Id.*) Accordingly, the Court of Appeals observed that "it appears that the district court has more work to do before the order is final and appealable." (*Id.*) The Court of Appeals ordered BC57 to file jurisdictional briefing, explaining that "[a] motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement." *Id.* On March 22, 2023, BC57 filed a motion to voluntarily dismiss the appeal. (*Id.* at Dkt. 5.) On March 23, 2023, the Court of Appeals granted BC57's motion and dismissed the appeal. (*Id.* at Dkt. 6.)

This appeal is taken following the order of the United States District Court for the Northern District of Illinois entered on May 3, 2023 by the Honorable Manish S. Shah, directing the Receiver to disburse the proceeds from the sale of the investment properties, "[p]ursuant to [the District Court's February 15, 2023 order] determining the priority of claimants to liquidated funds from the sale" of the Group 1 properties

as between BC57 and the Investor-Lender claimants. (A31 (the "Disbursement Order").) The Disbursement Order confirms that the District "Court intends that [the Disbursement Order] be a final distribution." (A36.) The District Court further confirmed that the Disbursement Order "is consistent with [the District Court's] conclusions and findings with respect to this case and the Group 1 issues, and that the [R]eceiver has, as accurately as can be expected, arrived at a distribution calculation that is consistent with the goals of this receivership." (R.1447 at 18:3-9.)

The United States Court of Appeals has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. An order is appealable by virtue of the collateral order doctrine if it "fall[s] [into] that small class [of decisions] which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). To determine whether the requirements for a collateral order appeal are met, the Court of Appeals does "not engage in an individualized jurisdictional inquiry," instead the "focus is on the entire category to which a claim belongs." *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1089 (7th Cir. 2014) (citing *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009)).

The District Court's May 3, 2023 Disbursement Order satisfies the *Cohen* criteria and falls within an already recognized category of collaterally appealable orders. The Court of Appeals decision in *SEC v. Wealth Management LLC*, 628 F.3d

323 (7th Cir. 2010), is particularly instructive. In *Wealth Management*, "[t]he receiver proposed to distribute the diminished assets" from failed investment vehicles subject to an SEC enforcement action, "on a pro rata basis," concluding "that no investors were creditors . . . and thus [the receiver's] plan treated all investors equally." *Id.* at 327. Two claimants objected to the receiver's proposed distribution plan, arguing they should be treated as creditors and thus were entitled to priority over other claimants. *Id.* at 329. The district court disagreed, and issued an order overruling the claimants' priority objections and approving the receiver's distribution plan. *Id.*

The objecting claimants appealed from the district court's priority and distribution order pursuant to the collateral order doctrine. *Id.* The Court of Appeals concluded the district court's order qualified as a reviewable collateral order because it satisfied all three criteria set out in *Cohen*. *Id.* at 330-31. The order "conclusively determine[d] the disputed question—how the recovered assets in the receivership [would] be distributed," the manner of distribution was "important to the defrauded investors," and such distribution was "independent of the merits of the underlying SEC enforcement action." *Id.* at 331. Joining the Fifth and Sixth Circuits, the Court of Appeals concluded that "the collateral-order doctrine permits interlocutory review of a district-court order approving a receiver's plan of distribution." *Id.* at 330 (citing *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657 (6th Cir. 2001) and *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325 (5th Cir. 2001)).

As in *Wealth Management*, the District Court's Disbursement Order satisfies each of the criteria set out in *Cohen*. The District Court's Disbursement Order "conclusively determines the disputed question—how the recovered assets in the receivership will be distributed." *See Wealth Mgmt., LLC*, 628 F.3d at 331. The manner in which the assets will be distributed is paramount to the Group 1 claimants and is independent from the merits of the underlying SEC enforcement action against the Defendants. *Id.* Additionally, as was the case in *Wealth Management*, the District Court's "order will be effectively unreviewable after the court enters a final judgment because the assets will have been distributed by that point." *Id.* Finally, and critically, like the order in *Wealth Management*, the District Court's Disbursement Order is an order approving the Receiver's plan of distribution and thus falls within a category of collaterally appealable orders specifically recognized by the Court of Appeals.

Accordingly, the Circuit Court of Appeals for the Seventh Circuit has jurisdiction over this appeal.

STATEMENT OF ISSUES

1. Whether the District Court erred in holding that the Illinois Mortgage Act (765 ILCS 905/2) "replaced" the long-standing Illinois common law rule that when the debt secured by a mortgage is paid, the lien of the mortgage is extinguished as a matter of law.

2. Whether the District Court erred in concluding releases executed and issued by the Investor-Lenders' authorized servicing agent were invalid due to a

scrivenor's error where the agent had authority to execute the releases and clearly intended to do so.

STATEMENT OF THE CASE

This matter concerns a mortgage lien priority dispute between two claimants—BC57 and a collection of more than 160 individual and entity investors (the "Investor-Lenders").[2] Each claims priority to funds liquidated by a receiver's sale of five properties by virtue of their respective mortgage liens. At stake is approximately $3.7 million presently available for distribution in satisfaction of the claims. (A38-A49.)

I. The Competing Mortgage Liens

The competing mortgage liens arose as follows. In 2015 and early 2016, the Investor-Lenders made loans to Equitybuild, Inc. ("Equitybuild"), which Equitybuild used to purchase five investment properties on the South Side of Chicago. In exchange, Equitybuild granted five mortgages to the Investor-Lenders to secure their investment. (R. 1147-1-1147-5, the "Investor-Lender Mortgages" or the "Investor-Lenders' Mortgages) For each loan, the Investor-Lenders entered into contracts with a related entity, Equitybuild Finance, LLC ("EBF"), whereby they appointed EBF as

[2] The Receiver identified 169 claimants in Group 1 who had submitted proof of claims forms. *See* R. 1201 at 1, n.1. The Receiver noted that "several individuals or entities submitted claims against more than one property in Group 1," but considered those individuals as separate claimants for each property in reaching its total. *Id*

the collateral agent, trustee, and loan servicer. (*See, e.g.*, Collateral Agency and Servicing Agreement ("CAS"), R.1147-7.[3])

By the CAS, the Investor-Lenders "authorize[d] and direct[ed] [EBF] to (a) enter into the Mortgage and the Note for and on behalf of and for the benefit of the Lenders" and to "exercise such rights and powers under [the CAS], the Note or the Mortgage as are specifically granted or delegated to [EBF] . . . together with such other rights and powers as are reasonably incidental thereto or as are customarily and typically exercised by agents performing" similar duties. (*Id.* at § 2(a).) The CAS further specifically authorized EBF to issue monthly statements, issue payoff demands, and demand, receive and collect loan payments. (*Id.* at § 9(a).) EBF's authorization was "subject, however, to any express limitations set forth herein or in the Mortgage." (*Id.* at § 2(a).) In particular, the CAS required "written instructions" from the Investor-Lenders for EBF to foreclose, amend, or terminate the Investor-Lender Mortgages. (*See id.* at §§ 3, 4(a)(ii), 6(a).)

Separate from the CAS, the Investor-Lenders also executed a separate "Authorization Document" contained in the investment packages. The "Authorization Document," designating EBF as "agent and trustee," provided EBF written authority "to receive the payoff in its name and issue and execute a release

[3] One CAS and one mortgage were executed with Hard Money Company, LLC, the predecessor to EBF. (*See* R.1 at 14.) In January 2015, Hard Money Company, LLC amended its Certificate of Formation to designate EBF as its new name. (*See* R.1160 at 2.)

of said mortgage, upon payment in full of any outstanding balance." (*See* R.1160 at 78.)

Thus under the CAS and Authorization Document, EBF was authorized to issue payoff statements, collect loan payments, receive payoffs, and issue and execute releases on the Investor-Lenders' behalf. (*See* R. 1147-7; *see also* R.1160 at 78.) Consistent with the CAS, each Investor-Lender mortgage further identified the mortgagees as "[p]ersons [l]isted on Exhibit A" to the specified mortgage "care of" EBF. (*See* R.1147-1-1147-5.) To this end, each mortgage provided that all lender notices were to be sent to EBF's address and that upon payment of the sums secured by the mortgage, the Investor-Lenders shall release the mortgage. (*Id.*; *see also* R.1160 at 78.)

In 2017, BC57, a lender sponsored by Bloomfield Capital, made a secured loan to SSDF5 Portfolio I LLC, a special purpose limited liability company sponsored by Equitybuild, to allow Equitybuild to refinance the existing debt on the five properties. (R.109.) Based on payoff statements provided by EBF listing the required payoff amount for each property, BC57's principal loan amount was $5,328,433.43. (R.1160 at 114.) The terms of the loan were further memorialized in a loan agreement and the loan was secured by a Corrective Mortgage (the "BC57 Mortgage"). (*Id.* at 189.) BC57 conditioned making its loan on, among other things, the BC57 Mortgage occupying a first mortgage lien position on each of the properties and receipt of a title insurance policy that insured the BC57 Mortgage as a first mortgage lien on each of the properties. (*Id.* at 114, 117.) BC57 further conditioned its loan on the receipt of

valid releases, releasing the Investor-Lenders' security interests in the five properties. (*Id.* at 115.)

At the refinancing closing, BC57's settlement agent, Near North National Title Company ("NNNT") as escrowee, received payoff statements from EBF stating the amounts due on the Investor-Lender loans, which also included wire instructions for payment. (R.1160 at 225-228). NNNT also received executed releases for each Group 1 property, signed by EBF. (*See* R.1147-16 – 20, collectively the "Releases".) Each Release, in the form of a "release deed," states that it released the Investor-Lender Mortgage identified by the recording number of the Investor-Lender Mortgage. *Id.* EBF signed each Release on behalf of the Investor-Lenders (the mortgagees) as the party releasing the Investor-Lender Mortgage, although the body of each Release erroneously named Equitybuild (the mortgagor), not Equitybuild Finance, LLC. *Id.* After NNNT wired $4,944,850 to EBF (the total of the amounts required by the payoff statements from EBF), the loan closed. (R.1160 at 238-257.) Thereafter, the BC57 Mortgage and Releases were recorded against each of the five properties on September 29, 2017. (R. 1147-22, 1147-16 – 20.)

II. Proceedings Before The District Court

Almost a year after BC57 made its loan and recorded its mortgage and the Investor-Lenders' Releases, on August 15, 2018, the U.S. Securities and Exchange Commission ("SEC") filed a complaint alleging Defendants Jerome and Shaun Cohen, through their companies, Equitybuild and EBF, engaged in a scheme to defraud investors in connection with real estate investments on the South Side of Chicago, including the five previously described properties. (R.1.) On the same day, the SEC

moved to appoint a receiver "to remove Defendants' control over investor funds, to secure the real estate and other assets obtained with investor proceeds, and to ultimately recompense the defrauded investors" (R.3), which the District Court granted on August 17, 2018 (R.14). On February 9, 2021, the District Court further issued an order establishing a claims resolution process. (R.941.) Pursuant to that process, the properties at issue were organized into ten groups "to allow for the resolution of a manageable number of claims in each proceeding." *Id.* at 2.

The first group—"Group 1"—included the five properties at issue in this matter. On February 15, 2023, after reviewing position papers from BC57, the Investor-Lenders, the SEC, and the Receiver, the District Court ruled that the Investor-Lender Mortgages have priority over BC57's Mortgage. (A01-A30.) Specifically, the District Court concluded that the Releases—issued by EBF after receiving BC57's payment of the debt shown on EBF's loan payoff statements—were facially defective because they listed Equitybuild in the body of each Release. (A01.) The District Court also found that EBF lacked authority to execute the Releases on the Investor-Lenders' behalf. (*Id.*)

The District Court found that BC57's payments were insufficient to extinguish the Investor-Lender's mortgage liens because the Releases were not signed by each of the 160 individual investors, pursuant to the Illinois Mortgage Act, 765 ILCS 905/2, which the District Court concluded "replaced" the common law rule that a lien of a mortgage is extinguished upon payment of the debt secured by the mortgage. (*Id.* at 28-29 (citing *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL

App (1st) 123784).) The Court concluded its Order with an instruction to the Receiver to "submit a proposed order for disbursement of the proceeds from the Group 1 properties . . . by March 8, 2023." (*Id.* at 30.) On May 3, 2023, the District Court entered an order disbursing the proceeds from the Group 1 properties, in accordance with its February 15, 2023 Priority Order. (A31-A36.)

SUMMARY OF THE ARGUMENT

In Illinois and across the country when debt secured by a mortgage is paid, the lien of the mortgage securing that debt ceases to exist as a matter of law. Pursuant to this well-established rule, BC57's payment of the debt underlying the Investor-Lender Mortgages in accordance with payoff statements issued by EBF, extinguished the lien of those prior mortgages, leaving BC57 with the only enforceable mortgage against the properties. Accordingly, BC57 is entitled to priority to the Group 1 sales proceeds over the Investor-Lenders.

The District Court concluded that Illinois "replaced" this long-standing principle by the Illinois Mortgage Act. This was error. Indeed, under the District Court's interpretation, the vitality of a mortgage lien would no longer be dependent on the continued existence of the debt, but instead would be dependent on the receipt of a signed release. This would create a new rule that would effectively allow mortgagees to hold a subsequent mortgage lien holder hostage, facing only a ministerial $200 and attorneys' fees as a penalty for withholding a release beyond thirty days.

The District Court's interpretation of Illinois law is contrary to the plain language of the Illinois Mortgage Act and its purpose. Neither the Act's legislative history nor any Illinois authority analyzing the Act supports this reading of the Act's effect. Instead, the Illinois Mortgage Act serves to complement the common law rule that once the debt underlying a mortgage is satisfied, the related lien is extinguished. BC57 respectfully submits that the District Court's opinion effecting such a fundamental change in the law should be reversed.

Even if a release were required to extinguish the lien of the Investor-Lenders Mortgages, the Releases here were valid. The Investor-Lenders' servicing agent, EBF, was expressly authorized to issue payoff statements and, pursuant to the Authorization Document, execute and issue the Releases. The District Court erred in interpreting the Authorization Document otherwise. The District Court further erred in concluding a scrivener's error rendered the Releases facially invalid. The scrivener's error does not negate the parties' clear intent to release the Investor-Lender Mortgages upon payment of the mortgage indebtedness, under the Authorization Document. Moreover, even if the Releases could be found to be deficient, BC57 is entitled to valid releases pursuant to the Illinois Mortgage Act, reflecting what has already occurred by operation of Illinois law: that the prior mortgage liens fell upon payment of the debt underlying them.

STANDARD OF REVIEW

BC57 appeals the District Court's Disbursement Order, approving the Receiver's proposed plan of distribution based on the District Court's Priority Order.

Orders of this genre are reviewed under an abuse of discretion standard. *See Wealth Mgmt., LLC*, 628 F.3d at 332-33. But the threshold questions presented here are questions of law, not discretion. Therefore, review of the legal issues on appeal is *de novo*. *See ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (employing *de novo* review where "district court reached its conclusion because of its interpretation of relevant law . . . because a district court's application of an erroneous view of the law is by definition an abuse of discretion."); *see also Keybank Nat'l Ass'n v. Fleetway Leasing Co.*, 781 Fed. App'x. 119, 121 (3d Cir. 2019) ("We review the District Court's application of law with regard to the equitable receivership de novo, and its decisions relating to procedures it will follow in connection with the receivership proceedings for abuse of discretion") (citing *SEC v. Black*, 163 F.3d 188, 195 (3d Cir. 1998).

ARGUMENT

I. BC57 has priority over the Investor-Lenders because the Investor-Lender Mortgages are unenforceable as a matter of Illinois law.

In Illinois, the lien of a mortgage is extinguished by payment of the debt secured by the mortgage as a matter of law. By operation of that rule, the Investor-Lenders' mortgage liens here were extinguished once BC57 paid the debt underlying the Investor-Lender Mortgages in accordance with EBF's payoff statements, thereby rendering the prior mortgages unenforceable and leaving BC57 with the only enforceable lien. Once extinguished, the Illinois Mortgage Act further entitled BC57 to valid releases to reflect the unenforceability of the Investor-Lenders' prior mortgage liens.

In the last two pages of its opinion, however, the District Court concluded that BC57's payment of the debt underlying the Investor-Lender Mortgages did not "[a]utomatically [r]elease [t]hem." (A28.) The District Court acknowledged the rule that "when [a] debt is paid, discharged, [or] released . . . the mortgagee's title is extinguished by operation of law," (*id.* at A28-29 (citing *Bradley v. Lightcap*, 201 Ill. 511, 517 (1903)). However, the District Court explained that "[a]ssuming this was the common-law rule," "the Illinois legislature replaced that rule in 1961 when it passed the Illinois Mortgage Act, 765 ILCS 905/2," citing *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784. (*Id.*) Neither the Illinois Mortgage Act nor *North Shore* go this far.

A. The common law rule in Illinois mandates that a mortgage is extinguished by payment of the underlying debt.

Illinois courts have long recognized that payment of the debt underlying a mortgage extinguishes that security interest. *See Bradley*, 201 Ill. 511, 517(1901) ("[T]he title conveyed to the mortgagee is a mere incident of the mortgage debt, . . . and when the debt is paid, discharged, released or barred by limitation, the mortgagee's title is extinguished by operation of law."); *see also Pollock v. Maison*, 41 Ill. 516, 521 (1866) ("A payment, release or discharge of the debt, . . . extinguishes the mortgage."). In Illinois, a mortgage "only creates a lien on the property" and "[i]t conveys a security interest that may be extinguished by the mortgagor paying in full any time prior to foreclosure." *City of Chi. v. Elm State Prop. LLC*, 2016 IL App (1st) 152552, ¶ 21 (citing Restatement (Third) of Prop. Mortgages § 3.1 (1997)). Indeed, "[i]t is a well settled and familiar principle, that the debt is the principal thing, and

the mortgage only an incident -- a mere security for the payment of the debt." *Vansant v. Allmon*, 23 Ill. 26, 30 (1859).

This long-standing rule continues to apply in Illinois. Recent cases, including decisions published *after* the Illinois Mortgage Act's passage in 1961, confirm the rule remains in effect. *See Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 193 (1970) (affirming the trial court's holding that "the note secured by the mortgage had been paid in full. Consequently, Rockford Life was not entitled to foreclose its mortgage and the defendants were entitled to a release of the mortgage."); *see also Jurado v. Simos*, 166 Ill. App. 3d 380, 381 (1st Dist. 1988) (affirming order granting motions for summary judgment on the finding that "plaintiff could not foreclose the mortgage because his purchase of the note extinguished the debt."); *see also City of Chi.*, 2016 IL App (1st) 152552, ¶ 21.

Illinois' common law rule tracks similar long-standing rules from other states. For example, in Wisconsin, "[a]uthorities are in general accord with the proposition that payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without satisfaction thereof of record or in writing." *Moore v. Benjamin*, 228 Wis. 591, 594 (1938); *see also Doyon & R. Lumber Co. v. Nichols*, 196 Wis. 387, 390 (1928) ("A mortgage is not property at all independent of the debt it secures. . . . The mere entry on the record of a release of the mortgage is not for the purpose of extinguishing it, but as evidence of a previous discharge of the debt."); *accord Klapmeier v. Peoples Nat'l Bank of Mora*, No. A07-1789, 2008 Minn. App. Unpub. LEXIS 909, at *9 (Aug. 5, 2008)) ("[O]nce a mortgage debt has been paid

in full . . . the mortgage is completely extinguished because 'it was a mere incident of the debt.' Moreover, even if a mortgage that was paid in full was not satisfied of record, the mortgage is still completely extinguished."); *Shriver v. Sims*, 127 Neb. 374 (1934) ("The payment or satisfaction of the mortgage debt avoids the mortgage deed. The failure to enter satisfaction upon the margin of the record may subject the mortgagee to penalties, but has no effect to keep the mortgage in existence.")[4]

B. The District Court erred in concluding the Illinois Mortgage Act "replaced" the common law rule, relying on *North Shore*.

The District Court acknowledged Illinois' common-law rule, but determined that "the Illinois legislature replaced that rule in 1961 when it passed the Illinois Mortgage Act, 765 ILCS 905/2," citing *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784. A review of the Illinois Mortgage Act and *North Shore* reveal neither upset, much less "replaced," the long-standing principle that payment of a debt extinguishes the corresponding mortgage.

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[4] Other states also apply this rule, demonstrating the uniformity in approach across the country. *See NattyMac Capital LLC v. Pesek,* 784 N.W.2d 156, 159 (S. Dakota 2010) ("It is generally recognized that a mortgage is extinguished by the payment of the debt. The mortgagee has no property in such mortgage after such payment.") (internal citation omitted); *see also Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1235 (1995) ("A security interest cannot exist without an underlying obligation, and therefore a mortgage or deed of trust is generally extinguished by either payment or sale of the property in an amount which satisfies the lien."); *FGB Realty Advisors, Inc. v. Parisi*, 265 A.D.2d 297, 298 (N.Y. App. Div. 1999)) ("A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation.") (citing *Copp v. Sands Point Marina*, 17 N.Y.2d 291, 292 (1966)).

1. The Illinois Mortgage Act did not "replace" the common law rule, it complements it.

The District Court's conclusion that the Illinois Mortgage Act replaced, or abrogated, the longstanding common law rule that payment of the debt extinguishes the mortgage securing that debt, with a new rule that the mortgage remains effective absent recording of a signed release, conflicts with both principles of statutory construction and the purpose of the Act.

In Illinois, well-settled principles govern legislative abrogation of a common law rule. *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, ¶ 16. Specifically, "unless expressly repealed by the legislature or modified by court decision," "[c]ommon law rights and remedies remain in full force" in Illinois. *Id.* Indeed, "[a]ny legislative intent to abrogate the common law must be plainly and clearly stated, and such intent will not be presumed from ambiguous or questionable language." *Id.* (citing *Maksimovic v. Tsogalis*, 177 Ill. 2d 511 (1997)). To this end, in Illinois, "[t]he implied repeal of the common law is not and has never been favored." *Id.* ¶ 17 (citing *People v. Spann*, 20 Ill. 2d 338, 341 (1960)).

"Thus, a statute that does not expressly abrogate the common law will be deemed to have done so only if that is what is 'necessarily implied from what is expressed.'" *Id.* (citing *Acme Fireworks Corp. v. Bibb*, 6 Ill.2d 112, 119, (1955)). Moreover, even then, "there must be an 'irreconcilable repugnancy' between the statute and the common law right such that both cannot be carried into effect." *Id.* (citing *People ex rel. Nelson v. West Englewood Trust & Savings Bank*, 353 Ill. 451, 460 (1933).). Finally, Illinois recognizes that "[w]here the common law rule in

question provides greater protection than the statute at issue, but the rule is not inconsistent with the general purpose of the statute, 'it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law rather than to say that it is repugnant to that rule.'" *Id.* ¶ 17.

With these principles in mind, the starting place for the Court's review is the words of the statute. *See In re County Collector*, 181 Ill.2d 237, 244 (1998). The Illinois Mortgage Act provides, in relevant part:

> Every mortgagee of real property, his or her assignee of record, or other legal representative, having received full satisfaction and payment of all such sum or sums of money as are really due to him or her from the mortgagor . . . shall, at the request of the mortgagor . . . his or her heirs, legal representatives or assigns, or a person authorized by such mortgagor . . . make, execute and deliver to the mortgagor . . . his or her heirs, legal representatives or assigns, or a person authorized by the mortgagor, grantor, heir, legal representative . . . an instrument in writing executed in conformity with the provisions of this Section releasing such mortgage or deed of trust in the nature of a mortgage, which release shall be entitled to be recorded or registered and the recorder or registrar upon receipt of such a release . . . .

765 ILCS 905/2. The Act further provides that "mortgage[s] shall be released of record only in the manner provided herein or as provided in the Mortgage Certificate of Release Act" (*id.*) and imposes a $200 penalty and the cost of attorney's fees for failure to issue a valid release within "30 days after the payment of the debt secured by such mortgage" (*id.* § 905/4).

The Act unambiguously requires a mortgagee, or its legal representative, to issue a valid release of a mortgage lien within thirty days of satisfaction of the debt underlying the lien. *Id.* The Act does not, however, demonstrate any legislative intent, much less a "plain[] and clear[]" one, *Rush Univ. Med. Ctr.*, 2012 IL 112906,¶

16, to abrogate the long-standing common law rule that payment of a debt secured by the mortgage extinguishes the lien of the mortgage as a matter of law. Instead, the Act simply provides the framework for a mortgagor to obtain a release within a reasonable period of time after the mortgage debt has been satisfied, which, once recorded, evidences that previous discharge of the debt. The release thus has the effect of removing the mortgage from the public record. And the statute's framework underscores the lack of legislative intent to overrule the common law rule.

As noted above, the Act gives a mortgagee thirty days from when the debt is paid to provide a release and imposes a $200 penalty, as well as the cost of attorney's fees, for failure to issue a release within that timeframe. 765 ILCS 905/4. The Illinois legislature could not have intended, *without so much as a comment* in the Act, to repeal the longstanding common law rule that protects a lender who has paid the debt underlying a mortgage, and usher in a new rule, pursuant to which that same lender is completely vulnerable as a matter of law and totally at the whim of the mortgagee for such an extended period of time. In this sense, the common law rule unquestionably provides "greater protection than the statute at issue," *Rush Univ. Med. Ctr.*, 2012 IL 112906, ¶ 17, where the penalty for a mortgagee who knowingly negates such a lender's legal claim to the underlying property, would face only a $200 fine and the cost of the lender's attorney's fees as a penalty. *See* 765 ILCS 905/4. Instead, these provisions further confirm the more limited scope of the Act, particularly given that "[w]ords and phrases [of a statute] should not be construed in isolation, but must be interpreted in light of other relevant provisions in the statute."

Mich Ave. Nat'l Bank v. County of Cook, 191 Ill.2d 493, 504 (2000) (citing *Antunes v. Sookhakitch*, 146 Ill.2d 477, 484 (1992)).

Though the statute is unambiguous in this regard, "extrinsic aids of construction" further confirm that the Illinois legislature did not intend for the Act to overrule the common law rule. *See Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021, ¶ 28, ("When a statute is ambiguous, we will turn to extrinsic aids of construction to determine the legislature's intent, including legislative history. . .").

As an initial matter, the legislative history that accompanied the Illinois Mortgage Act is minimal. *See* 72nd General Assembly, 1st Special Session, at 42-46 (1961). Importantly, just like the text of the statute, the Act's legislative history does not include any statements suggesting that any member of the Illinois legislature sought to "expressly repeal[]" the longstanding common law rule that payment extinguishes a mortgage, and instead replace it with a new, chaotic rule that a mortgage is not extinguished absent delivery of a signed release within thirty days of payment. *Rush Univ. Med. Ctr.*, 2012 IL 112906, ¶ 16.

Additionally, Illinois courts have discussed the purpose of the Act, explaining that it is designed "to allow the mortgagor to obtain a release when the terms of the mortgage have been fully satisfied." *In re Gluth Bros. Constr. Inc.*, 451 B.R. 447, 451 (Bankr. N.D. Ill. 2011). In requiring a mortgagee to execute a release upon payment, the Act further "protects the free alienability of land," guarding against forever clouding title. *Id.* Correspondingly, the purpose of a release is "to give public notice

that the debt [underlying the mortgage] is satisfied." *Havighorst v. Bowen*, 214 Ill. 90, 98-99 (1905).

These statutory purposes recognized by Illinois courts readily demonstrate that there is no "irreconcilable repugnancy" between the Act's requirement that a mortgagee furnish a valid release within thirty days of payment, and Illinois' common law rule that payment of the debt extinguishes the mortgage. *See Rush Univ. Med. Ctr.*, 2012 IL 112906, ¶ 17. As explained, once the mortgage debt is paid, the lien of the mortgage is extinguished as a matter of law. *See Bradley*, 201 Ill. 511(1901). However, even after the debt secured by a mortgage is paid, the extinguished mortgage lien remains of record in the chain of title, short of removal by a court of equity in the event there is a cloud on title. *See* 765 ILCS 5/28 (Illinois Conveyances Act requiring that all instruments relating to or affecting the title to real estate be recorded in their county); *see also Allensworth v. First Galesburg Nat'l Bank & Trust Co.*, 7 Ill. App. 2d 1, 4 (2d Dist. 1955) ("Any instrument or proceedings in writing which appears of record and casts doubt upon the validity of the record title constitutes a cloud on the title. . . . equity has jurisdiction to quiet the title [and] remove said clouds. . ."). Without a recorded release, the chain of title would continue to reflect two mortgages on the property even where one has been extinguished as a matter of law, but remains of record. To avoid this issue, a recorded release clarifies the chain of title, evidencing what has already occurred—that the prior mortgage debt has been discharged and the lien securing that debt is extinguished. *See*

Havighorst, 214 Ill. at 98-99 ("[a release] give[s] public notice that the debt [underlying the mortgage] is satisfied.").

The purpose of the Illinois Mortgage Act thus becomes manifest: to avoid forever clouding title, the Act obligates the mortgagee to furnish a valid release within thirty days, under penalty of law, upon payment of the debt secured by the mortgage. Consistent with Illinois's general disfavor for the implied repeal of the common law, the Illinois Mortgage Act is accordingly better understood as an administrative supplement to the "greater protection" provided to mortgagors by the common law rule. *See Rush Univ. Med. Ctr.*, 2012 IL 112906, ¶ 17; *see also Mich Ave. Nat'l Bank*, 191 Ill.2d at 504. This interpretation is further consistent with the absence of *any* legislative intent to impliedly overrule the common law rule.

Similarly, courts analyzing the Illinois Mortgage Act—including *North Shore*, discussed in detail below—have not interpreted the Act to repeal the common law rule that payment of the debt secured by a mortgage extinguishes the mortgage lien though it still appears of record. Tellingly, these cases do not even mention the common law rule. Instead, several embrace its import. For example, in *AAMES Capital Corp. v. Interstate Bank*, 315 Ill. App. 3d 700 (2d Dist. 2000), the court noted the significance of a release as it relates to the chain of title. The court explained that "[t]he mortgage liens acted to secure payment of the mortgage debts" and gave third parties examining chain of title "notice of the existence of the debts and of the liens on the real estate." *Id.* at 705. Even though the debt was paid, without a release "there was no indication to third parties that the liens were ever extinguished." *Id.*

These cases also highlight the real world implications of ignoring the Act's clear statutory framework and interpreting it to overrule the common law rule that payment of the debt extinguishes the lien of the mortgage. As noted above in discussing the Illinois Mortgage Act's statutory framework, the Act is intended for the benefit of the mortgagor and to ensure free alienability of land—not for the benefit of the prior mortgage holder. *See In re Gluth Bros. Constr. Inc.*, 451 B.R. at 451. Yet, if the Act "replaced" the common law rule, a mortgagee could withhold a release, enjoy the windfall of its debt relief from the mortgagor, yet only face a $200 fine, plus attorneys' fees. *See* 765 ILCS 905/4. The mortgagor or the refinancing mortgagor's lender, on the other hand, would have paid the mortgagee's debt, receive nothing, and be left to pursue the Act's statutory penalties. Further, in the absence of the common law rule, a mortgagor would have to obtain releases from all individual investors—in this case more than 160 individuals—to ensure its rights are protected as a matter of law. Under this configuration of the law, consumers may be hard-pressed to find a lender willing to refinance in Illinois.

The District Court's truncated analysis does not discuss these real world implications, these cases, or Illinois' controlling principles of statutory construction. Moreover the District Court erred in failing to consider the beneficial coexistence of the common law rule and the Illinois Mortgage Act, as proscribed by Illinois law. *See id.* Instead, the District Court singularly relies on *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, for its broad interpretation of

the Illinois Mortgage Act to the contrary, but nothing in *North Shore* supports an implied repeal of the common law rule.

2. *North Shore* did not hold that the Illinois Mortgage Act "replaced" the common law rule and is distinguishable.

No court in Illinois has held that the Illinois Mortgage Act abrogated the long-standing common law rule that payment of the debt extinguishes the lien of the mortgage securing the debt, and the Illinois Appellate Court's decision in *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, is no exception. Indeed, the appellate court made no reference whatsoever to the common law rule, much less expressing any intent to replace it. In *North Shore*, the Illinois appellate court rejected a party's argument, in the context of a standing analysis and on very limited briefing on the issue, that the Illinois Mortgage Act, ***in and of itself***, provided support for "its contention that, once a mortgagee receives full payment for the mortgage, the mortgage is deemed released." 2014 IL App (1st) 123784 ¶ 71. While *North Shore* analyzes the Illinois Mortgage Act, the opinion is narrowly focused on the effect of payment on an *undelivered release* on the question of standing, not the effect of payment of the debt secured by a *mortgage lien*. *See id.* ¶¶ 64-76. Moreover, *North Shore* primarily concerned the Illinois Mechanics Lien Act, not the Illinois Mortgage Act. *Id.* ¶¶ 81-86. Material differences in the mortgage and release in *North Shore* also limit its applicability. Accordingly, the District Court erred in relying on *North Shore* as support for the notion that the Act "replaced" the common law rule that payment of the debt extinguishes the mortgage lien.

In *North Shore*, two contractors, Premier and Bluewater, sought to foreclose mechanics' liens on a property after a bank, North Shore Community Bank ("NSCB"), foreclosed its mortgage on the same property. *Id.* ¶¶ 15-18. NSCB received its mortgage in May 2008 and following the owner's default, in May 2009, NSCB filed a foreclosure action. *Id.* ¶¶ 7, 9. As provided for in the terms of the mortgage, NSCB requested that a receiver take possession of the property during foreclosure. *Id.* ¶ 10. Thereafter, the receiver sold the property. *Id.* ¶ 11. Days after the sale, NSCB signed and executed a release of its mortgage, but the release had "not been delivered pursuant to the agreement of the parties and remain[ed] in escrow pending the resolution of this case" and NSCB's "mortgage, thus, 'remain[ed] of record.'" *Id.* ¶ 12. Notwithstanding NSCB's release-in-escrow, the buyer thereafter granted a mortgage to another lender. *Id.*

Having lost motions for summary judgment seeking enforcement of their mechanics' liens on the property sold by the receiver, Premier and Bluewater appealed. *Id.* ¶¶ 52-55. The issue on appeal was whether, under the Illinois Mechanics Lien Act, the contractors could file a mechanics lien with an incorrect completion date and then later amend the filing with the corrected date. *Id.* ¶ 78. Ancillary to the main issue, Premier and Bluewater argued NSCB's mortgage release meant the bank no longer had an interest in the property, and thus lacked standing to challenge the mechanics lienors' claims. *Id.* ¶¶ 67-68. NSCB conceded it executed a mortgage release, but argued it was "not yet effective because it has not been delivered." *Id.* ¶ 69. Premier and Bluewater did not contest whether the release had

been delivered, but instead argued that delivery was unnecessary for the release to be effective because "once a mortgagee receives full payment it seeks under its mortgage, the mortgage is deemed released." *Id.* ¶ 67. However, Premier and Bluewater's abbreviated discussion did not mention Illinois' common law rule regarding payment of the underlying debt to support this proposition, much less cite any cases for the appellate court addressing the rule. Instead, they simply cited the Illinois Mortgage act as a basis for their position. *Id.* ¶¶ 67, 69, 71; *see also* SA70.

In response, NSCB did not discuss the Illinois Mortgage Act or Illinois' common law rule regarding payment of the debt underlying the mortgage. Instead, NSCB's similarly brief discussion emphasized the fact that its release was held in escrow and that its mortgage, in turn, remained intact by design, so that NSCB could protect its own interests in court given that the mechanics liens dispute was ongoing at the time NSCB executed its release. (SA130-132.) The parties further provided the appellate court with Illinois case law focused on the delivery of deeds, not releases or the effect of payment on the existence of a mortgage lien. (*See* SA19-22; SA70-73; SA129-132; SA169-170.)

Understandably given the parties' briefing, *North Shore*'s analysis focused on the delivery of NSCB's release. After concluding Bluewater had waived its standing argument, the court first noted "the authorities Premier cites simply do not support its legal theory that full payment or anything short of delivery is sufficient to give effect to a mortgage release." *North Shore*, 2014 IL App (1st) 123784, ¶¶ 68, 70. The court considered section 2 of the Illinois Mortgage Act, which Premier cited as support

for "its contention that, once a mortgagee receives full payment for the mortgage, the mortgage is deemed released." *Id.* ¶ 71. The court explained the "plain language of section 2 . . . does indicate that full payment is a *necessary* condition before a mortgagee is obligated to release a mortgage," but "it does not suggest that full payment, by itself, is a *sufficient* condition to release a mortgage." *Id.* ¶ 72 (emphasis in original). Rather, the court explained, section 2 further requires delivery of the release. *Id.* (citing 765 ILCS 905/2 ("having received full satisfaction and payment . . . the mortgagor . . . shall . . . make, execute an deliver [a release]."). Accordingly, "[t]o adopt Premier's construction would render the statutory requirements to 'make, execute and deliver' meaningless and superfluous." *Id.*

The court next explained section 4 of the Act did not support Premier's argument that upon full payment, a mortgage is deemed released, either. As with section 2, the Act does not "say that full payment *by itself* releases the mortgage." *Id.* ¶ 73 (emphasis in original). Instead, per section 4, "full payment triggers only the obligation of a mortgagee to release a mortgage" and "make[s] a mortgagee liable to aggrieved parties when it fails to release a mortgage within one month of receiving full payment for the mortgage." *Id.*

Finally, the court distinguished Premier's reliance on *American Garden Homes, Inc. v. Gelbart Fur Dressing*, 238 Ill. App. 3d 64 (1st Dist. 1992), as support for its argument that a mortgage release is effective prior to delivery. The court distinguished *American Garden* as it "did not consider whether a mortgage release was effective before delivery but, rather, whether a party had standing to *compel* the

release of a mortgage" and whether the plaintiff "could compel the defendant to *deliver*" the release. 2014 IL App (1st) 123784, ¶ 75 (emphasis in original) (citing *American Garden*, 238 Ill. App. 3d at 68-69). All told, since it "[wa]s undisputed that there was no delivery" of the release, "the mortgage ha[d] not been released" and NSCB had standing. *Id.* ¶ 76.

The conclusion in *North Shore*—limited to the effect of an undelivered release held in escrow on a party's standing to challenge the opposing party's mechanics' lien claim—does not speak to the Illinois common law rule that payment of a mortgage debt extinguishes the lien of the mortgage. Nor does *North Shore* suggest that the Illinois Mortgage Act overruled the common law rule, which was never raised by the parties. Rather, based on the parties' briefing and the court's opinion, it appears *North Shore* did not even consider the common law rule. Importantly, the District Court's opinion appears to be unique in extending *North Shore* to overrule the common law rule. No case citing *North Shore* since its publication relies on it for its limited discussion of the Illinois Mortgage Act, much less reads it to overrule the long-standing common law rule. *See, e.g.*, *Pepper Constr. Co. v. Palmolive Tower Condos., LLC*, 2021 IL App (1st) 200753, ¶ 110 (applying *North Shore* to judicial admission analysis); *see also Lake County Grading Co., LLC v. Forever Constr., Inc.*, 2017 IL App (2d) 160359, ¶ 28 (citing *North Shore* for purpose of Illinois Mechanics Lien Act).

Nevertheless, the District Court extrapolated *North Shore*'s limited application to conclude the Illinois Mortgage Act "replaced" the common law rule that "when [a] debt is paid, discharged, [or] released . . . the mortgagee's title is

extinguished by operation of law." (A28-29.) In its place, the District Court effectively adopted a new rule that a mortgage is not extinguished absent delivery of a signed release. This conclusion goes well beyond the limits of *North Shore*'s interpretation of the Illinois Mortgage Act, which never expressed an intent to implicitly repeal the common law rule.

To the extent *North Shore* can be read to abrogate the principle that payment of the mortgage debt extinguishes the lien of the mortgage, BC57 respectfully submits that *North Shore* is neither correct nor binding on this Court. "When a state supreme court has not spoken on an issue," which appears to be the case here, "the decisions of the state's intermediate appellate courts are authoritative unless [the Court] ha[s] a compelling reason to doubt that they have stated the law correctly." *AAR Aircraft & Engine Grp., Inc. v. Edwards*, 272 F.3d 468, 470 (7th Cir. 2001). While "persuasive, the Illinois Appellate Court decisions do not bind" the Court. *Id.* *North Shore* did not mention, much less analyze, the common law rule. The Illinois Supreme Court, by contrast, has long-recognized the efficacy of the common law rule. *See Bradley*, 201 Ill. 511(1901). Further, reading *North Shore* to so overrule turns the Illinois Mortgage Act on its head given its purpose to "to allow the mortgagor to obtain a release when the terms of the mortgage have been fully satisfied." *In re Gluth*, 451 B.R. at 451. This interpretation is contrary to the language and purpose of the Illinois Mortgage Act, which instead—in conjunction with the common law and as supported by evidence in the record—requires BC57's lien priority.

3. The record supports BC57's lien priority.

Once BC57 paid the Investor-Lenders' authorized servicing agent, EBF, in accordance with the payoff statements issued by EBF, the liens of their mortgages were extinguished as a matter of law and became unenforceable. *See infra* §§ I(A)-(B). The payment triggered an obligation by the Investor-Lenders—through their servicing agent, EBF, authorized to execute releases upon satisfaction of the debt underlying their mortgages—to execute a valid release pursuant to the Illinois Mortgage Act to evidence the discharge of the debt. Regardless of the validity of the Releases, however, the payment to the Investor-Lenders' servicing agent alone was sufficient to discharge the lien of the Investor-Lenders Mortgages.

It is undisputed that the CAS authorized EBF to issue payoff statements. (R.1147-7 at § 9(a); *see also* A16 (District Court noting EBF's "express responsibilities" included "issu[ing] payoff statements").) BC57's reliance on the payoff statements issued by the authorized servicing agent, to which the Investor-Lenders were bound, was reasonable and there is no evidence of record to the contrary. (R.1160 at 225-228 (Payoff Statements).) EBF received the payoff funds from BC57 satisfying the prior-mortgage debt, as evidenced by completed wire transfers. (*Id.* at 238-257 (Wire Transfer Confirmations).) It is further undisputed that the CAS specifically authorized EBF to demand, receive and collect loan payments on behalf of the Investor-Lenders. (R.1147-7 at § 9(a); *see also* A16 (District Court noting EBF's "express responsibilities" included "collect[ing] loan payments").) In addition to the authority provided in the CAS, the Authorization Document also authorized EBF to receive the payoff in EBF's name. (R.1160 at 78.) In light of that

indisputable authority, BC57 had no obligation to confirm that the funds paid to EBF were in fact remitted to the Investor-Lenders. *See Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 533 (1970) ("If payment is made to an authorized agent as in the case at bar, the payor is not bound to inquire into the application of such payment."). Accordingly, a finding that BC57's payment to EBF satisfied the Investor-Lender Mortgages is supported by the record and BC57 is entitled to lien priority, given it has the only enforceable lien under Illinois law. *See Schaeppi v. Glade*, 195 Ill. 62, 66, (1902) ("A mortgage without any debt has no effect as a lien, and it can only take effect from the time when some debt or liability secured by it is created. A debt or mortgage obligation is essential to create a lien.").

II. Even if a release were required to extinguish the lien of the Investor-Lender Mortgages, the Releases issued by EBF satisfied that requirement.

Though Releases were not necessary to extinguish the lien, given BC57s payment of the debt secured by the Investor-Lenders Mortgages, the Releases issued by EBF nevertheless satisfied that requirement. The District Court erred in concluding otherwise.

First, the District Court erroneously concluded that EBF lacked authority to issue and execute the Releases, notwithstanding the Authorization Document expressly conferring that authority on EBF. The District Court further erred in concluding the Illinois Fiduciary Obligations Act did not protect BC57's payment to EBF. Second, the District Court erred in concluding that the Releases were invalid due to a scrivener's error. Because the District Court's conclusions were based on a review of the Releases themselves, as well as the controlling authorization

documents, those conclusions are subject to *de novo* review. *See VLM Food Trading Int'l v. Ill. Trading Co.*, 811 F.3d 247, 251 (7th Cir. 2016) ("We review de novo a district court's interpretation of a contract.")

A. Pursuant to the Authorization Document, EBF had express authority to issue and execute the Releases.

The District Court rejected BC57's argument that EBF had express authority to issue and execute the Releases. In reaching its conclusion, the District Court misinterpreted the Authorization Document, the CAS, and Illinois law.

1. The Authorization Document is the "written instruction" required by the CAS and does not render the CAS superfluous.

The Authorization Document gave EBF express authority to "receive the payoff in its name and issue and execute a release of [the Investor-Lender's] mortgage, upon payment in full of any outstanding balance." (R. 1160 at 78.) Nevertheless, the District Court concluded EBF did not have this authority, in light of separate restrictions in the CAS. Specifically, the District Court cited language in the CAS requiring "written instructions" from the Investor-Lenders for EBF to act "with respect to the amendment or termination of the Mortgage." (R.1147-7 at §§ 3, 4(a)(ii), 6(a).) Without that separate instruction, the District Court reasoned, EBF lacked "written consent from the individual investor-lenders" to execute and issue the Releases. Further, the District Court explained "construing the Authorization Document to give [EBF] unilateral release authority would render sections of the CAS superfluous." (A18, 23.)

The District Court's reasoning does not account for the fact that the Authorization Document—independently signed by the Investor-Lenders—itself is

the "written instruction" called for in the CAS. That document, a writing separate and apart from the CAS, provides precisely the "written instruction" contemplated by the CAS.

This interpretation of the Authorization Document does not render any section of the CAS superfluous. The District Court grounded its reasoning in the conclusion that the "Authorization Document was completed as part of the same investment package as the CAS," thus the Authorization Document "provided ex ante authority" rendering the "written instruction" requirements in the CAS superfluous. (A23.) But the CAS's general admonition that there be "written instruction" to amend or terminate the Investor-Lender Mortgages is not in tension with the simultaneous grant of the specific authority, separately signed, to execute and issue releases. To the contrary, Sections 2 and 6 of the CAS continue to require "written instruction" for any other changes to EBF's authority.

The District Court's interpretation of the Authorization Document further renders the release language in the Authorization Document superfluous. The District Court reasoned that the purpose of the Authorization Document "was to get the individual investors to authorize the amount of their investment and their percentage interest in the mortgage." (A24.) If this was the singular purpose of the Authorization Document, why does it also provide that EBF "has been authorized . . . to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance"? (R.1160 at 78.) Looking at the Authorization Document as a whole as the Court must, the District Court's

construction renders the release language in the document "superfluous and meaningless." *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (1st Dist. 2008) ("A court, will not interpret a contract in a way that will render any provision meaningless."). The District Court's reading of the Authorization Document is simply not a "natural and reasonable one." *See Smith v. West Suburban Med. Ctr.*, 397 Ill. App. 3d 995, 1000 (1st Dist. 2010).

Accordingly, EBF was separately authorized in writing by the Authorization Document to act "with respect to the amendment or termination" of the Investor-Lender Mortgages in executing and issuing the Releases. (*See* R.1147-7 at §§ 3, 4(a)(ii), 6(a).)

2. The terms of the Authorization Document were met.

The District Court further concluded that the Authorization Document did not confer express authority to EBF to execute and issue the Releases because the "terms of the Authorization Document . . . were not met." (A20.) The District Court concluded "even if the signatures bound the investors to the quoted language" in the Authorization Document, "the language only authorized release 'upon payment in full of any outstanding balance." (*Id.*) Because BC57 did not pay the Investor-Lenders directly—and instead paid their servicing agent, EBF—the District Court concluded the "terms of the Authorization Document therefore were not met." (*Id.*)

The District Court erred in three respects in reaching this conclusion. First, the District Court erroneously interpreted the Illinois Mortgage Act as requiring payment be made to the mortgagee directly, rather than through a "legal representative," such as an agent. Second, the District Court erred in distinguishing

Illinois case law demonstrating that once payment was made to the Investor-Lenders' servicing agent authorized to accept payoffs and loan payments, BC57 had no obligation to ensure that payment was remitted to the Investor-Lenders. Third, the District Court erred in disregarding the applicability of the Illinois Fiduciary Obligations Act to protect BC57's payment to the Investor-Lenders' fiduciary, EBF.

a) The Illinois Mortgage Act does not limit payment directly to a mortgagee to trigger the mortgagee's obligation to execute a valid release.

The Authorization Document provides EBF "has been authorized . . . to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance." (See R. 1160 at 78.) The District Court concluded that this language "doesn't specify to whom payment in full must be made" and "[g]iven the requirements of the Illinois Mortgage Act . . . the reasonable interpretation is payment in full to the mortgagee (i.e., the individual investors)." (A20.) In reaching this conclusion, the District Court read key language out of the Illinois Mortgage Act, demonstrating that EBF was authorized to accept payment from BC57 on behalf of the Investor-Lenders.

The Act specifically contemplates payment may be made to the mortgagee's legal representative. The relevant section of the Act provides:

> Every mortgagee of real property, his or her assignee of record, *or other legal representative*, having received full satisfaction and payment of all such sum or sums of money as are really due to him or her from the mortgagor . . . shall . . . make, execute and deliver . . . an instrument . . . releasing such mortgage . . .

765 ILCS 905/2 (emphasis added). Although the statute does not define "legal representative," other authorities define it to include an agent. For example, Black's

Law Dictionary defines "agent" as "[s]omeone who is authorized to act for or in the place of another; a representative." Agent, *Black's Law Dictionary* (11th ed. 2019). Similarly, "legal representative" directs the reader to "representative," which is defined as "[s]omeone who stands for or acts on behalf of another." *Id.* Courts also recognize that an agent is necessarily a legal representative. *See, e.g. Grane v. Grane*, 143 Ill. App. 3d 979, 985, (2d Dist. 1986) (describing defendant as "agent/legal representative"). *Rockford*, which was decided after the enactment of the Illinois Mortgage Act and is discussed further below, also provides explicit support for the proposition that payment to the agent has the same legal effect as payment to the principal in the context of mortgage debt. *See Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 195, (3d Dist. 1970) ("If payment is made to an authorized agent [for the balance of the debt secured by a mortgage] as in the case at bar, the payor is not bound to inquire into the application of such payment."). Accordingly, the Illinois Mortgage Act provides explicit support for the notion that BC57's payment to EBF, the Investor-Lenders' servicing agent, was the legal equivalent of payment directly to EBF's principal, the Investor-Lenders. *See* 765 ILCS 905/2.

b) Under Illinois law, BC57 was not obligated to ensure its payment to EBF, an agent authorized to accept payoffs and loan payments on behalf of the Investor-Lenders, was remitted to the Investor-Lenders.

Illinois law recognizes that payment to an authorized agent—instead of directly to the principal—is the legal equivalent of payment to the principal where the agent is authorized to accept payment on behalf of the principal. Here, the CAS unequivocally authorized EBF to demand, receive and collect loan payments (*see*

R.1147-7 at 5, § 9(a)) and the Authorization Document authorized EBF to receive payoffs in its name (R.1160 at 78).

The District Court acknowledged EBF's authority in this regard (*see* A16), but nevertheless concluded BC57 was required to ensure its payment was remitted to the Investor-Lenders to trigger the Authorization Document's release provision (*id.* at 20-21). In so doing, the District Court erred in distinguishing *Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190 (3d Dist. 1970), which demonstrates that once payment was made to the Investor-Lenders' servicing agent authorized to accept loan payments, BC57 had no obligation to ensure that payment was remitted to the Investor-Lenders. *See also M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233 ("Where one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong."); *Brenner v. Neu*, 28 Ill. App. 2d 219, 222, (4th Dist. 1960) ("It is also apparent that Dungey, as trustee, had the right to receive payment of the mortgage and, as a corollary thereto, in absence of any knowledge to the contrary by the successor in title, had the right to release the mortgage.").

In *Rockford*, plaintiff Rockford Life, purchased a mortgage loan through H.A. Roe Company ("Roe"), Rockford Life's servicing agent. 128 Ill. App. 2d at 192. Thereafter, the property owners, the Rios, sold the property to the Johnsons, who obtained financing for the purchase from Sterling Federal Savings and Loan ("Sterling"). *Id.* Sterling delivered a check to Roe for the purpose of paying the balance of principal and interest then due on Rockford Life's mortgage. *Id.* However,

"Roe cashed the check, but neglected to remit any part thereof to Rockford Life." *Id.* "Instead, Roe continued to send to Rockford Life the amount of the monthly payment . . . less its service commission." *Id.*

The main issue on appeal was whether payment to Roe, the servicing agent, was payment to Rockford Life, the principal. *Id.* at 193. The court concluded that Roe, by virtue of the written servicing agreement as well as the parties' conduct consistent with that agreement, had authority to collect all payments due under the mortgage. *Id.* at 193-94. Accordingly, because payment was made to an authorized agent, the payor, Rockford Life, was

> not bound to inquire into the application of such payment. The default of such agent is the responsibility of the principal. It is the principal who in the first instance selects the agent, grants him the authority and enables him to come into possession of the funds which are diverted. It is this conduct which makes the loss possible and the principal may not shift the burden to the party dealing with his agent.

Id. at 195 (citing *Brenner v. Franke*, 18 Ill. App. 2d 202 (4th Dist. 1958)).

The District Court erred in distinguishing the applicability of *Rockford*'s holding that a payor has no obligation to ensure the payment is remitted to the agent's principal. According to the District Court, the "contract between Rockford and Roe did not 'include any limitations or exceptions on the authority of the agent' to collect payments.'" (A21.) The same is true for the CAS. Regardless of whether the CAS "barred [EBF] from unilaterally releasing the mortgages," as found by the District Court (*id.* at A22), the CAS unequivocally granted EBF authority to *receive loan payments*. (*See* R.1147-07 at § 9(a).) The District Court separately recognized this very aspect of EBF's authority. (A16 (describing EBF's "express responsibilities"

as including "collect[ing] loan payments").) Further, the fact that the "mortgage in *Rockford* had been slowly paid down over nearly a decade before payment in full was made" (A22), as the District Court observed, does not in any way undermine EBF's unambiguous contractual authority to accept loan payments and payoffs on behalf of its principals.

Accordingly, BC57's payment to EBF, the Investor-Lenders' servicing agent expressly authorized to receive loan payments and payoffs on behalf of the Investor-Lenders pursuant to the CAS, extinguished the lien of the Investor-Lender Mortgages. As a result, BC57's Mortgage is the only enforceable mortgage and BC57 is entitled to priority to the funds from the sale of the Group 1 properties.

c) The Illinois Fiduciary Obligations Act applies and, as a result, BC57 was not obligated to ensure its payment to EBF was remitted to the Investor-Lenders.

The Court further erred as a matter of law in disregarding the applicability of the Illinois Fiduciary Obligations Act (the "IFOA"). The District Court erroneously rejected the IFOA's applicability because the CAS "expressly disclaimed" a fiduciary relationship between EBF and the Investor-Lenders. (A20.) The IFOA applies and, as a result, BC57 was under no obligation to make sure its payment to EBF ended up with the individual investors and it was error for the District Court to suggest EBF's authority to execute a release was contingent on BC57 ensuring its payment made it to the individual investors.

The IFOA provides in relevant part:

> A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and

> any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

760 ILCS 65/2. The IFOA is intended to protect payors such as BC57. *See* 760 ILCS 65/1(1). The purpose of the IFOA is "'to facilitate the fiduciary's performance of his responsibilities by limiting the liability of those who deal with him.'" *Praither v. Northbrook Bank & Tr. Co.*, 2021 IL App (1st) 201192, ¶ 27 (citations omitted). The IFOA thus serves to "facilitate banking and financial transactions and place[s] on the principal the burden of employing honest fiduciaries." *Cty. of Macon v. Edgcomb*, 274 Ill. App. 3d 432, 435, (4th Dist. 1995).

Although the CAS disclaims a fiduciary relationship between EBF and the Investor-Lenders, the IFOA nevertheless applies. After detailing the various duties conferred unto EBF, including the exercise of "such rights and powers under [the CAS], the Note, or the Mortgage . . . together with such other rights and powers as are reasonably incidental thereto or as are customarily and typically exercised by agents performing" similar duties, the CAS disclaims any fiduciary relationship between EBF and the Investor-Lenders. (*See* R.1147-7 at § 2(a).) The CAS thus includes an advance waiver of fiduciary duties, which Illinois courts disfavor. *See Labovitz v. Dolan*, 189 Ill. App. 3d 403 (1st Dist. 1989) ("Defendants cite no authority, and we find none, for the proposition that there can be *a priori* waiver of fiduciary duties in a partnership – be it general or limited.").

Consistent with the reproach of advance waivers of fiduciary duties, Illinois law further recognizes fiduciary relationships are born of the parties' conduct, not labels. *See, e.g.*, *McNerney v. Allamuradov*, 2017 IL App (1st) 153515, ¶ 69

(analyzing the label of "independent contractor" in a written agreement and stating "the declaration of the parties is not controlling where the conduct of the parties demonstrates the existence of an agency relationship"). "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Id.* ¶ 64. Given the nature of the relationship between EBF and the Investor-Lenders—in which EBF was authorized to act and receive payments on the Investor-Lenders' behalf, the Investor-Lenders had the right to control EBF (*see* R.1147-7 at § 2(a)), and BC57 could rely on EBF's fiduciary status—EBF and the Investor-Lenders indeed shared a fiduciary relationship for purposes of the IFOA, which is intended to facilitate financial transactions without obligating the payor "to inquire into a fiduciary's transactions to ensure nothing was amiss." *Praither*, 2021 IL App (1st) 201192, ¶ 39. Finally, the IFOA broadly defines "fiduciary" to include an agent, which EBF undoubtedly was on behalf of the Investor-Lenders. *See id.* § 65/1(1) (including "agent" as a "fiduciary" within the meaning of IFOA). The IFOA further defines "fiduciary" to include a trustee, which EBF was by virtue of the Authorization Document. (R.1160 at 78.)

Accordingly, the IFOA applies to protect BC57's payment of the loan proceeds to EBF and, consistent with Illinois common law, BC57 was under no obligation to ensure the payment properly made to EBF was ultimately remitted to the Investor-Lenders.

B. The Releases BC57 received and recorded are valid, notwithstanding a scrivenor's error, and BC57 is entitled to valid Releases in any event.

The District Court concluded the Releases are facially invalid because of a discrepancy between the body and signatory and because EBF, not the individual Investor-Lenders, signed the Releases. (A13-14.) As to the body and signatory discrepancy, though the body mistakenly referred to "Equitybuild, Inc." as the releasing party, Equitybuild Finance LLC (the signatory) was the releasing party. The District Court erred in failing to take into account the Authorization Document, the CAS, and BC57's loan agreement, all of which demonstrate the parties' intent to authorize EBF to release the Investor-Lender Mortgages. As to the signatory, the District Court erred in failing to address EBF's authority to execute and issue valid releases, and further erred in failing to consider the significance of the "care of" EBF description of the mortgagee in the Investor-Lenders Mortgages.

Under Illinois law, there is a presumption that a written instrument conforms to the intention of the parties. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (1st Dist. 2008). "However, where a mutual mistake is alleged, parol or extrinsic evidence is admissible to show the true intent of the parties." *Id.* A "mutual mistake is one that is common to the parties such that each labors under the same misconception. In such a case, the parties are in actual agreement, but the instrument to be reformed, in its present form, does not express the parties' real intent." *Id.*

Here, record evidence establishes EBF's intent to release, as well as the parties' intent that Equitybuild Finance LLC, on behalf of the Investor-Lenders, not

Equitybuild, was the party intended to release the Investor-Lender Mortgages. First, the CAS authorized EBF to act on the Investor-Lenders' behalf, including pursuant to any written instruction authorizing EBF to amend or terminate the Investor-Lender Mortgages. (*See* R.1147-07, §§ 2(a), 3, 4(a)(ii), 6(a).) As described, the Authorization Document further gave EBF authority to "issue and execute" releases of the Investor-Lender Mortgages. (*See* R.1160 at 78.) Further, BC57's loan agreement confirms the parties' intent to issue valid releases. The loan agreement indicates BC57 conditioned its loan on giving the BC57 Mortgage "a first security interest" on the collateral Group 1 properties. (*See* R.1160 at 114.) Accordingly, the only party authorized to sign the Releases on behalf of the Investor-Lenders was Equitybuild Finance LLC, not Equitybuild.

For the same reasons, EBF was the correct signatory to the Releases, not the individual Investor-Lenders. As described, EBF was fully authorized to "issue and execute" releases on behalf of the Investor-Lenders. (*See* R.1160 at 78.) The Investor-Lenders specifically granted EBF that authority through the Authorization Document, a "written instruction" permitting EBF to release the Investor-Lender Mortgages "upon payment in full of any outstanding balance." *Id.* The Investor-Lender Mortgages also listed the mortgagees as the Investor-Lenders, "care of" EBF. (R.1147-1-5.) As such, the Investor-Lender Mortgages likewise illustrate that EBF was permitted to act on the Investor-Lenders' behalf vis a vis their mortgages.

The District Court thus misinterpreted the various agreements of record, which confirm the parties' intent that EBF was intended, and authorized, to issue

and execute the Releases on behalf of the Investor-Lenders. In all events, if the Releases are deficient in some regard, BC57 would be entitled to valid releases, pursuant to both its loan agreement (*see* R.1160 at 114) and the Illinois Mortgage Act (765 ILCS 905/4 ("Upon a finding for the party aggrieved, the court shall order the mortgagee . . . to make, execute and deliver the release as provided in Section 2 of this Act.")). *See also Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1150, (2d Dist. 2004) (ordering plaintiff to execute and deliver a release as required by the Illinois Mortgage Act, noting the Act "allows a mortgagor, who has paid in full, to compel a release of his mortgage and to recover a penalty."); *see also Rockford Life Ins. Co.*, 128 Ill. App. 3d at 193, 195 (affirming trial court's holding that defendants were entitled to a release of the mortgage, which had been paid).

CONCLUSION

Consistent with the foregoing, Appellant BC57 respectfully requests this Court enter an order reversing the District Court's priority determination and remanding with instruction to enter an order finding BC57's mortgage lien has priority to the sales proceeds of the Group 1 properties over the Investor-Lenders' unsecured claims.

Dated: June 14, 2023

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 12,181 words, excluding Fed. R. App. P. 32(f)'s exclusions. I also certify, pursuant to Fed. R. App. P. 32(a)(5), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century.

Dated: June 14, 2023

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CERTIFICATE OF SERVICE

I certify that, on June 14, 2023, I filed the foregoing via the Court's ECF system, which will send notice to all users registered with that system.

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CIRCUIT RULE 30(d) STATEMENT

I certify that the appendix bound with this brief contains all materials required by Circuit Rule 30(a) and that the appendix filed along with this brief contains all materials required by Circuit Rule 30(b).

Dated: June 14, 2023

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CIRCUIT RULE 30(a) APPENDIX
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

No. 18 CV 5587

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

Defendants Jerome Cohen and Shaun Cohen ran a Ponzi scheme through their real estate companies, EquityBuild, Inc. and EquityBuild Finance, LLC, from at least 2010 to 2018. The United States Securities Exchange Commission sued them, alleging fraud. They admitted to the scheme and a receiver was appointed to advise the court on distributing assets. This opinion focuses on claims to the liquidated funds from five properties (the so-called "Group 1 claims"). Multiple individual investors, as well as private lender BC57, invested in these properties. The issue is which of the parties has priority to receive the funds liquidated by the receiver's sale of the properties. (The individual investors have filed position statements and other briefs as a bloc and do not contest each other's priority.) Because Equitybuild Finance's mortgage releases were facially defective and Equitybuild Finance lacked the authority to release the individual investors' mortgages, the individual investors have priority to the funds.

I. Legal Standard

District courts have broad discretion in approving a plan for distribution of receivership funds. *See S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 332 (7th Cir. 2010); *see also S.E.C. v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009). A district court's primary job in supervising an equitable receivership is to ensure that the receiver's proposed plan of distribution is "fair and reasonable." *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d at 332.

II. Facts

Starting in 2010 or earlier, defendants began selling promissory notes to investors. [1] ¶ 20.[1] Each note represented a fractional interest in a specific real estate property. [1] ¶ 24. Most of the real estate consisted of residential properties in underdeveloped areas on the South Side of Chicago. [1] ¶ 19. Investors' funds would be pooled together to purchase each property, which would then be renovated or developed. [1] ¶ 24. The notes provided for interest rates ranging from 12% to 20%; the more someone invested, the higher their promised rate of return was. [1] ¶ 22. The parties to the notes were Equitybuild (the borrower) and the individual investors (the lenders). [1] ¶ 21. The investors, per an investment form defendants drafted, signed away most of their rights and powers under the notes and mortgages to a

[1] Bracketed numbers refer to entries on the district court docket. Page numbers are taken from the CM/ECF header placed at the top of filings, except in the case of citations to court transcripts and depositions, which use the transcript's original page number. The facts are taken from the SEC's complaint and exhibits submitted by the SEC. [1]; [1147]. Jerome and Shaun Cohen consented to entry of judgment against them without admitting or denying the allegations of the complaint, while also agreeing, for purposes of exceptions to bankruptcy discharge, that the allegations of the complaint were true and admitted. [40].

"collateral agent," Equitybuild Finance. [1] ¶ 25. So the mortgages were typically structured to be between Equitybuild and the investors "care of" Equitybuild Finance. [1] ¶ 25. Defendants told investors that the investment plan was structured as follows.

The investors' funds would go toward collectively purchasing one of the properties. [1] ¶ 24. The investors and defendants would thus enter into a mortgagee-mortgagor relationship. The defendants, in turn, would enter into a mortgagee-mortgagor relationship with a third party. [1] ¶ 34. The third parties would borrow on shorter terms and at a higher rate than purchasers using traditional mortgages (including defendants themselves). *See* [1] ¶ 34. Defendants would retain as profits the difference between the mortgage payments received from the third parties and the promised interest payments made to the investors. [1] ¶ 35.

Defendants assured investors that default was unlikely—the third parties, they said, were "qualified" borrowers with "A-grade" credit. [1] ¶ 36. The third-party payments would generate "more than enough revenue to cover [defendants'] note payments [to the investors] as well as all of the property's operating expenses, and still return positive cash flow." [1] ¶ 36. And in the unlikely scenario that an investor's mortgage went into default, defendants assured investors they could simply sell the property in a quick sale and get their money out of the investment. [1] ¶ 31.

Little of that was true. Equitybuild itself owned most of the properties securing the notes, with some third parties renting. [1] ¶¶ 44, 45. Defendants also told investors that the properties securing their notes were worth significantly more than

the actual cost of the properties—47% more, on average. [1] ¶ 38. That extra money from investors meant that, for a time, it wasn't a problem that there were no third-party mortgage purchasers to generate profit for the defendants or generate the promised returns for investors. Instead, defendants could generate profit by keeping some of the investors' investments as undisclosed fees. [1] ¶ 37. And they did, at a rate of 15% to 30%. [1] ¶ 37. They also used later investors' inflated investments to repay earlier investors, in what soon became a Ponzi scheme. [1] ¶¶ 39, 45. From January 2015 to February 2017, for example, defendants earned only $3.8 million in revenue from the properties, but investors received around $14.5 million in interest payments. [1] ¶ 45.

On top of all that, because the properties were worth significantly less than the investors' investments, their investments weren't fully secured, as defendants had promised. [1] ¶ 40. Instead, they were only secured by the actual, much smaller, value of the properties. [1] ¶ 40.

Defendants' payments to investors eventually became unsustainable, and defendants started to kick the can down the road. They routinely extended the payback terms on investors' notes, often for years. [1] ¶ 48. They forced investors to either agree to those extensions or be placed on a "buyout list" and wait for defendants to find another investor willing to buy out the original investment. [1] ¶ 48. As of June 2018, there were around $3 million worth of investments on the buyout list. [1] ¶ 48. Defendants also forced around 100 investors to accept unsecured promissory notes in lieu of their original "secured" notes. [1] ¶ 49. Throughout, defendants

continued offering securities to new investors without disclosing any of this information. [1] ¶ 49.

In 2017, Jerome and Shaun Cohen changed their business model. [1] ¶ 52. Instead of offering promissory notes, they began offering investments in real estate funds. [1] ¶ 53. Again, they said they would pool investors' proceeds to purchase and renovate properties. [1] ¶ 53. As with the promissory notes, they promised double-digit returns. [1] ¶ 54. Significant portions of fund investor money were used to repay earlier promissory-note investors. [1] ¶ 56. What's more, many of the properties that fund investors were investing in were the same properties that were supposedly securing the promissory-note investors' investments. [1] ¶ 58. In September 2017, BC57 lent roughly $5.3 million in exchange for a first mortgage on five properties. [1147-21] (loan agreement). Around the same time, Shaun Cohen signed off as Equitybuild Finance manager on five releases for those properties. [1147-16]–[1147-20].[2] Those releases stated:

> Know all men by these presents, that EQUITYBUILD, INC. for and in consideration of TEN DOLLARS ($10.00) and for other good and valuable considerations, the receipt of which is hereby confessed, does hereby remise, convey, release, and quit-claims unto EQUITYBUILD FINANCE, LLC of the County of COLLIN, State of TEXAS, all rights, title, interest, claim or demand whatsoever he/she may have acquired in, through or by a certain Mortgage bearing the date of [2/21/2014 or 12/30/2014].

[2] The mortgage for one of the properties, 7752 S. Muskegon Ave., listed the lender as "The Persons Listed on Exhibit A to the Mortgage c/o *Hard Money Company, LLC*." [1147-1] (emphasis added). But as with the other properties, Cohen signed the Muskegon Ave. release on behalf of Equitybuild Finance and not Hard Money Company. [1147-16].

Each release included the address of the property it was releasing, as well as a description of the property. [1147-16]–[1147-20]. Each was notarized by a notary public and filed with the Cook County Recorder of Deeds. [1147-16]–[1147-20].

By late 2017, investors in more than 1,200 notes still hadn't been repaid their principal, totaling almost $75 million in delinquent payments. [1] ¶ 59. By late May 2018, Equitybuild and Equitybuild Finance had less than $100,000 in their bank accounts. [1] ¶ 59.

In May and June 2018, defendants disclosed to earlier investors that they couldn't continue making interest payments on the notes and that they had "no choice but to restructure and reduce the debt burden" by unilaterally converting investors' notes to equity positions in one of the funds. [1] ¶¶ 61–62. In August 2018, in a video recording emailed to note investors (i.e., earlier investors), Shaun Cohen admitted that Equitybuild had funded investor interest payments by using the investments of later investors, but that the structure was no longer sustainable. [1] ¶ 63. Cohen also warned investors not to file suits against Equitybuild and told them that the company wouldn't be able to respond to investor inquiries because it had cut down to a "skeleton crew." [1] ¶ 63. But defendants shared none of this information with later investors, and instead continued to promise "guaranteed" returns and high annual returns on investment. [1] ¶ 64.

The SEC filed suit in August 2018, alleging violations of the Exchange Act, 15 U.S.C. §§ 78a, *et seq.*, and Securities Act, 15 U.S.C. §§ 77a, *et seq.* [1]. Specifically, the SEC alleged violations of the following Exchange Act sections: 10(b) and its

corresponding regulation, 17 C.F.R. 240.10b-5 (fraud in connection with the purchase or sale of securities); 20(e) (aiding and abetting said fraud); and 20(a) (control person liability resulting in joint and several liability for Jerome and Shaun Cohen). [1] ¶¶ 65–76. The SEC also alleged violations of Sections 5(a), 5(c), and 17(a) of the Securities Act. [1] ¶¶ 77–83.

The SEC quickly obtained a temporary restraining order against defendants. [3], [14]–[15]. The court appointed a receiver and directed him to "develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Assets." [16] ¶ 62. The Receiver filed a liquidation plan in late November 2018, informing the court of the properties he had identified that were owned by Equitybuild. [166]. Among those properties are the five at issue here: 3074 Cheltenham Ave. (Property 74), 7625-33 S East End Ave. (Property 75), 7635-43 S East End Ave. (Property 76), 7750 S Muskegon Ave. (Property 77), and 7201 S Constance Ave. (Property 78). [1201] at 1, 18, 21, 23, 25, 28. The claims against these properties are the "Group 1" claims. There are 169 claimants in Group 1 who have submitted proof-of-claims forms. [1201] at 1.[3] The Receiver, SEC, and individual investors say that the individual investor lenders have priority over BC57. [1118]; [1146]; [1151]; [1201]; [1215]; [1216]; [1227]. They argue that the mortgage releases were facially defective, and that Equitybuild Finance lacked authority to release the individual investors' mortgages without their consent. [1146]; [1151]; [1215]; [1216].

[3] Individuals or entities who submitted claims against more than one property in Group 1 are considered a separate claimant for each property. [1201] at n.1.

They also argue that, even if the releases weren't facially defective and Equitybuild Finance had the authority to release the mortgages, BC57 was on inquiry notice of Equitybuild Finance's fraud. [1118]; [1146] [1151]; [1227]. BC57 therefore doesn't qualify as a bona fide purchaser, and any release constituted a fraudulent transfer, they say. [1118]; [1146] [1151]; [1227].

BC57 argues that it has priority because the releases were valid, and Equitybuild Finance had express, implied, and apparent authority to unilaterally execute them. [1152]; [1217]. It also says it was a bona fide purchaser and that the transfer wasn't fraudulent. [1152]; [1217].

III. Evidentiary Issues

A. Expert Opinion Testimony and Report

The SEC and individual investors argue that I shouldn't consider the report and testimony of BC57's expert, J. Bushnell Nielsen. [1146] at 16–18, [1215] at 9–10, [1216] at 14–15. The SEC says Nielsen's report and testimony provide impermissible legal conclusions. [1146] at 16–18.[4] Experts generally cannot provide legal conclusions or statements about what the law is. *See Jimenez v. City of Chicago*, 732

[4] At the same time as it argues this, the SEC peppers its position statement with concessions from Nielsen that cut in its favor. *See, e.g.*, [1146] at 3 (Nielsen's definition of a "hard money" loan), 4 (conceding investors weren't repaid in connection with release of mortgages), n.5 (concession that "Release Deed" is "not a commonly used term" and that Nielsen couldn't recall a "release deed" being used to release an Illinois mortgage); *id.* ("somewhat unusual" that the investors' mortgages identified both their names and the name of their loan servicer"), n.6 (Nielsen's opinion that it's normal for a borrower, like Equitybuild, to instruct a mortgage servicer, like Equitybuild Finance, how to prepare a payoff statement.), 9 (borrower typically not authorized to release a mortgage), *id.* (for a release showing a borrower attempting to release the mortgage—instead of the investors or loan servicer—the title insurer "would start with the assumption that that release is not valid").

F.3d 710, 721 (7th Cir. 2013); *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003). And before this case was reassigned, Judge Lee told the parties he didn't want to see legal conclusions in the testimony or report. *See* [942] at 41:3–7 ("[A]n expert that says, well, you know, I'm a real estate lawyer and I believe that the priority should be this, this, this, and this…those types of experts are non-starters…I don't want to see those reports."). But for the most part, Nielsen didn't provide that sort of testimony. He generally focused on industry custom and practice. For instance, he talked about the documents that closing agents and title insurance companies rely on to determine that a loan servicer has authority to release a mortgage. [1147-34] at 12. He talked about how payoff statements don't come with loan servicing agreements, so title insurers don't know the terms of the agreement. [1147-34] at 17. And he said that the transposition of the name of the releasor and releasee on a release is such a common mistake that a title officer wouldn't inquire about it. [1147-34] at 21.

There were times when he stepped outside his expert role to reach legal conclusions. For instance, he explained parts of Illinois mortgage law. *See* [1147-34] at 9 ("Illinois, like almost all other states, has adopted a statute that obligates a lender to release its mortgage when it has been paid in full. Further, Illinois…permit[s] a title insurer to release a mortgage when the insurer has paid the lender or its agent the amount stated in a written payoff statement.); n.44 ("There is a growing body of law, both statutory and by precedent, to the effect that third parties are entitled to the release of the real estate on payment of the amount recited in a

payoff statement, even if that sum is not sufficient to pay off the loan. Part of this emerging consensus is the principle that a third[-]party buyer or lender has a right to obtain a release of the real estate when it has relied on a payoff statement, whether or not the letter is accurate."). He also applied that law to conclude BC57's conduct regarding the hard-money loans "was reasonable and prudent," and that the circumstances wouldn't have triggered further inquiry for a reasonable title agent or closing agent. [1147-34] at 14–15. These are legal conclusions, so I disregard them.

The SEC objects to Nielsen's opinions about industry custom and practice on another ground: it thinks the opinions are irrelevant. [1216] at 14. Or, rather, only relevant to the inquiry-notice issue, which I don't have to resolve unless I reach the bona-fide-purchaser or fraudulent-transfer issues. [1216] at 14. Because I can resolve this case by holding that the releases were facially defective or that Equitybuild Finance lacked authority to release the mortgages, Nielsen's testimony about industry custom and practice is of no help, the SEC says. *See* [1216] at 14.

I agree that I don't need to—and don't—resolve the bona-fide-purchaser or fraudulent-transfer questions. But compliance with industry custom and practice is relevant to implied authority and apparent authority. Implied authority is actual authority "established through circumstantial evidence." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 939 (7th Cir. 2016). Apparent authority arises when a principal's conduct makes a "third party reasonably believe that [the principal] has consented to an action done on his behalf by someone purporting to act for him." *Id.* "[T]he scope of the agent's authority may be ascertained by determining what persons

of reasonable prudence, ordinarily familiar with business practices, in dealing with the agent might rightfully believe him to possess, based on the principals' conduct." *Mateyka v. Schroeder*, 152 Ill. App. 3d 854, 864 (5th Dist. 1987); *see also Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 675 (7th Cir. 2004) ("Custom and practice in the industry is relevant towards determining whether a third party acted reasonably and diligently."). I therefore consider Nielsen's opinions on industry practice and custom. Whether that practice and custom is reasonable under agency law is a separate question.

B. BC57's Insured Status

The SEC points out that BC57, unlike the individual investors, has title insurance and will be compensated even if I find that BC57 doesn't have priority. [1216] at 16; *see also id.* at 2, [1146] at 10. The individual investors note that some of BC57's lawyers have been provided by the title insurer, which "may be on the hook for BC57's losses" if BC57 doesn't have priority. [1215] at 9. BC57 says considering its insured status is inappropriate and irrelevant to the legal issue. [1217] at 32–33. The Federal Rules of Evidence don't apply here, so I'm not bound by Rule 411's prohibition on considering a party's insured status in certain circumstances. Fed. R. Evid. 411. Still, I agree that BC57's insured status is irrelevant to the validity of the releases, so I don't consider it. Nor do I consider the relative size and sophistication of the claimants.

IV. Analysis

The parties focus on four issues: whether the releases were facially defective, whether Equitybuild Finance had authority to release the mortgages, whether the

release (if valid) was a fraudulent transfer, and whether BC57 qualified as a bona fide purchaser. BC57 says the receiver lacks standing to pursue any avoidance action against BC57. [1217] at 37. Because the first two issues resolve the priority dispute, I don't reach the others.

A. The Releases are Facially Defective

The individual investors say their mortgages were never released because the release documents were facially defective: they listed different parties as the releasor in different sections of the document and were signed by the wrong party. The SEC sides with the individual investors, but BC57 responds that the so-called defects were mere transcription errors of no consequence and that Equitybuild Finance was the correct signatory.

1. Discrepancy between Body and Signature

The body and signature line of the releases conflict with each other. The body lists Equitybuild as the party issuing the release, but the signature line lists Equitybuild Finance as the party issuing the release. [1147-16]–[1147-20]. BC57 says that listing Equitybuild as the mortgagee in the body of the release was clearly a scrivener's error and should be disregarded in favor of the parties' obvious intent. [1217] at 12–13. The fact that Equitybuild Finance, and not Equitybuild, signed the releases shows that Equitybuild Finance was intended as the releasing party, BC57 says. [1217] at 12. But this is conclusory; the importance of the discrepancy is that it's not clear who is claiming to release the mortgage. BC57 provides no reason that the intended releasor would necessarily be the signatory party, as opposed to the party whose name is listed in the fully drafted version of the contract. Nor does BC57

provide any evidence from Equitybuild or Equitybuild Finance—let alone evidence that is "clear, precise, convincing and of the most satisfactory character"—to show that they intended for Equitybuild Finance to be listed in the body. *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F. Supp. 2d 850, 894 (N.D. Ill. 2009), *affirmed*, 615 F.3d 808 (7th Cir. 2010). That sort of evidence about the parties' intent is required to find a scrivener's error, and it's the burden of the party asserting a scrivener's error to provide it. *Id.*

BC57 says other courts have found scrivener's errors where one of the parties was misnamed. [1217] at 12–13 (citing *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184 (1910), and *In re Pak Builders*, 284 B.R. 663 (C.D. Ill. Bankr. 2002)). In both cases BC57 cites, the party's name was written incorrectly in the contract, but it wasn't replaced with the name of another party to the suit. Instead, the errors named companies that didn't exist. For instance, in one case, a check was made out to "Beaver Dam Malleable Iron Range Co.," instead of "Malleable Iron Range Co.," a company based in Beaver Dam, Wisconsin. *Malleable Iron Range Co.*, 244 Ill. at 193–95. "Beaver Dam Malleable Iron Range Co." didn't exist—Equitybuild does. The same is true of *In re Pak Builders*, where an estate was inadvertently granted to a non-existent entity. 284 B.R. at 669. It's fair to assume a mistake has been made when a mortgage is released to or by a non-existent entity, but not necessarily when it's been released to or by an existing entity, let alone one that's closely affiliated with the supposedly intended grantee. BC57 has not proven a scrivener's error.

2. Improper Signatory

The Illinois Mortgage Act provides, 765 ILCS 905/2:

> Every mortgagee of real property...having received full satisfaction and payment of all such sum or sums of money as are really due to him or her from the mortgagor...shall, at the request of the mortgagor...make, execute, and deliver to the mortgagor...an instrument in writing...releasing such mortgage.

The language of the statute makes clear that a release is invalid if not executed by the mortgagee. *Id.* The releases were signed by Equitybuild Finance and Shaun Cohen instead of the individual-investor mortgagees. [1147-16]–[1147-20]. But neither Equitybuild Finance nor Cohen held mortgages in the five properties; they weren't the mortgagees that the statute says must execute the release. BC57 responds that Equitybuild Finance was signing as the individual investors' agent, so was authorized to act in their place. [1217] at 14. As I explain below, Equitybuild Finance lacked the authority to do so.

B. Equitybuild Finance Lacked the Authority to Execute the Releases Without the Investors' Consent.

BC57 bears the burden of proving by a preponderance of the evidence that Equitybuild Finance had the authority to bind individual investors to Equitybuild Finance's purported mortgage releases. *See Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 892 (3d Dist. 2010); *Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132, 1136 (1st Dist. 1980). There are three kinds of authority: express actual authority, implied actual authority, and apparent authority. *Bridgeview Health Care Ctr., Ltd.*, 816 F.3d at 938. Express authority is actual authority granted explicitly by the principal to the agent by words. *See Patrick Eng'g, Inc v. City of Naperville*, 2012 IL 113148 ¶ 34. Implied authority is actual authority "established through circumstantial evidence." *Bridgeview Health Care Ctr., Ltd.*, 816 F.3d at 939. For instance, if doing something that isn't expressly authorized is necessary to accomplish

a task for which an agent has express authority, the agent has implied authority to do that thing. *See id.* Apparent authority exists when a third party reasonably believes that the principal has authorized the agent to enter into an agreement on the principal's behalf. *See Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 (7th Cir. 1998). A third party can only ascertain apparent authority from the actions or conduct of the principal and not from the agent. *See Chase v. Consol. Foods Corp.*, 744 F.2d 566, 568–69 (7th Cir. 1984) ("[An agent] cannot just bootstrap himself into a position where he can bind his principal."); *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 867–68 (7th Cir. 1999).

1. Actual Authority

According to BC57, two documents granted Equitybuild Finance the authority to release the mortgages: the Collateral Agent and Servicing Agreement (CAS) and the Authorization Document. [1217] at 6–11. The CAS impliedly granted that authority by authorizing Equitybuild Finance to issue payoff statements and receive payoffs, and the Authorization Document expressly granted that authority, BC57 says. [1217] at 10–11.

a. Implied Actual Authority from the CAS

Implied authority is actual authority either "(1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent." Restatement (Third) of the Law of Agency § 2.01. Such authority is implied by facts and circumstances and

may be proved by circumstantial evidence. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064 (7th Cir. 2000).

BC57 doesn't argue that executing releases was necessary to accomplish Equitybuild Finance's express responsibilities (issue payoff statements and collect loan payments, among others). Instead, it argues that, because the individual investors authorized those things, they obviously intended for Equitybuild Finance to also unilaterally execute mortgage releases. *See* [1217] at 11 ("EBF had implied actual authority to issue the Releases arising from its authority to issue payoff statements and receive payoffs pursuant to the [CAS] signed by the Investor-Lenders."); *id.* ("[T]he [CAS] impliedly granted that authority [to execute releases] by giving EBF the authority to issue payoff statements and receive payoffs."); *id.* at 12 ("The Investor-Lenders never expected to individually execute a release of any mortgage, and instead knew that EBF would execute releases of their mortgages.").

There are a few problems with this assumption. For one, it mischaracterizes the implied-authority issue. Neither the individual investors nor the SEC argues that Equitybuild Finance lacked any authority to execute the releases. They argue that Equitybuild Finance lacked the authority to do so without the individual investors' consent. *See* [1215] at 5–6; [1216] at 6. Second, whether the individual investors intended for Equitybuild Finance to unilaterally execute the releases is beside the point. Implied authority is based on what the agent would have reasonably believed

about the scope of its authority based on the principal's manifestations—not the principal's intent. Restatement (Third) of the Law of Agency § 2.01.

Third, and most importantly, it's not clear why expressly granting an agent authority to issue payoff statements and receive payoffs on the principal's behalf would make an agent reasonably believe that the principal wanted the agent to do a wholly separate thing (release a mortgage)—something that implicates the basis of the principal-agent relationship (the principals' ownership of the mortgages). Even if that were a reasonable assumption in general, it wouldn't be reasonable in a scenario like this. The CAS, the same document from which BC57 gleans the implied authority, precludes that. It says, [1147-6]–[1147-10], §§ 3, 4(a), 6(a):

- IN THE ABSENCE OF WRITTEN INSTRUCTIONS FROM THE REQUIRED LENDERS, NEITHER THE COLLATERAL AGENT NOR THE SERVICER SHALL FORECLOSE UPON ANY LIEN WITH RESPECT TO ANY OF THE COLLATERAL OR TAKE ANY OTHER ACTION WITH RESPECT TO THE COLLATERAL OR ANY PART THEREOF.
- [T]he Collateral Agent shall have no obligation to, and shall not, take any action hereunder or under the Mortgage except upon written instructions from the Required Lenders in accordance with Section 6(a).
- Collateral Agent shall act only on written instructions from all Lenders with respect to the amendment or termination of the Mortgage.

BC57 acknowledges the constraints this language creates. *See* [1152] at 9 (quoting the language); [1152] at 20 ("The Investor-Lenders also limited EBF's discretion and established their control of EBF where, for example, they required EBF to receive instructions before taking action that affected the collateral...and [terminated] the mortgage."); [1152] at 21–22 (CAS required "that EBF obtain instructions from the Investor-Lenders to take action with respect to the collateral or

any part thereof (*see* § 3) and to terminate the Investor-Lender Mortgage (*see* § 6(a)).”). Still, BC57 insists that an agent with Equitybuild Finance’s power to issue payoff statements and receive payoffs would reasonably believe it had the power to unilaterally release the mortgages. [1217] at 6, 11. But no agent could reasonably believe that they had the authority to do something that their principal explicitly forbade them from doing. The CAS did not give Equitybuild Finance implied authority to release the mortgages without written consent from the individual investor-lenders.

b. Express Actual Authority from the Authorization Document

Even without implied authority from the CAS, BC57 says Equitybuild Finance had express authority from the Authorization Document. [1217] at 6. The Authorization Document, signed by (at least some) individual investors, reads: “Equitybuild Finance, LLC, as agent and trustee has been authorized by the above listed lenders to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance.” [1160] at 78.

The SEC rejects the idea that this granted express authority to release the mortgages for three reasons. First, it points to the location of the investors’ signatures on the Authorization Documents. The documents looked like this, [1160] at 78; [1168-1] at 63:

Lender Name: Kevin Scheel

Lender Amount: $25,000.00

Percentage of Ownership of Total Loan: 1.11%

Monthly Interest Payment Amount to Be Received: $250.00 at 12%

Kevin Scheel

Lender Signature

EquityBuild Finance, LLC, as agent and trustee has been authorized by the above listed lenders to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance.

Based on the document's layout, the SEC says the individual investors were signing off on the amount of their investment and their percentage interest in the mortgage. [1216] at 7. They weren't signing off on the language that came below the signature. *See* [1216] at 7. The SEC cites no legal authority for this argument. In fact, under Illinois law, it isn't necessary for a signature to be at the end of a contract. "[I]f the party's name is written by him or her in any part of the agreement with the intent to sign it…it is sufficient to bind that party." 12 Ill. Law & Prac. Contracts § 39 (citing

McConnell v. Brillhart, 17 Ill. 354, 361 (1856); *First Nat'l Bank of Elgin v. Husted*, 57 Ill. App. 2d. 227, 230 (2d Dist. 1965) (signatory was bound to contract terms on the flip side of the page from his signature)). The placement of the release on the document is not a persuasive sign that the investors did not grant release authority to Equitybuild Finance.

But even if the signatures bound the investors to the quoted language, the SEC says, the language only authorized release "upon payment in full of any outstanding balance." [1160] at 78. The SEC says that never happened because the individual investors received nothing. [1216] at 8. BC57 says it did happen—BC57 paid Equitybuild Finance, after all. [1217] at 17. The language doesn't specify to whom payment in full must be made. Given the requirements of the Illinois Mortgage Act, 765 ILCS 905/2, though, the reasonable interpretation is payment in full to the mortgagee (i.e., the individual investors). The terms of the Authorization Document therefore were not met.

BC57 counters that it was under no obligation to make sure its payment to Equitybuild Finance ended up in the individual investors' hands. [1152] at 14, 15; [1217] at 29. It cites the Illinois Fiduciary Obligations Act and *Rockford Life Ins. Co. v. Rios* to argue that "a party paying the agent of the principal has no duty to confirm the agent remitted the payment of the principal." [1217] at 29 (citing 760 ILCS 65/1, 65/2 and 128 Ill. App. 2d 190, 195 (3d Dist. 1970)). The Illinois Fiduciary Obligations Act only applies to a fiduciary relationship, which is expressly disclaimed by the CAS. *See* [1147-6]–[1147-10], § 2(a) (Equitybuild Finance's "duties...shall be deemed

ministerial and administrative in nature, and neither the Collateral Agent nor the Servicer shall have, by reason of this Agreement or either of the Mortgage or the Note, a fiduciary relationship with any Lender and/or any Affiliate thereof.").

Rockford Life Ins. Co. is more relevant, but its facts are materially different from the ones here. There, Sterling Federal Savings and Loan Association paid the full interest and principal due on a mortgage owned by Rockford Life Insurance Co. 128 Ill. App. 2d at 192. Rockford, the equivalent of the individual investors here, used a loan servicer called H.A. Roe Co., the equivalent of Equitybuild Finance. *Id.* Sterling paid Roe the full interest and principal due on the mortgage, assuming Roe would remit the payment to Rockford minus commission. *Id.* Roe didn't do that. *Id.* Instead, it took Sterling's lump-sum payment but continued sending to Rockford only the amount of the monthly payment. *Id.* Seemingly unaware of what was happening, Rockford tried to foreclose on the mortgage. *See id.* at 193. When Sterling challenged Rockford's ability to foreclose, Rockford claimed it hadn't released the mortgage because Rockford hadn't been paid for it. *Id.* The court disagreed. *Id.* at 193–94. It said that "[u]nder the general rules of agency[,] if Roe [the loan servicer] had either actual or apparent authority to receive the payment[,] then payment to him had the same legal effect as payment to Rockford Life, its principal." *Id.* at 193.

This case is different from *Rockford*. The contract between Rockford and Roe did not "include any limitations or exceptions on the authority of the agent" to collect payments. *Id.* The language was broad and in fact obligated the servicer to service the mortgage "continuously from the date of purchase until the principal and interest

are paid in full." *Id.* The contract here explicitly barred Equitybuild Finance from unilaterally releasing the mortgages. [1147-6]–[1147-10] §§ 3, 4(a), 6(a). Further, Rockford and Roe's past conduct was consistent with the agent's authority to implement the termination of the mortgage. *Id.* at 194. In the five years preceding Roe's fraud, ten loans were paid before maturity. *Id.* Each of those was handled by paying the final balance to Roe. *Id.* Roe then remitted the payments to Rockford minus commission, and Rockford forwarded the mortgage releases to Roe for delivery to the borrowers. *Id.* "If any ambiguity existed in the language of the agreement…the course of conduct between the parties[,] representing as it does the contemporaneous construction of the agreement, would indicate that the agent had actual authority to accept the pre-payment," the court said. *Id.* In contrast, here there was no course of conduct establishing Equitybuild Finance's practice (and authority) of releasing investors' mortgages.

More fundamentally, the mortgage in *Rockford* had been slowly paid down over nearly a decade before payment in full was made and the mortgage was released. *Id.* at 192. The release, though earlier than Rockford might have anticipated, wasn't wholly unexpected. Here, though, the individual investors had no notice of a potential release. In fact, there's no indication that the individual investors even knew of BC57 until after they'd already (purportedly) lost the properties to BC57. *Rockford*'s holding, and the Authorization Document's statement, that payment in full releases a mortgage must be read in the context of other requirements. Among those is the existence of a valid release—whether executed by the holder of the mortgage or by

the holder's agent, who has been given the authority to do so by past conduct. The Authorization Document did not allow for automatic release of the mortgages upon payment in full to Equitybuild Finance absent a valid written release.

Third, the SEC argues that construing the Authorization Document to give Equitybuild Finance unilateral release authority would render sections of the CAS superfluous. [1216] at 8. Sections 2 and 6 of the CAS require written instructions from the individual investors to release the mortgages. [1147-6]–[1147-10]. The Authorization Document was completed as part of the same investment package as the CAS. If BC57 is right, the Authorization Document provided ex ante authority to release the mortgages, making parts of Sections 2 and 6 unnecessary.

I must "look to the contract [here, the investment package, including the CAS and Authorization Document] as a whole in interpreting its individual terms." *Land of Lincoln Goodwill Indus., Inc. v. PNC Fin. Servs.*, 762 F.3d 673, 679 (7th Cir. 2014) (citing *Smith v. West Suburban Med. Ctr.*, 397 Ill. App. 3d 995, 1000 (1st Dist. 2010)). And I must "attempt to give meaning to every provision of the contract and avoid a construction that would render a provision superfluous." *Id.*; *see also Hot Light Brands, L.L.C. v. Harris Realty Inc.*, 392 Ill. App. 3d 493, 499 (2d Dist. 2009). Assuming that the CAS required the individual investors to authorize Equitybuild Finance's release of the mortgages, and that the Authorization Documents simultaneously gave Equitybuild Finance permission to release those mortgages (as BC57 claims they did), what was the point of the CAS provisions in the first place? That interpretation would have rendered them superfluous.

Of course, BC57 might ask: What was the point of the Authorization Document if not to authorize Equitybuild Finance to release the mortgages whenever it chose to down the line? The point, as the SEC notes and as the document itself shows, was to get the individual investors to authorize the amount of their investment and their percentage interest in the mortgage. [1216] at 7. The Authorization Document did not give Equitybuild Finance authority to unilaterally release the mortgages.

2. Apparent Authority

According to BC57, even if Equitybuild Finance lacked actual authority to unilaterally release the mortgages, the releases are valid because Equitybuild Finance had apparent authority. [1152] at 20; [1217] at 17–19.[5] Apparent authority exists when a principal's conduct makes a "third party reasonably believe that [the principal] has consented to an action done on his behalf by someone purporting to act for him." *Bridgeview Health Care Ctr., Ltd.*, 816 F.3d at 939. A third party can only ascertain apparent authority from the words or conduct of the *principal* and not the agent. *Sphere Drake Ins. Ltd.*, 376 F.3d at 672.

Whether it was reasonable for BC57 to believe that the individual investors consented to Equitybuild Finance's release of their mortgages depends on what BC57

[5] BC57 doesn't use the language of "apparent authority." But the arguments it makes in the agency sections of its briefs go to apparent authority. For instance, BC57 says "the Investor-Lenders *advised the world* in the recorded Investor-Lender Mortgages that EBF served as their contact." [1152] at 20. The parties' bona-fide-purchaser, fraudulent-transfer, and reasonable-reliance arguments are also relevant to apparent authority. [1146] at 13 (lender can't rely on facially defective release or unauthorized release if lender is on inquiry notice); [1217] at 20–21; [1217] at 48–51 (good-faith defense to finding of fraudulent transfer depends on whether transferee was on inquiry notice); [1152] at 24. Each depends, in part, on whether Equitybuild Finance acted in accordance with industry custom and standards.

knew or should have known. *See* Restatement (Second) of Agency §§ 166, 167 cmt. a. "A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers." *Gen. Refrigeration & Plumbing Co. v. Goodwill Indus.*, 30 Ill. App. 3d 1081, 1086 (5th Dist. 1975) (quoting 3 John Bourdeau, et al., Am. Juris. Law of Agency (2d ed.)); *see also Malcak v. Westchester Park Dist.*, 754 F.2d 239, 245 (7th Cir.1985) ("A third party dealing with an agent has the obligation to verify both the fact and extent of the agent's authority."). If "a document open to and intended for [the third party's] inspection" shows the fact and scope of an agent's authority, the third party should have known about (and read) that document. *See* Restatement (Second) of Agency § 167 cmt. a. Failing to do so shows a lack of "ordinary diligence" that falls on the third party—not the principal. *See Sphere Drake Ins. Ltd.*, 376 F.3d at 673–74 (quoting Restatement (Second) of Agency § 167 cmt. a. and citing *Application of Lester*, 386 N.Y.S.2d 509, 514 (N.Y. Sup. Ct. 1976)).

BC57 admits that it didn't have a copy of the CAS or Authorization Document throughout the refinancing process. [1152] at 13. And in depositions, BC57 employees said they didn't recall reviewing those documents, the recorded mortgages, or payoff letters. [1147-30] at 111:1–112:17; [1147-26] at 91:10–14, 92:21–93:7. One BC57 employee said the company would not have reviewed the releases because "[i]t wouldn't be our job or within our purview to do that." [1147-26] at 114:21–115:20.

BC57's outside counsel reiterated that sentiment. [1147-25] at 60:18–63:14 ("A: I didn't have to understand [the rights of the individual investors]. It wasn't my obligation to understand," "Q: Did you do anything beyond rely on the title insurance company to determine whether the liens had been released, A: No.").

BC57 says this behavior isn't out of the ordinary. In support, it cites to Nielsen's expert testimony and report. According to Nielsen, it's common for, [1147-34] at 12–15, 17; [1147-33] at 24:15–19:

- a title insurer and closing agent to not request documentation of a loan servicer's authority;
- a closing agent to rely on a signed payoff statement from the loan servicing agent as evidence that the lender or servicer holds the loan and has authority to act for the lender in accepting a payoff and releasing the loan collateral on payment in full;
- a lender to appoint counsel to represent it in making the loan, including taking all necessary steps to obtain assurance that the lender's mortgage will have the desired priority;
- title companies to not conduct a heightened inquiry into existing mortgages made under unusual circumstances;
- a closing agent to rely on a loan servicer to obtain whatever authority it needs from the lender in order to accept a loan payoff and release the loan collateral; this is because the closing agent doesn't have the authority, time, or skill to verify that the servicer has authority to act;
- a title insurer, lender, or lender's counsel to not receive or review servicing agreements.

Nielsen also testified that he wasn't aware of any instances where a servicer didn't have the authority to release a mortgage. [1147-33] at 50:11–14. And it would be "impossible to verify that the servicer is telling you the truth [about its authority] because there is no other source to whom you can turn who can give you better

information. Also, it simply is not custom to verify the statements of the servicer, which begins with the presumption that the servicer may be perpetrating a fraud, not have authority, or would be lying in some capacity. That is not [a] presumption that the title industry or the lenders making new loans operate under." [1147-33] at 62:13–63:1.

Much of Nielsen's expert testimony is about whether the *title insurer*'s conduct was reasonable. *See, e.g.*, [1147-34] at 15–21. That's beside the point. A "title insurer is not in the business of supplying information when it issues a title commitment or a policy of title insurance," *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 341 (2006), so BC57 could not rely on the title insurer, Near North Title, doing its own review.

BC57 counters that even if hiring Near North Title as a title insurer has no bearing on whether BC57 conducted its due diligence, hiring Near North Title as a closing agent does. [1217] at 26–27. According to Nielsen, "[w]hen a lender appoints a title agency as its closing agent, the title agency wears two hats at the closing—as the closing or escrow agent of the lender, and as the agent of a title insurer." [1147-34] at 8. BC57 says the SEC and individual investors fail to distinguish these roles when they argue that BC57 could not rely on Near North Title. [1217] at 27.

BC57 might be right about this. In its role as closing agent, Near North Title may well have been in the "business of providing information" if its value was in its "analytical work," similar to the services provided by attorneys and real estate brokers. *See Freedom Mortg. Corp. v. Burnham Mortg., Inc.*, 720 F. Supp. 2d 978, 994

(N.D. Ill. 2010). So hiring Near North Title as a closing agent may be a factor that cuts in BC57's favor. But it doesn't get BC57 to a finding of reasonableness. Despite his earlier testimony that it's "impossible to verify" that the servicer is being honest about its authority, Nielsen admitted that BC57 could easily have made its loan contingent on being able to contact the existing lenders to verify Equitybuild Finance's release authority. *See* [1147-33] at 64:1–6. Instead, BC57 entirely outsourced due-diligence work and failed to look at the most basic documents. Had BC57 looked at the CAS, it would have learned that the individual investors had expressly disclaimed Equitybuild Finance's authority to unilaterally release. It cannot now blame its lack of knowledge on its own failure to do its homework.

I'm not swayed by the argument that because this sort of lax review is commonplace, it should be accepted as reasonable. *See* [1147-33] at 63:8–10 (individual investors' attorney's questioning of Nielsen) ("What the industry may have decided to do doesn't mean that there isn't something that the industry could be doing."). BC57 isn't off the hook simply because it belongs to an industry that, to hear Nielsen tell it, is sloppy and too trusting. Equitybuild Finance did not have apparent authority to unilaterally release the individual investors' mortgages.

C. BC57's Payment for the Mortgages Didn't Automatically Release Them.

BC57 says that even if the releases were defective and even if Equitybuild Finance lacked the authority to release the mortgages, the mortgages were released because Equitybuild Finance provided payment in full. [1217] at 6. In support, BC57 cites to *Bradley v. Lightcap*, 201 Ill. 511 (1903), which holds that "when [a] debt is

paid, discharged, [or] released...the mortgagee's title is extinguished by operation of law." *Id.* at 517, *reversed in unrelated part by*, 195 U.S. 1 (1904). Assuming this was the common-law rule, the Illinois legislature replaced that rule in 1961 when it passed the Illinois Mortgage Act, 765 ILCS 905/2. The Act says a payment (together with a request for a mortgage release) triggers an *obligation* to release the mortgage—it doesn't trigger the release itself. *Id.*; *see North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784 ¶ 72. That's why Section 4 of the Mortgage Act makes a mortgagee liable for failing to release a mortgage within a month of receiving full payment—because there is no automatic release. 765 ILCS 905/4; *see North Shore Cmty. Bank & Trust Co.* 2014 IL App (1st) 123784 ¶ 73.

BC57 also relies on the Illinois Mortgage Certificate of Release Act, 765 ILCS 935. [1152] at 22; [1217] at n.4. Under the Act, "[r]eceipt of payment pursuant to the lender's written payoff statement shall constitute authority to record a certificate of release." 765 ILCS 935/10. The Act also provides that "a certificate of release...upon being recorded with the recorder, shall constitute a release of the lien of the mortgage described in the certificate of release." 765 ILCS 935/35. The Act doesn't help BC57; it only applies to certificates of release executed by an agent of a title insurance company. *See* 765 ILCS 935/20 ("A certificate of release executed under this Act must contain...[a] statement that the person executing the certificate of release is an officer or a duly appointed agent of a title insurance company."); *see also* 765 ILCS 935/15. The releases were not executed by Near North Title, but instead by Equitybuild Finance. The Act is therefore inapplicable.

V. Conclusion

The individual investors' mortgages have priority. The Receiver shall submit a proposed order for disbursement of the proceeds from the Group 1 properties (3074 Cheltenham Ave. (Property 74), 7625-33 S East End Ave. (Property 75), 7635-43 S East End Ave. (Property 76), 7750 S Muskegon Ave. (Property 77), and 7201 S Constance Ave. (Property 78)) by March 8, 2023.[6]

ENTER:

Manish S. Shah
United States District Judge

Date: February 15, 2023

[6] To the extent the City of Chicago's Position Statement, [1144], affects the receiver's ability to propose a distribution plan, the parties may file supplemental position statements, limited to the City of Chicago's claimed interests, by March 8, 2023.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN, Defendants.	Case No. 1:18-cv-5587 Hon. Manish S. Shah

ORDER APPROVING DISTRIBUTION OF PROCEEDS FROM THE SALES OF GROUP 1 PROPERTIES 74, 75, 76, 77, 78

Pursuant to this Court's Memorandum Opinion and Order (Dkt. 1386) determining the priority of claimants to liquidated funds from the sale of the five estate properties located at 3074 Cheltenham Ave. (Property 74), 7625-33 S East End Ave. (Property 75), 7635-43 S East End Ave. (Property 76), 7750 S Muskegon Ave. (Property 77), and 7201 S Constance Ave. (Property 78) (collectively, the "Group 1 Properties"), the Court hereby finds and ORDERS:

1. Properties 75, 76, and 77 were sold by the Receiver free and clear of all liens pursuant to the Court's Order entered December 12, 2019 (Dkt. 602), and Properties 74 and 78 were sold by the Receiver free and clear of all liens pursuant to the Court's order entered September 25, 2020 (Dkt. 802). Pursuant to these orders, the net proceeds of sale were deposited into separate interest-bearing accounts held by the Receiver for each property. Subsequently, monthly interest deposits and a deposit resulting from the post-sale reconciliation of the property manager's accounts were made to each of these property accounts. Additionally, pursuant to the Court's September 25, 2020 Restoration Order (Dkt. 796), additional funds were transferred to the account for 7625 S East End (#75) and out of the accounts for 7635 S East End (#76) and 7750 S

Muskegon (#77). Finally, pursuant to the Court's Order granting the Receiver's 17th Fee Application (Dkt. 1372), additional funds were transferred to the Receiver's account from each of the five accounts. The Receiver has reported and will continue to report all such additions and subtractions in his quarterly status reports (Dkt. 624, 698, 757, 839, 930, 985, 1017, 1077, 1164, 1243, 1280, 1328, 1379). The balance in the accounts held by the Receiver for each property as of February 28, 2023 are set forth in Exhibits 1 to 5 to this Order.

2. The Court approved a claims process as to which fair and adequate notice was provided to all potentially interested persons and all were provided a full and fair opportunity to submit claims and supporting information. (*E.g.*, Dkt. 941) The Court also determined that a summary process, addressing claims against groups of properties on a seriatim basis, was necessary, appropriate, and afforded due process to all claimants and interest persons for adjudication of allegedly competing secured claims as to those properties. (*E.g.*, Dkt. 941)

3. This Court initiated the summary process for the resolution of Group 1 claims in July 2021. (Dkt. 1006) That process included exchanges of written and oral discovery (fact and expert), the submission to the Court of position statements and responses in regards to issues of priority by the SEC (Dkt. 1146-47, 1216), by institutional-lender claimant BC57 LLC (Dkt. 1152-60, 1217), and by certain of the Group 1 individual investor-lender claimants (Dkt. 1140, 1144, 1149, 1151, 1168 (attaching 50 position statements submitted by claimants to Receiver), 1195, 1215), and recommendations from the Receiver in regards to distributions. (Dkt. 1201, 1345)

4. Adequate and fair notice has been provided to all interested and potentially interested parties (including lienholders in the chain of title), and these potentially interested parties, including all claimants asserting an interest in the five Group 1 Properties, have had a full and fair opportunity to participate in the claims process established by the Court for the resolution of disputed claims and determination of secured interests.

5. Adequate and fair notice of the Receiver's proposed fee allocations has been provided to all claimants. (Dkt. 1107, 1321) All claimants have had a full and fair opportunity to assert their interests and any objections to the allocations in the Receiver's first Fee Allocation Motion (Dkt. 1107) and to Magistrate Judge Kim's order granting the Receiver's first fee allocation motion and overruling objections thereto (Dkt. 1381).

6. Having determined the issue of priority, the Court is now in a position to approve distributions consistent with the orders previously approved and entered by the Court. (Dkt. 941)

7. The Court finds that defendants implemented a Ponzi scheme in which they commingled funds and used new funds from investor and institutional lenders to pay principal and excessive profits in the form of interest which was not tied directly and exclusively to income generated by the real estate assets associated with their loans and/or investments. As a result, in order to promote the orderly and efficient administration of the estate for the benefit of all claimants, the amount of pre-receivership distributions to the individual investors on the loans secured by the Group 1 properties will be netted against the initial amounts lent by that individual.

8. Exhibits 1-5 hereto set forth the total amounts of the distributions made to each of the Group 1 claimants in the form of interest, principal, or "other" distributions (such as bonus incentives extended to claimants). These distributions have been deducted from the claimant's secured claim to calculate the net difference between "money in" and "money out" for the individual claims against these five properties, and the resulting figures used to determine each secured claimants' pro-rata share of the liquidated amounts currently available for distribution to the claimants, which are provided. For claimants whose loan secured by an interest in Group 1 Properties was satisfied in full, no distribution from the liquidated proceeds held for these properties is warranted. Likewise, no distribution is warranted for claimants who did not submit

any documentation supporting their claims and the claims are not supported by EquityBuild's records.

9. The Court further finds that certain claimants agreed to relinquish their secured interest in the Group 1 properties by rolling their secured loan to either an equity position or an unsecured promissory note. These investor lenders will be treated as unsecured creditors and their claims against the relevant Group 1 property will be considered at a later time along with all other unsecured claims against the Receivership Estate. Another claimant agreed to transfer its secured loan to different loans secured by other properties. This investor lender's claims will be considered by the Court at such time as those properties are before the Court. Another claimant's claim has been determined to be partially secured and partially unsecured. Finally, two claimants asserting claims for construction work and fines and costs relating to administrative orders, respectively, do not have a security interest in the liquidated proceeds of sales, and therefore their claims will be considered as unsecured claims against the estate. Each of the foregoing positions were recommended and specified by the Receiver in his February 28, 2022 Submission on Group 1 Claims (Dkt. 1201), and no objections thereto were submitted by any claimants despite haven been given notice and a full and fair opportunity to file a responsive position statement (see Dkt. 941, 1006, 1091, 1211).

10. Having determined the issue of priority, this Court ordered the Receiver to prepare a proposed distribution order. (Dkt. 1386) After receiving notice of the Receiver's proposed distribution order that was filed in the public record on March 8, 2023 (Dkt. 1409), certain claimants contacted the Receiver to object to his distribution recommendation. Consistent with his review of the issues raised by those claimants, the Receiver filed amended proposed distribution orders on March 17, 2023 (Dkt. 1423) and April 7, 2023, each amending the Receiver's recommendation for a single claim.

11. Accordingly, the Court approves the Receiver's preliminary recommendation of final distributions as set forth in Exhibits 1 to 5 to this Order, subject to a final accounting and adjustments that may be required prior to distribution, namely:

a. any adjustments to the available funds due to interest accrued through the date of distribution;

b. any adjustments to the fees allocated to the Group 1 properties pursuant to the Court's ruling on pending objections to the Magistrate Judge's order (Dkt. 1389);

c. any adjustments to the fees allocated to the Group 1 Properties pursuant to the Court's resolution of the pending Receiver's Second Motion for Approval of Fee Allocations for Interim Payment Pursuant to Receiver's Lien (Dkt. 1321);

d. any adjustment to the fees allocated to the Group 1 Properties in the Receiver's pending Fee Application #18 (Dkt. 1379);

e. any additional allocation of fees to the Group 1 Properties in future fee applications;

f. any adjustment to the expenses allocated to the Group 1 Properties pending resolution of the Receiver's Third Motion for Reimbursement and Restoration of Funds Expended for the Benefit of Receivership Properties and to Approve Certain Additional Payments from Receivership Property Sales Proceeds (Dkt. 1393); and

g. any further developments occurring between the date of this Order and the date of distribution.

12. Because the Court intends that this be a final distribution, there will not be any holdbacks of professional fees or expenses associated with the Receiver's fee applications or fee allocation motions upon the distribution of proceeds to claimants. However, any excess proceeds in the account for 7625 S East End, following final distributions consistent with this order, shall be held in the account for that property until further order of the Court.

Entered:

Manish S. Shah
United States District Court Judge

Date: May 3, 2023

Amended Exhibit 1

SEC v. EquityBuild

Group 1 Distributions

3074 Cheltenham Avenue a/k/a 7836-38 S South Shore Avenue (Property 74)

AMENDED 4/7/23

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
1839 Fund I LLC	74-367	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$12,850.00	POC, LSA	$37,150.00			2.66%	$ 24,045.54
Adir Hazan	74-143	POC, DIS, POS	Investor-Lender	$50,000.00	$0.00	$8,183.00	POC (interest) and LSA ($1000 other)	$0.00	$41,817.00	Secured investment rolled to SSDF1 Equity Fund	0.00%	$ -
Alton Motes and Vicki Elaine Washburn JTWROS	74-2042	POC, DIS	Investor-Lender	$80,000.00	$0.00	$21,226.60	LSA	$0.00	$58,773.40	EquityBuild records indicate claim bought out by another investor and principal returned	0.00%	$ -
BTRUE LLC Barry J. Oates	74-669	POC	Equity Investor	$38,400.00	$38,400.00	$0.00	POC, LSA	$38,400.00			2.75%	$ 24,854.61
Christopher Pong	74-760	POC, DIS	Investor-Lender	$29,280.00	$29,280.00	$7,622.57	POC, DIS, LSA	$21,657.43			1.55%	$ 14,017.89
City of Chicago	74-693	POC, DIS, POS	Other	$10,812.42		$0.00	N/A	$0.00	$0.00	Water debt paid at closing	0.00%	$ -
Daniel Matthews, Leah Matthews	74-117	POC	Investor-Lender	$20,000.00	$20,000.00	$3,606.62	POC	$16,393.38			1.17%	$ 10,610.70
Danyel Tiefenbacher and Jamie Lai	74-510	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$13,599.93	POC, LSA	$36,400.07			2.61%	$ 23,560.14
Degenhardt, Duane A	74-2015	POC, DIS	Investor-Lender	$66,684.00	$66,684.00	$9,780.32	LSA	$56,903.68			4.07%	$ 36,831.21
Erika Dietz	74-1283	POC, DIS	Investor-Lender	$50,000.00	$0.00	$42,756.68	POC, LSA	$0.00	$7,243.32	$30,000 principal returned and $20,000 of investment rolled to unsecured promissory note	0.00%	$ -
G&M You-Nique Properties, LLC	74-722	POC, DIS, POS	Investor-Lender	$60,000.00	$60,000.00	$16,695.00	POC (interest) and LSA ($1000 other)	$43,305.00			3.10%	$ 28,029.39
Grathia Corp	74-1445	POC, POS	Investor-Lender	$100,000.00	$100,000.00	$32,600.07	LSA	$67,399.93			4.83%	$ 43,624.97
iPlan Group Agent for Custodian FBO Jyotsna Sharma IRA	74-341	POC, DIS, POS	Investor-Lender	$25,000.00	~~$25,000.00~~	~~$3,591.70~~	LSA	~~$21,408.30~~		~~Principal returned to claimant on 7/20/16~~	~~1.53%~~	~~$ 13,856.64~~
IPlanGroup Agent for Custodian FBO Mark Young	74-1446	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$25,033.40	LSA	$74,966.60			5.37%	$ 48,522.54
Ira J. Fields Living Trust, Glynis Sheppard, Trustee	74-1240	POC, DIS, POS	Investor-Lender and Equity Investor	$50,000.00	$50,000.00	$12,848.95	DIS and LSA ($1000 other)	$37,151.05			2.66%	$ 24,046.22
James Hoven	74-2029	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$14,082.00	POC (interest) and LSA ($1000 other)	$35,918.00			2.57%	$ 23,248.12
Jill Meekcoms (The Entrust Group Inc. FBO Jill (Halverson) Meekcoms IRA #33-21296)	74-548	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$14,183.26	POC	$35,816.74			2.56%	$ 23,182.58
John Taxeras (Flying Hound Holdings. LLC	74-994	POC, DIS	Investor-Lender	$18,552.85	$18,552.85	$7,884.23	DIS	$10,668.62			0.76%	$ 6,905.32
Joseph and Linda Martinez	74-2095	POC	Investor-Lender	$50,000.00	$50,000.00	$13,016.60	LSA	$36,983.40			2.65%	$ 23,937.70
Joshua Morrow	74-734	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$13,599.93	POC (interest) and LSA ($1000 other)	$36,400.07			2.61%	$ 23,560.14
Julia Pong (iPlanGroup Agent for Custodian FBO Julia Pong IRA)	74-1022	POC, DIS	Investor-Lender	$34,572.00	$34,572.00	$9,000.24	POC, DIS, LSA	$25,571.76			1.83%	$ 16,551.46
Kenneth (Ken) and Maria (Tina) Jorgensen (iPlanGroup Agent for Custodian FBO Maria Christina Jorgensen IRA)	74-194	POC, DIS, POS	Investor-Lender	$42,000.00	$42,000.00	$10,820.00	POC, DIS	$31,180.00			2.23%	$ 20,181.42
Kester Brothers Farm, LLC, C/O James R. Kester	74-944	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$13,099.93	POC, DIS	$36,900.07			2.64%	$ 23,883.77
Kevin Randall	74-811	POC	Investor-Lender	$50,000.00	$0.00	$10,266.61	LSA	$0.00	$39,733.39	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
KKW Investments, LLC	74-336	POC, DIS, POS	Investor-Lender	$1,600.00	$1,600.00	$456.00	POC	$1,144.00			0.08%	$ 740.46
Madison Trust Company Agent for Custodian FBO The Jacqueline C Rowe Living Trust IRA	74-163	POC, DIS	Equity Investor	$50,000.00	$50,000.00	$11,583.33	LSA	$0.00	$38,416.67	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
Madison Trust Company Custodian FBO Robert W. Jennings Account# M1605053	74-241	POC, DIS, POS	Investor-Lender	$74,539.00	$74,539.00	$20,266.69	DIS	$54,272.31			3.89%	$ 35,128.05
May M. Akamine for Aurora Investments, LLC (assets formerly under MayREI, LLC)	74-1412	POC, DIS	Investor-Lender	$86,515.00	$86,515.00	$22,200.00	POC, DIS	$64,315.00			4.60%	$ 41,628.23
Michael F Grant & L. Gretchen Grant (Michael F. Grant & L. Gretchen Grant Revocable Trust dated March 16th 2012)	74-393	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$4,712.53	LSA	$45,287.47			3.24%	$ 29,312.56
New Move Ventures Inc. (Steven Fecko)	74-115	POC	Investor-Lender	$50,000.00	$50,000.00	$14,500.00	LSA	$35,500.00			2.54%	$ 22,977.57
Optima Property Solutions, LLC	74-1023	POC, DIS, POS	Investor-Lender	$60,000.00	$0.00	$74,645.00	LSA	$0.00	$0.00	Secured investment transferred to different EquityBuild properties	0.00%	$ -
Pat DeSantis	74-397	POC, DIS, POS	Investor-Lender	$110,000.00	$110,000.00	$30,910.07	LSA	$79,089.93			5.66%	$ 51,191.38
Paul N. Wilmesmeier	74-300	POC, DIS, POS	Investor-Lender	$25,000.00	$25,000.00	$6,161.07	POC, DIS	$18,838.93			1.35%	$ 12,193.60
PNW Investments, LLC	74-332	POC, DIS, POS	Investor-Lender	$10,000.00	$10,000.00	$2,850.00	POC, DIS	$7,150.00			0.51%	$ 4,627.88
QUEST IRA Inc. FBO Francisco A. Romero Sr. Acct# 25282-11 and Acct# 25282-21	74-1352	POC, DIS	Investor-Lender	$56,000.00	$56,000.00	$13,553.59	POC. DIS	$42,446.41			3.04%	$ 27,473.67

KEY

POC - Proof of Claim

DIS - Claimants' Discovery Response

LSA - EquityBuild Lender Statement of Accounts

POS - Claimant's Position Statement

WF - Wells Fargo Bank Records

A 38

SEC v. EquityBuild

Group 1 Distributions

3074 Cheltenham Avenue a/k/a 7836-38 S South Shore Avenue (Property 74)

AMENDED 4/7/23

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
Quest IRA FBO Francis D Webb 1437711	74-218	POC, DIS, POS	Investor-Lender	$22,035.00	$0.00	$5,993.56	LSA	$0.00	$16,041.44	Secured investment rolled to SSDF6 Equity Fund	0.00%	$ -
Sam Gerber, CEO, Gerber and Associates, REI, LLC	74-562	POC, DIS, POS	Investor-Lender	$80,000.00	$0.00	$0.00	POC, LSA	$0.00	$80,000.00	Secured investment rolled to SSDF6 Equity Fund	0.00%	$ -
SAMUEL HOME SOLUTIONS LLC, George Samuel	74-347	POC	Investor-Lender	$42,131.00	$42,131.00	$13,468.46	POC	$28,662.54			2.05%	$ 18,551.98
Scott E Pammer	74-827	POC, DIS	Investor-Lender	$70,000.00	$70,000.00	$19,483.00	POC, DIS	$50,517.00			3.62%	$ 32,697.40
Sidney Haggins (Vantage FBO Sidney Haggins IRA)	74-1434	POS	Investor-Lender	$30,000.00	$30,000.00	$8,700.00	LSA	$21,300.00			1.52%	$ 13,786.54
Susan Kalisiak-Tingle	74-1438	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$16,299.93	LSA	$33,700.07			2.41%	$ 21,812.55
Terry L. Merrill, Sheryl R. Merrill	74-602	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$13,599.93	LSA	$36,400.07			2.61%	$ 23,560.14
TruStar Real Estate Solutions, LLC	74-337	POC, DIS, POS	Investor-Lender	$75,000.00	$75,000.00	$20,125.00	POC	$54,875.00			3.93%	$ 35,518.14
Vladimir Matviishin	74-233	POC, DIS	Investor-Lender	$28,075.00	$0.00			$0.00	$0.00	This is a duplicate claim	0.00%	$ -
Vladimir Matviishin, dba Network Expert	74-1387	POC, DIS	Investor-Lender	$28,075.00	$28,075.00	$7,861.05	LSA	$20,213.95			1.45%	$ 13,083.59
Walter T Akita and Margaret M Akita	74-950	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$13,099.93	POC	$36,900.07			2.64%	$ 23,883.77
Young Family Trust	74-1452	POC, DIS, POS	Investor-Lender	$45,000.00	$45,000.00	$1,800.00	LSA	$43,200.00			3.09%	$ 27,961.43
Yvette Nazaire Camacho (iPlanGroup Agent for Custodian FBO Yvette Nazaire Camacho IRA)	74-487	POC, DIS	Investor-Lender	$30,000.00	$30,000.00	$7,510.00	DIS	$22,490.00			1.61%	$ 14,556.77
TOTAL				$2,349,271.27	$1,918,348.85			$1,396,876.85	$282,025.22		100%	$904,136.07

Calculation of Funds Available for Distribution	
Account balance as of 2/28/23	$ 1,025,851.52
Fee allocations Apps 1-18	$ (94,795.19)
Credit 17th fee app payment	$ 2,316.00
Credit agency fees paid	$ 2,896.00
Reimbursement Third Restoration Motion (Dkt. 1393)	$ (32,132.26)
Available for distribution	$ 904,136.07

KEY

POC - Proof of Claim

DIS - Claimants' Discovery Response

LSA - EquityBuild Lender Statement of Accounts

POS - Claimant's Position Statement

WF - Wells Fargo Bank Records

Exhibit 2

S.E.C. v. EquityBuild
Group 1 Distributions
7625-33 S East End Avenue (Property 75)
AMENDED 3/17/23

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Disribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
Alcalli Sabat	75-786	POC, DIS, POS	Investor-Lender	$22,993.00	$0.00			$0.00		Failure of documentation supporting claim either submitted by Claimant or located in EquityBuild records	0.00%	$ -
Asians Investing In Real Estate LLC	75-503	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$18,466.65	POC	$31,533.35			3.58%	$ 31,533.35
Brad and Linda Lutz	75-962	POC, DIS, POS	Investor-Lender	$397,836.00	$361,629.00	$134,255.27	POC, DIS, LSA	$227,373.73			25.84%	$ 227,373.73
Capital Investors, LLC	75-1490	POC, DIS, POS	Investor-Lender	$36,207.00	$36,207.00	$4,505.76	DIS	$31,701.24			3.60%	$ 31,701.24
City of Chicago	75-693	POC, DIS, POS	Other	$24,790.76	$0.00	$0.00	N/A	$0.00	$24,790.76		0.00%	$ -
Edge Investments, LLC, Janet F. Turco, Owner/Member IRA	75-180	POC, DIS	Investor-Lender	$176,226.00	$176,226.00	$63,906.94	LSA	$112,319.06			12.77%	$ 112,319.06
Geronimo Usuga Carmona	75-543	POC, DIS	Investor-Lender	$35,667.00	$35,667.00	$3,863.90	POC	$31,803.10			3.61%	$ 31,803.10
KKW Investments, LLC	75-336	POC, DIS, POS	Investor-Lender	$75,000.00	$75,000.00	$22,925.00	POC	$52,075.00			5.92%	$ 52,075.00
Knickerbocker LLC	75-2035	POC, DIS, POS	Investor-Lender	$39,664.00	$39,664.00	$14,378.20	LSA	$25,285.80			2.87%	$ 25,285.80
Lorenzo Jaquias (iPlanGroup Agent for Custodian FBO Lorenzo Jaquias)	75-184	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$14,783.33	LSA	$35,216.67			4.00%	$ 35,216.67
Madison Trust Company Agent for Custodian FBO The Jacqueline C Rowe Living Trust IRA	75-163	POC, DIS	Equity Investor	$200,000.00	$0.00	$71,491.67	DIS	$0.00	$128,508.33	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
Michael James Guilford and Nancy Richard-Guilford, Jointly with Right of Survivorship	75-516	POC, DIS, POS	Investor-Lender	$92,561.00	$92,561.00	$30,269.05	POC	$62,291.95			7.08%	$ 62,291.95
Randall Sotka (Tahiti Trust)	75-1207	POC, DIS, POS	Investor-Lender	$38,826.00	$38,826.00	$5,694.48	LSA	$33,131.52			3.77%	$ 33,131.52
Robert Potter	75-1389	POC, DIS	Investor-Lender	$786.00	$786.00	$100.26	LSA	$685.74			0.08%	$ 685.74
Stephan Tang	75-1111	POC, DIS, POS	Investor-Lender	$25,185.00	$25,185.00	$3,492.32	LSA	$21,692.68			2.47%	$ 21,692.68
Steven R. Bald	75-399	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$15,000.00	POC	$35,000.00			3.98%	$ 35,000.00
Strata Trust Company FBO David J Geldart	75-1010	POC	Investor-Lender	$107,362.00	$107,362.00	$32,566.04	LSA	$74,795.96			8.50%	$ 74,795.96
The Peter Paul Nuspl Living Trust	75-2044	POC, DIS, POS	Investor-Lender	$217,100.00	$0.00	$57,983.79	LSA	$0.00	$159,116.21	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
United Capital Properties, LLC	75-1480	POC	Investor-Lender	$2,303.00	$2,303.00	$306.13	LSA	$1,996.87			0.23%	$ 1,996.87
Wesley Pittman (Pittman Gold LLC)	75-469	POC, DIS	Investor-Lender	$150,000.00	$150,000.00	$47,125.00	POC, DIS, LSA	$102,875.00			11.69%	$ 102,875.00
TOTAL				$1,792,506.76	$1,291,416.00			$879,777.67	$312,415.30		100.00%	$ 879,777.67

Calculation of Funds Available for Distribution	
Account balance as of 2/28/23	$ 1,256,932.32
Fee allocations Apps 1-18	$ (102,433.00)
Credit 17th fee app payment	$ 495.59
Credit agency fees paid	$ 3,108.00
Reimbursement Third Restoration Motion (Dkt. 1393)	$ (48.43)
Available for distribution	$ 1,158,054.48
Preliminary Recommended Amount of Final Distribution	$ (879,777.67)
Preliminary to Receiver's Account for future distribution	$ 278,276.81

KEY
POC - Proof of Claim
DIS - Claimants' Discovery Response
LSA - EquityBuild Lender Statement of Accounts
POS - Claimant's Position Statement
WF - Wells Fargo Bank Records

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Exhibit 3

Sec. Equity Fund

Group 1 Investor-Lender Claims

7635-43 S East End Avenue (Property 76)

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
Arthur and Dinah Bertrand	76-890	POC, DIS, POS	Investor-Lender	$217,448.00	$217,448.00	$83,899.00	POC, DIS	$133,549.00			13.59%	$ 131,055.85
Arthur Bertrand	76-892	POC, DIS, POS	Investor-Lender	$2,875.00	$2,875.00	$1,124.00	POC, DIS	$1,751.00			0.18%	$ 1,718.31
Carolyn B Ucker	76-1099	POC	Equity Investor	$25,000.00	$25,000.00	$7,250.00	LSA	$17,750.00			1.81%	$ 17,418.63
Cecilia Wolff	76-1204	POC, DIS, POS	Investor-Lender	$25,000.00	$25,000.00	$7,250.00	LSA	$17,750.00			1.81%	$ 17,418.63
City of Chicago	76-693	POC, DIS, POS	Other	$917.76	$0.00	$0.00	N/A	$0.00	$ 917.76		0.00%	$ -
Daniel Matthews, Leah Matthews	76-117	POC	Investor-Lender	$72,029.00	$0.00	$30,544.07	POC	$0.00	$ 41,484.93	Secured investment rolled to unsecured promissory note	0.00%	$ -
Dennis & Mary Ann Hennefer	76-355	POC, DIS	Investor-Lender	$25,000.00	$25,000.00	$3,466.00	DIS	$21,534.00			2.19%	$ 21,131.99
Equity Trust Custodian FBO Dorothy Marie Baker IRA	76-2007	POC	Investor-Lender	$10,000.00	$10,000.00	$3,050.00	POC	$6,950.00			0.71%	$ 6,820.25
Frank Starosciak	76-1239	POC, DIS, POS	Investor-Lender	$17,125.00	$17,125.00	$5,774.45	POC	$11,350.55			1.16%	$ 11,138.66
Gary R Burnham Jr Solo401K Trust	76-1067	POC, DIS, POS	Investor-Lender	$42,029.00	$0.00	$10,480.00	POC	$0.00	$31,549.00	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
iPlanGroup Agent for Custodian FBO Laura Dirnberger Roth IRA	76-448	POC, DIS	Investor-Lender	$10,000.00	$10,000.00	$2,800.00	LSA	$7,200.00			0.73%	$ 7,065.59
James Clements	76-1402	POC, DIS	Investor-Lender	$20,000.00	$0.00	$22,800.00	POC	$0.00	$0.00	Principal repaid with interest	0.00%	$ -
Jeffry M. Edwards	76-666	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$14,533.33	DIS	$35,466.67			3.61%	$ 34,804.51
JK Electron, Inc., Jan Kobylarczyk	76-1297		Trade Creditor	$13,250.00	$13,250.00	$0.00	N/A	$13,250.00		Order approving sale (Dkt. 602) at 3(h)	1.35%	$ 13,002.64
John Bloxham	76-1012	POC, DIS, POS	Investor-Lender	$50,000.00	$0.00	$11,966.66	DIS	$0.00	$50,000.00	Secured investment rolled to SSDF4 Equity Fund	0.00%	$ -
Lorenzo Jaquias	76-184	POC, DIS	Investor-Lender	$50,000.00	$0.00	$0.00	N/A	$0.00	$0.00	Claimant's loan is secured by 7625-33 S East End (property 75) only.	0.00%	$ -
Manoj Donthineni	76-1357	POC, DIS	Investor-Lender	$41,007.00	$41,007.00	$12,068.03	LSA	$28,938.97			2.95%	$ 28,398.78
Michael James Guilford and Nancy Richard-Guilford, Jointly with Right of Survivorship	76-516	POC, DIS, POS	Investor-Lender	$57,439.00	$57,439.00	$18,709.28	POC	$38,729.72			3.94%	$ 38,006.68
Paul N. Wilmesmeier	76-300	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$16,786.21	POC	$33,213.79			3.38%	$ 32,593.73
Penny W Goree (iPlanGroup Agent for Custodian FBO Timothy J Goree IRA)	76-236	POC	Equity Investor	$50,000.00	$50,000.00	$14,000.00	POC, LSA	$36,000.00			3.66%	$ 35,327.98
QCH Investment Trust	76-1436	POC	Investor-Lender	$50,000.00	$50,000.00	$14,783.33	POC	$35,216.67			3.58%	$ 34,559.21
Robert Guiney	76-798	POC, DIS, POS	Investor-Lender	$18,250.00	$18,097.00	$5,442.15	DIS	$12,654.85			1.29%	$ 12,418.67
Steven R. Bald	76-399	POC, POS	Investor-Lender		$0.00	$0.00	N/A	$0.00	$0.00	Claimant's loan is secured by 7625-33 S East End (property 75) only.	0.00%	$ -
THE INCOME FUND, LLC Thomas Garlock, Managing Member	76-1421	POC, DIS	Investor-Lender	$80,000.00	$80,000.00	$29,066.67	POC	$50,933.33			5.18%	$ 49,982.48
The Peter Paul Nuspl Living Trust	76-2044	POC, DIS, POS	Investor-Lender	$0.00	$0.00	$0.00	N/A	$0.00	$0.00	Claimant's loan is secured by 7625-33 S East End (property 75) only.	0.00%	$ -
Tiger Chang Investments LLC	76-164	POC, DIS	Investor-Lender	$25,000.00	$25,000.00	$8,975.00	POC, DIS	$16,025.00			1.63%	$ 15,725.84
Total Return Income Fund, LLC Thomas Garlock, Managing Member	76-1366	POC, DIS	Investor-Lender	$520,000.00	$520,000.00	$149,500.00	DIS	$370,500.00			37.70%	$ 363,583.26
Trey Hopkins	76-714	POC	Investor-Lender	$100,000.00	$100,000.00	$23,000.00	DIS	$77,000.00			7.84%	$ 75,562.54
Umbrella Investment Partners	76-1167	POC, DIS, POS	Investor-Lender	$12,833.00	$12,833.00	$3,864.90	POC	$8,968.10			0.91%	$ 8,800.68
Winnie Quick Blackwell (née Winnie Jannett Quick)	76-102	POC, DIS, POS	Investor-Lender	$11,000.00	$11,000.00	$3,087.33	DIS	$7,912.67			0.81%	$ 7,764.90
TOTAL				$1,646,202.76	$1,411,074.00			$982,644.32	$123,951.69		100.00%	$ 964,299.71

Calculation of Funds Available for Distribution	
Account balance as of 2/28/23	$ 1,061,643.95
Fee allocations Apps 1-18	$ (96,368.85)
Credit 17th fee app payment	$ 477.04
Credit agency fees paid	$ 2,896.00
Reimbursement Third Restoration Motion (Dkt. 1393)	$ (4,348.43)
Available for distribution	$ 964,299.71

KEY
POC - Proof of Claim
DIS - Claimants' Discovery Response
LSA - EquityBuild Lender Statement of Accounts
POS - Claimant's Position Statement
WF - Wells Fargo Bank Records

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Exhibit 4

SEC v. EquityBuild
Group 1 Distributions
7750-52 S Muskegon Avenue (Property 77)

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
Alton Motes (Alton P. Motes Trust UTA 12-15-11)	77-2042	POC, DIS	Investor-Lender	$43,000.00	$43,000.00	$12,255.00	LSA	$30,745.00			2.58%	$ 8,280.50
Arthur and Dinah Bertrand	77-890	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$49,356.00	POC, DIS	$50,644.00			4.25%	$ 13,639.86
Bancroft, Ed (iPlanGroup Agent for Custodian FBO Ed Bancroft Roth)	77-2008	POC	Investor-Lender and Equity Investor		$0.00	$0.00	N/A	$0.00	$0.00	Claimed interest in this property not supported by Proof of Claim or EquityBuild Records	0.00%	$
Celia Tong Revocable Living Trust Dated December 22, 2011	77-287	POC, DIS	Investor-Lender	$25,000.00	$0.00	$7,508.33	DIS	$0.00	$17,491.67	Claimants security interest assigned to another claimant and investment rolled to SSDF4 Equity Fund	0.00%	$
Christopher Wilson and Brittny Wilson (Niosi)	77-807	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$25,000.00	DIS	$25,000.00			2.10%	$ 6,738.21
CLD Construction, Inc. (Doru Unchias)	77-1454	POC	Independent Contractor	$49,000.00	$0.00	$0.00	N/A	$0.00	$49,000.00	Unsecured trade creditor	0.00%	$
Daniel J Martineau	77-1299	POC, DIS, POS	Investor-Lender	$100,000.00	$0.00	$124,000.00	POC	$0.00	$0.00	Principal repaid with interest	0.00%	$
Danielle DeVarne	77-679	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$18,667.00	DIS	$31,333.00			2.63%	$ 8,438.86
Derrick, Horace (H Derrick, LLC)	77-2016	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$40,000.00	POC, DIS	$60,000.00			5.04%	$ 16,159.89
Fraser Realty Investments, LLC	77-1079	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$42,033.00	POC	$57,967.00			4.86%	$ 15,612.15
Girl Cat Capital West LLC, Valentina Salge, President	77-350	POC, DIS, POS	Investor-Lender	$25,000.00	$25,000.00	$3,666.63	DIS, LSA	$21,333.37			1.79%	$ 5,745.68
Henry D. Gallucci (Equity Trust Company Custodian FBO Henry D. Gallucci beneficiary of DCD Victoria E. Gallucci IRA 2.67 Undivided interest)	77-2059	POC, DIS	Investor-Lender	$60,000.00	$60,000.00	$24,000.00	POC	$36,000.00			3.02%	$ 9,695.82
Hillside Fund, LLC - Janet F. Turco, Owner/ Managing Member	77-101	POC	Investor-Lender	$125,000.00	$125,000.00	$45,312.50	LSA	$79,687.50			6.69%	$ 21,462.09
iPlan Group FBO Randall Pong IRA	77-728	POC, DIS	Investor-Lender and Equity Investor	$8,632.00	$8,632.00	$1,035.81	POC, DIS	$7,596.19			0.64%	$ 2,046.87
iPlanGroup Agent for Custodian FBO Charles Michael Anglin	77-331	POC, DIS, POS	Investor-Lender	$10,633.00	$10,633.00	$1,333.00	POC, LSA	$9,300.00			0.78%	$ 2,504.75
Jason Ragan - TSA	77-797	POC, DIS, POS	Equity Investor	$2,022.00	$2,022.00	$269.60	LSA	$1,752.40			0.15%	$ 471.97
John E. Wysocki	77-740	POC, DIS	Equity Investor	$17,745.00	$17,745.00	$7,418.36	DIS	$10,326.64			0.87%	$ 2,781.26
John Taxeras (Flying Hound Holdings)	77-994	POC, DIS	Equity Investor	$21,400.00	$21,400.00	$9,197.72	POC	$12,202.28			1.02%	$ 3,286.42
Joseph and Linda Martinez	77-2095	POC	Investor-Lender	$50,000.00	$50,000.00	$8,536.06	POC, LSA	$41,463.94			3.48%	$ 11,167.41
Kingdom Trust Company, Custodian, FBO Louis Duane Velez SEP IRA acct # 7422686172	77-1475	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$43,283.24	POC, DIS	$56,716.76			4.76%	$ 15,275.42
Maher, Avery (Christopher Maher CESA)	77-2080	POC, DIS	Investor-Lender	$11,000.00	$11,000.00	$4,400.00	POC	$6,600.00			0.55%	$ 1,777.57
Maher, Christopher	77-2036	POC, DIS	Investor-Lender	$14,000.00	$14,000.00	$5,600.00	POC	$8,400.00			0.70%	$ 2,262.86
Maher, Gavin (Christopher Maher, CESA)	77-2081	POC, DIS	Investor-Lender	$15,000.00	$15,000.00	$6,000.00	POC	$9,000.00			0.76%	$ 2,423.95
Maher, Travis (Christopher Maher, CESA)	77-2082	POC, DIS	Investor-Lender	$10,000.00	$10,000.00	$4,000.00	POC	$6,000.00			0.50%	$ 1,615.97
Mark P. Mouty	77-165	POC, DIS, POS	Investor-Lender	$50,000.00	$0.00	$20,500.00	POC	$0.00	$29,500.00	Secured loan rolled to SSDF6 Equity Fund	0.00%	$
Mark Young	77-1154	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$33,833.43	LSA	$66,166.57			5.55%	$ 17,820.52
Matthew Boyd	77-2060	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$16,916.57	LSA	$33,083.43			2.78%	$ 8,910.30
May M. Akamine for Aurora Investments, LLC (assets formerly under MayREI, LLC)	77-1412	POC, DIS	Investor-Lender	$25,000.00	$25,000.00	$3,800.00	POC	$21,200.00			1.78%	$ 5,709.76
May M. Akamine for Aurora Investments, LLC (assets formerly under MayREI, LLC)	77-1412	POC, DIS	Investor-Lender	$2,005.00	$2,005.00	$267.30	DIS	$1,737.70			0.15%	$ 468.01
Paul N. Wilmesmeier	77-300	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$21,808.44	POC	$28,191.56			2.37%	$ 7,592.78
Paul Scribner	77-1135	POC, DIS	Investor-Lender	$6,708.00	$6,708.00	$651.61	POC, DIS, LSA	$6,056.39			0.51%	$ 1,631.16
Quest IRA FBO Francis D Webb 1437711	77-218	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$14,500.00	LSA	$35,500.00			2.98%	$ 9,561.15
Scott E Pammer	77-827	POC, DIS	Investor-Lender	$70,000.00	$70,000.00	$31,464.52	POC, DIS	$38,535.48			3.23%	$ 10,378.99
Self Directed IRA Services, Inc., Custodian FBO Ping Liu IRA	77-544	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$21,641.67	DIS, POS	$28,358.33			2.38%	$ 7,637.20
Spectra Investments LLC/ Deborah L. Mullica	77-1220	POC, DIS, POS	Investor-Lender	$82,255.00	$82,255.00	$34,917.37	POS, DIS	$47,337.63			3.97%	$ 12,749.86
Steven and Linda Lipschultz	77-1442	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$47,451.50	POC	$52,548.50			4.41%	$ 14,152.79
Terry L. Merrill, Sheryl R. Merrill	77-602	POC, DIS	Investor-Lender	$49,500.00	$49,500.00	$14,500.00	LSA	$35,000.00			2.94%	$ 9,425.49
The Anchor Group LLC - Ronald J. Hansen, Managing Partner (c/o Viola Hansen)	77-949	POC	Investor-Lender	$25,000.00	$25,000.00	$7,250.00	LSA	$17,750.00			1.49%	$ 4,780.58

KEY
POC - Proof of Claim
DIS - Claimants' Discovery Response
LSA - EquityBuild Lender Statement of Accounts
POS - Claimant's Position Statement
WF - Wells Fargo Bank Records

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SEC vs EquityBuild
Group 1 Distributions
7750-52 S Muskegon Avenue (Property 77)

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
The Edward Falkowitz Living Trust	77-575	POC, POS	Investor-Lender	$111,000.00	$0.00	$17,297.50	LSA	$0.00	$93,702.50	Secured investment rolled to unsecured promissory note	0.00%	$
THE INCOME FUND, LLC Thomas Garlock, Managing Member	77-1421	POC, DIS	Investor-Lender	$150,000.00	$150,000.00	$73,050.00	POC	$76,950.00			6.46%	$ 20,724.81
The Mennco Properties, LLC. Solo 401K Plan (by Robert Mennella Managing Partner)	77-1032	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$20,000.00	POC, DIS	$30,000.00			2.52%	$ 8,079.85
Thomas F. Gordon	77-2023	POC	Equity Investor	$100,000.00	$100,000.00	$17,811.16	LSA	$82,188.84			6.90%	$ 22,135.77
Walter Akita (Walter T. Akita & Margaret M. Akita, JTWROS)	77-1361	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$21,016.67	POC, DIS	$28,983.33			2.43%	$ 7,806.03
TOTAL				$2,258,900.00	$1,923,900.00			$1,191,655.84	$189,694.17		100.00%	$ 320,946.53

Calculation of Funds Available for Distribution	
Account balance as of 2/28/23	$ 412,473.66
Fee allocations Apps 1-18	$ (95,996.09)
Credit 17th fee app payment	$ 2,245.44
Credit agency fees paid	$ 2,272.00
Reimbursement Third Restoration Motion (Dkt. 1393)	$ (48.48)
Available for distribution	$ 320,946.53

KEY
POC - Proof of Claim
DIS - Claimants' Discovery Response
LSA - EquityBuild Lender Statement of Accounts
POS - Claimant's Position Statement
WF - Wells Fargo Bank Records

Exhibit 5

SEC v. EquityBuild
Group 1 Distributions
7201 S Constance Avenue (Property 78)

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
Aaron Beauclair	78-408	POC, DIS	Investor-Lender	$10,000.00	$10,000.00	$1,235.85	DIS, LSA	$8,764.15			0.58%	$ 4,037.34
Arthur and Dinah Bertrand	78-890	POC, DIS, POS	Investor-Lender	$100,000.00	$100,000.00	$41,389.00	POC, DIS	$58,611.00			3.90%	$ 27,000.08
Bancroft, Ed (iPlanGroup Agent for Custodian FBO Ed Bancroft Roth)	78-2008	POC	Investor-Lender and Equity Investor	$10,000.00	$10,000.00	$2,800.00	LSA	$7,200.00			0.48%	$ 3,316.78
Cecilia Wolff (iPlan Group Agent for Custodian FBO Cecilia Wolff)	78-1204	POC, DIS, POS	Investor-Lender	$6,299.00	$6,299.00	$1,763.72	LSA	$4,535.28			0.30%	$ 2,089.95
City of Chicago	78-693	POC, DIS, POS	Other	$28,915.96	$0.00	$0.00	N/A	$0.00	$26,050.89	Per Dkt. 1144	0.00%	$ -
CLD Construction, Inc. (Doru Unchias)	78-1454	POC	Independent Contractor	$131,000.00	$0.00	$0.00	N/A	$0.00	$131,000.00	Unsecured trade creditor	0.00%	$ -
Edge Investments, LLC, Janet F. Turco, Owner/Member IRA	78-180	POC, DIS	Investor-Lender	$17,374.00	$17,374.00	$6,298.24	LSA	$11,075.76			0.74%	$ 5,102.76
Girl Cat Capital West LLC, Valentina Salge, President	78-350	POC, DIS, POS	Investor-Lender	$16,574.00	$16,574.00	$2,430.89	DIS, LSA	$14,143.11			0.94%	$ 6,515.25
Initium LLC/Harry Saint-Preux	78-968	POC, DIS, POS	Investor-Lender	$50,000.00	$0.00	$15,716.67	POC	$0.00	$34,283.33	Secured investment rolled to unsecured promissory note	0.00%	$ -
James Tutsock	78-2057	POC, DIS, POS	Investor-Lender	$319,483.00	$0.00	$63,902.64	DIS	$0.00	$255,580.36	Secured investment rolled to SSDF1 Equity Fund on or about 6/28/17	0.00%	$ -
Jason Ragan - TSA	78-797	POC, DIS, POS	Equity Investor	$4,747.00	$4,747.00	$575.94	LSA	$4,171.06			0.28%	$ 1,921.46
John P. Sullivan	78-660	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$13,500.00	POC (interest) and LSA ($500 other)	$36,500.00			2.43%	$ 16,814.30
Kelly E Welton (iPlanGroup Agent for Custodian FBO Kelly Welton, IRA;)	78-310	POC, DIS, POS	Investor-Lender	$31,233.00	$31,213.00	$8,281.85	LSA	$22,931.15			1.53%	$ 10,563.54
Kirk Road Investments, LLC	78-755	POC, DIS, POS	Investor-Lender	$63,000.00	$48,000.00	$17,670.00	DIS	$30,330.00	$15,000.00	$15,000 of secured loan rolled to the CCF 2 fund on 11/20/17	2.02%	$ 13,971.09
Lori Moreland (Madison Trust Company Custodian FBO Lori Moreland #M1606124 RothIRA)	78-805	POC, DIS, POS	Investor-Lender	$10,074.00	$10,074.00	$1,222.31	POC, LSA	$8,851.69			0.59%	$ 4,077.87
Lori Moreland (Madison Trust Company Custodian FBO LoriMoreland #M1606123 Inherited IRA)	78-823	POC, DIS, POS	Investor-Lender	$48,087.00	$45,333.00	$5,596.84	POC, LSA	$39,736.16	$2,754.00	Secured interest obtained from partial assignment of mortgage is $45,333; claims $2,754 added to investment in February 2018, which is documented by records, but no support that this amount is secured by this property.	2.65%	$ 18,305.09
Lori Moreland (Madison Trust Company FBO Lori Moreland)	78-822	POC, DIS, POS	Investor-Lender	$52,348.00	$47,348.00	$5,919.88	POC, LSA	$41,428.12	$5,000.00	Secured interest obtained from partial assignment of mortgage is $47348; claims $5,000 added to investment in February 2018, which is documented by records, but no support that this amount is secured by this property.	2.76%	$ 19,084.52
Michael Borgia	78-231	POC, DIS	Investor-Lender	$669,327.00	$669,327.00	$234,264.00	DIS	$435,063.00			28.99%	$ 200,418.92
Michael C. Jacobs	78-2031	POC, DIS	Equity Investor	$25,000.00	$25,000.00	$2,666.64	LSA	$22,333.36			1.49%	$ 10,288.21
Pat DeSantis	78-397	POC, DIS, POS	Investor-Lender	$171,439.00	$171,439.00	$25,144.35	LSA	$146,294.65			9.75%	$ 67,392.43
PNW Investments, LLC	78-332	POC, DIS, POS	Investor-Lender	$50,000.00	$50,000.00	$17,433.33	POC	$32,566.67			2.17%	$ 15,002.85
Property Solutions LLC, Kevin Bybee (managing member)	78-268	POC	Investor-Lender	$60,000.00	$60,000.00	$20,800.00	DIS	$39,200.00			2.61%	$ 18,058.10
Provident Trust Group, LLC FBO Stephan Tang IRA	78-172	POC, DIS, POS	Investor-Lender	$35,345.00	$0.00	$4,429.94	LSA	$0.00	$30,915.06	Secured investment rolled to SSDF6 Equity Fund	0.00%	$ -
Rene Hribal	78-768	POC, DIS	Investor-Lender	$439,517.00	$439,517.00	$153,830.88	LSA	$285,686.12			19.03%	$ 131,605.80
Reynald Lalonde & Chantal Lemaire	78-327	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$17,233.33	DIS	$32,766.67			2.18%	$ 15,094.48
Robert Potter	78-1389	POC, DIS	Investor-Lender	$2,796.00	$2,796.00	$342.98	DIS, LSA	$2,453.02			0.16%	$ 1,130.02
Sidney Haggins	78-1431	POC, POS	Investor-Lender	$50,000.00	$50,000.00	$16,650.00	POC	$33,350.00			2.22%	$ 15,363.00
Steven J. Talyai	78-131	POC, DIS	Investor-Lender	$150,000.00	$150,000.00	$48,750.00	DIS	$101,250.00			6.75%	$ 46,642.92
Steven K. Chennappan IRA # 17293-31	78-206	POC, DIS	Investor-Lender	$10,000.00	$10,000.00	$2,800.00	DIS	$7,200.00			0.48%	$ 3,316.75
Towpath Investments LLC - Robert Kessing (manager)	78-338	POC, DIS	Investor-Lender	$50,000.00	$50,000.00	$14,500.00	LSA	$35,500.00			2.37%	$ 16,353.63

KEY
POC - Proof of Claim
DIS - Claimants' Discovery Response
LSA - EquityBuild Lender Statement of Accounts
POS - Claimant's Position Statement
WF - Wells Fargo Bank Records

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SEC v. EquityBuild
Group 1 Distributions
7201 S Constance Avenue (Property 78)

Claimant Name	Claim Number	Claimant Submissions	Claim Category as Identified on Claim Form	Amount Claimed to be Invested in Property	Secured Claim Remaining	Distributions Received on Investment	Source	Maximum Potential Distribution from Proceeds of Sale	Maximum Unsecured Claim from this Investment	Notes	Percentage by claimant	Preliminary Amount of Final Distribution
US Freedom Investments, LLC (Kevin Scheel)	78-1234	POC, DIS, POS	Investor-Lender	$25,000.00	$0.00	$5,750.00	DIS	$0.00	$19,250.00	Secured investment rolled to SSDF1 Equity Fund	0.00%	$
Victor Shaw (Shaw Family Trust)	78-1040	POC, DIS, POS	Investor-Lender	$55,000.00	$55,000.00	$15,950.00	LSA	$39,050.00			2.60%	$ 17,989.00
TOTAL				$2,792,558.96	$2,180,041.00			$1,500,990.97	$519,833.64		100.00%	$ 691,455.10

Calculation of Funds Available for Distribution	
Account balance as of 2/28/23	$ 974,787.78
Fee allocations Apps 1-18	$ (92,675.11)
Credit 17th fee app payment	$ 470.27
Credit agency fees paid	$ 2,944.00
Reimbursement Third Restoration Motion (Dkt. 1393)	$ (194,071.84)
Available for distribution	$ 691,455.10

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