

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

Case No. 1:18-cv-5587

Hon. John Z. Lee

Magistrate Judge Young B. Kim

**MOTION FOR TURNOVER OF SALE PROCEEDS BY WILMINGTON TRUST,
NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF
WELLS FARGO COMMERCIAL MORTGAGE TRUST 2014-LC16, COMMERCIAL
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2014-LC16**

Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16, ("Mortgage Holder"), respectfully files this motion requesting the turnover of sale proceeds to satisfy the mortgage debt ("Debt") of Mortgage Holder under the applicable loan documents ("Loan Documents").

INTRODUCTION

It has come to Mortgage Holder's attention that on May 22, 2109, the receiver closed the sale of the commercial real estate property commonly known as 5001-05 South Drexel Blvd. Chicago, Illinois 60615 (the "Property"). The closing generated sale proceeds of \$2,579,171.14.¹

¹ To ensure a current payoff statement was provided to the Receiver, Mortgage Holder requested that the Receiver provide the scheduled closing date so that Mortgage Holder could tender a payoff statement reflecting the closing date, which is customary in connection with commercial real estate sales. This practice is done to ensure adequate funds are received from the buyer to provide a full payoff of the mortgage debt. Despite these requests, the Receiver never informed Mortgage Holder of the closing date nor did the Receiver request an updated payoff statement. Counsel for Mortgage Holder contacted counsel

Mortgage Holder respectfully requests that the Receiver be required to turn over that portion of the sale proceeds that satisfies Mortgage Holder's Debt. Receiver has not contested but has, in fact, admitted the priority of Mortgage Holder's lien. To allow the Receiver to hold these funds hostage contravenes Illinois law governing security interests and is not in the best interests of any party to this case. Every day that the Receiver withholds funds, interest, fees, and costs continue to accrue under the Loan Documents, thereby reducing amounts that could be used to repay investors, restore unlawfully removed rents from the properties to lenders, and pay for administrative expenses. In short, no one benefits from the continued and ongoing withholding of payment from an uncontested Mortgage Holder in this case.

ARGUMENT

I. MORTGAGE HOLDER HAS A FIRST PRIORITY LIEN ON THE PROPERTY, AND NO EQUITYBUILD INVESTORS HAVE AN INTEREST IN THE PROPERTY.

Public records evidence that the Mortgage Holder has a first priority lien on the Property. The title commitment provided directly by the Receiver to the Court confirms Mortgage Holder has a first priority mortgage and assignment of rents on the Property and that no EquityBuild investors have a recorded interest in the Property. Sale Approval Motion, Exhibit J. [Dkt. 230]. In fact, the Receiver's own title commitment shows ***Mortgage Holder is the only party of record with a mortgage recorded against the Property.*** Indeed, the Receiver even acknowledges Mortgage Holder's first priority lien is the only recorded mortgage lien on the Property. Sale Approval Motion, ¶ 30. The proceeds of Mortgage Holder's loan were not used to refinance

for the receiver – without success – on May 21, 2019 (the day before the closing) and again on May 28, 2019 to see if a closing had been scheduled by the Receiver. It was only until counsel for Mortgage Holder indicated that it would be required to seek court intervention if the Receiver did not respond to Mortgage Holder's inquiries as to the date of the closing, that Mortgage Holder final received a response on June 3, 2019 that the sale had already occurred on May 22, 2019.

Equitybuild affiliates or investor loans, and there is no Equitybuild affiliate debt associated with the Property.

Mortgage Holder's loan was originally made by Wells Fargo Bank, National Association to Ohio Commons LLC² (the "Loan"). The Loan was used to pay off a prior loan between Ohio Commons LLC and FirstMerit Bank, N.A, a commercial mortgage lender, not an Equitybuild investor or affiliate. In fact, attached hereto as **Exhibit A** is a true and correct copy of the Loan closing statement evidencing a payoff to FirstMerit Bank, N.A. for payoff of the loan made by the commercial lender FirstMerit Bank, N.A.

The Loan proceeds were not used to pay off Equitybuild investor loans, because no such investor loans exist. Nor do any Equitybuild investor collateral assignments exist regarding the Property. Again, this is because there were no loans made by the Equitybuild investors or affiliates for this Property.

Furthermore, attached hereto as **Exhibit B** are true and correct copies of a recorded Satisfaction of Mortgage and Release of Assignment of Rents made by FirstMerit Bank, N.A. in favor of Ohio Commons LLC. These documents were recorded against the Property immediately after the payoff was made, further evidencing the Loan was used to pay off FirstMerit Bank, N.A. and not an EquityBuild affiliate. Mortgage Holder's position is further bolstered by the Receiver's own admission in filings to the Court that "[t]he [P]roperty does not appear to have EquityBuild affiliate debt." *See* Receiver's Motion for Court Approval of the Process for Public Sale of Real Property by Sealed Bid [Dkt. No. 130, ¶ 6].

² Ohio Commons LLC is not affiliated with EquityBuild and is not a receivership defendant. Neither the Order Appointing Receiver [Dkt No. 16] nor the Receiver's Motion to Amend and Clarify Order Appointing Receiver to Specifically Identify Additional Known Receivership Defendants [Dkt No. 226] identify Ohio Commons LLC as a receivership defendant or an affiliate of a receivership defendant. The Loan was assigned to and assumed by 5001 S. Drexel LLC over three and a half years after origination. 5001 S. Drexel LLC is listed in the Order Appointing Receiver as a receivership defendant.

There is simply no legal basis for the receiver to deny withholding payment from the Mortgage Holder from the sale proceeds. Public records confirm Mortgage Holder has a first priority mortgage on the Property, and the receiver has admitted there is no Equitybuild affiliated secured debt on the Property. The receiver has baselessly reserved the right to contest Mortgage Holder's lien for over eight months without a scintilla of evidence. The reason the Receiver has failed to provide any evidence is simple—there is no such evidence.

II. TO ALLOW THE RECEIVER TO CONTINUE TO WITHHOLD THE SALE PROCEEDS WITHOUT PAYMENT TO MORTGAGE HOLDER CONTRAVENES MORTGAGE HOLDER'S SECURITY INTERESTS AND RELATED RIGHTS.

As this Court as properly held, the Receiver lacks the authority to extinguish a creditor's pre-existing state law security interest. *See* Memorandum Report and Recommendation [Dkt. 311] (stating "a court does not have the authority to extinguish a creditor's pre-existing state law security interest" and clarifying the issue by stating "[t]o be sure, a receiver appointed by the federal court takes property subject to all liens, properties, or privileges existing or accruing under the laws of the state.") (internal citation omitted); *See also* Magistrate Kim's Memorandum Opinion and Order, pp. 9-10 [Dkt. 352] (reaffirming the foregoing rulings). In fact, the Court has already made rulings and determinations in furtherance of these well-established principles. *See United States v. EquityBuild, Inc.*, No. 18 CV 5587, 2019 WL 587414, *3 (N.D. Ill. Feb. 13, 2019) (Magistrate Kim's Memorandum Opinion and Order [DKT. 223] (holding that the Receiver cannot commingle rents and the Receiver must separately account for the rents from each property); Memorandum Report and Recommendation [Dkt. 311] (holding that sale proceeds shall not be commingled and that the lender's security interest in the proceeds shall not be extinguished by sale of the property). Here, Mortgage Holder's liens in the sale proceeds are not extinguished. The Receiver has propounded no evidence – much less evidence that would satisfy Rule 11 – that

Mortgage Holder does not have a first lien position. Withholding such funds is a patent violation of Mortgage Holder's state law rights.

Even the Seventh Circuit acknowledges that to the extent a creditor is oversecured – as is the exact case here because the property sold for more than the Debt – the secured creditor is entitled to default interest, late fees, and attorneys' fees in bankruptcy cases. *See* 11 USC § 506(b) (“To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.”); *see also In re Airadigm Commc'ns, Inc.*, 547 F.3d 763, 771 (7th Cir. 2008). Local Rule 66.1 provides that bankruptcy law should be a frame of reference for the Court when making decisions regarding the administration of receiverships: “[t]he administration of estates by receivers or other officers shall be similar to that in bankruptcy cases.” Yet, the receiver has propounded no legal or factual basis for its ongoing withholding of sale proceeds while fees, interests, and costs continue to needlessly accrue post-closing.

III. TO ALLOW THE RECEIVER TO CONTINUE TO WITHHOLD THE SALE PROCEEDS IS NOT IN THE BEST INTERESTS OF ANY PARTY TO THIS CASE.

Every day that the Receiver withholds payment from Mortgage Holder is another day that interest, fees, and costs continue to accrue under the Loan Documents, meaning that there are fewer funds available for distribution to creditors, fewer funds to repay lenders whose rents were wrongfully misappropriated by the receiver, and fewer funds to pay burgeoning administrative expenses. In short, every day the receiver withholds money from Mortgage Lender, the receiver is actually *losing* money for the receivership estate. Such a result should not be countenanced.

Any effort by the receiver to deny this fundamental statutory right is utterly without merit. At best, the only item the Receiver may contest is the reasonableness of such charges. To that end, Mortgage Lender would be happy to provide an updated payoff statement to Receiver to finally and fully call to question what amounts the Receiver believes he is disputing and to compel the Receiver to specifically identify both to the Court and the Mortgage Holder the amounts he disputes and the legal ground for disputing such amounts and withholding the sale proceeds. The receiver can no longer hide behind vague and unsupported assertions without proffering some scintilla of evidence to the Court why the sale proceeds should continue to be diminished for no apparent reason.

Finally, the Receiver has not provided any accounting or closing statement to Mortgage Holder of any fees, costs, or other items charged against the sale proceeds. This certainly impacts Mortgage Holder as it diminishes the funds available for payment of amounts accruing under the Loan Documents. Throughout this case, a lack of transparency has existed and the veil should be lifted.³ While the receiver is vested with certain authority under the Receivership Order, the Receiver still remains a fiduciary acting in the best interests of all parties in interest. Moreover, as an adjunct of this Court, the receiver is required to act at the Court's direction in the best interest of all parties. Such transparency is in the best interest of all parties and should be provided to all parties in interest. The cost of furnishing such information is simply the cost of forwarding an email including the closing statement and is by no means unduly burdensome.

³ By way of example, the Receiver Order requires quarterly fee applications by the receiver and his professionals. To date and since the inception of the case on August 17, 2018, not a single fee application has been filed in direct violation of the Receiver Order.

WHEREFORE, for each of the reasons asserted herein, Mortgage Holder respectfully requests that this Court enter an order requiring the Receiver to turn over the amount of sale proceeds sufficient to satisfy Mortgage Holder's Debt under the Loan Documents.

Dated: July 3, 2019

Respectfully submitted,

/s/ Jill L. Nicholson

Jill Nicholson (jnicholson@foley.com)

Andrew T. McClain (amccain@foley.com)

Foley & Lardner LLP

321 N. Clark St., Ste. 2800

Chicago, IL 60654

Ph: (312) 832-4500

Fax: (312) 644-7528

*Counsel for Wilmington Trust, National Association,
as Trustee for the Registered Holders of Wells Fargo
Commercial Mortgage Trust 2014-LC16,
Commercial Mortgage Pass-Through
Certificates, Series 2014-LC16*

EXHIBIT A



CHICAGO TITLE AND TRUST COMPANY

10 S LASALLE STREET
CHICAGO, IL 60603

ESCROW TRUST DISBURSEMENT STATEMENT

DISBURSEMENT DATE: April 22, 2014

REFER TO: AMANDA QUAS-LEY
PHONE: (312)223-2054
FAX: (312)223-2108

ESCROW TRUST NO. [REDACTED]-001
TITLE ORDER NO. [REDACTED] 1556

PARTIES:
BORROWER: OHIO COMMONS, LLC
LENDER: WELLS FARGO BANK, NA
PROPERTY: 5001 S. DREXEL, CHICAGO, IL

RECEIPTS:

04/22/14	WELLS FARGO --LOAN PROCEEDS	2,284,209.26
		2,284,209.26
		\$ 2,284,209.26

DISBURSEMENTS:

01) CHICAGO TITLE AND TRUST COMPANY - Borrower's Charges

Re: Title Order No. [REDACTED] 1556

ESCROW FEE	1,250.00	
NY CLOSING FEE	300.00	
TITLE INSURANCE	2,070.00	
ENDORSEMENTS	3,500.00	
TITLE UPDATE FEES	200.00	
WIRE FEES	80.00	
ESTIMATED RECORDING FEES	300.00	
ILAPLD CERTIFICATE SERVICE FEE	50.00	
EXPRESS DELIVERY SERVICE FEE	50.00	

	\$7,800.00	\$7,800.00
02) CEDAR STREET CAPITAL PARTNERS LLC FINANCE FEE	23,000.00	\$23,000.00
03) BROTSCHUL POTTS LLC LEGAL FEES	20,000.00	\$20,000.00
04) BROTSCHUL POTTS LLC REIMBURSEMENT FOR ARTICLES OF AMENDMENT FILING FEES	347.00	\$347.00
05) MORADI MULTI DIMENSIONS CONSULTING SURVEY UPDATE FEE	500.00	\$500.00
06) CSC ORGANIZATIONAL DOCUMENTS	465.00	\$465.00
07) CBRE, INC. LBP O&M PLAN AND ACM O&M PLAN	800.00	\$800.00

EV 04/22/14 12:56

NOTE: * - Indicates items Paid Outside of Closing.

ESCROW TRUST NO. D2201411025-001
PAGE NO. 2

08) LAMB LITTLE & COMPANY INSURANCE PREMIUM	4,532.52	\$4,532.52
09) METCAP BANK PAYMENT AS DIRECTED	50,000.00	\$50,000.00
10) GRANDBRIDGE REAL ESTATE CAPITAL, LLC TAX SERVICE FEE	800.00	\$800.00
11) GRANDBRIDGE REAL ESTATE CAPITAL, LLC FLOOD CERTIFICATION	25.00	\$25.00
12) PAYOFF EXISTING LOAN WITH: FIRSTMERIT BANK LOAN NUMBER: 35351-09233-001 PLUS \$ 169.25 INTEREST PER DAY FROM 04/10/14 TO 04/22/14	1,780,111.30 2,031.00	\$1,782,142.30
13) WELLS FARGO CREDIT: APPLICATION FEE LESS: INITIAL INSURANCE DEPOSIT LESS: PER DIEM INTEREST LESS: INITIAL TAX DEPOSIT LESS: APPLICATION FEE LESS: ADD'L BORROWER COST	* 20,000.00 * 5,283.09 * 3,047.50 * 3,087.68 * 20,000.00 * 4,372.47 ----- \$0.00	\$0.00
14) OHIO COMMONS, LLC TOTAL DISBURSEMENT AMOUNT TOTAL BORROWER RECEIPTS		\$1,890,411.82 \$2,284,209.26 -----
OVERDEPOSIT TO BORROWER		\$393,797.44 =====

DISBURSEMENTS APPROVED:

4/22/14
DATE _____


FOR BORROWER _____

FOR LENDER _____

DATE _____

DATE _____

FOR CHICAGO TITLE AND TRUST _____

EXHIBIT B

PREPARED BY / RETURN TO:
First American Title Insurance Company
Kelly Bonham; 801-261-2359



Po Box 571797
Salt Lake City, Utah 84157-1797
Ref No.: 58300 003535109233-140614-SM (OC)

SATISFACTION OF MORTGAGE

WHEREAS the indebtedness secured by the mortgage described below has been fully paid and satisfied, FirstMerit Bank, N.A., owner and holder of the debt, hereby declares that the lien of said mortgage is forever discharged and satisfied.

Original Mortgagee: FirstMerit Bank, N.A.
Original Mortgagor: Ohio Commons, LLC, an Illinois Limited Liability Company

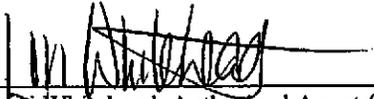
Recorded in Cook County, Illinois, on 12-19-2011 as Inst # 1135311144

Legal Description: Lots 9 and 10 in the Subdivision of Lots 1 to 4 inclusvie in Block 8 in Drexel and Smith's Subdivision of the W 1/2 of NW 1/4 and W 1/2 of W 1/2 of SW 1/4 of Sec11, T38N, R14E of the Third Principal Meridian
Parcel ID Number: 20-11-114-001-0000
Property Address: 5001-C5 S Drexel, Chicago IL 60615

Date of Mortgage: 11-30-2011
Date of Satisfaction: 05-06-2014

Dated: 05-13-2014

FirstMerit Bank, N.A.

By: 
Lori Whitehead, Authorized Agent for First American Title Company
By Power Of Attorney Dated 06-19-2013; # 1322808061

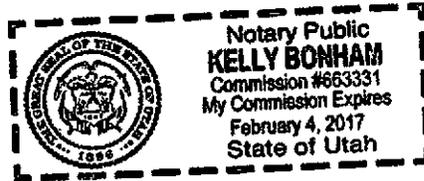
State of Utah
County of Salt Lake

This instrument was acknowledged and executed before me this 13 day of May, 2014 by Lori Whitehead for First American Title Company who acknowledge to be the Authorized Agent of FirstMerit Bank, N.A. by Power of Attorney dated 06-19-2013; #1322808061, and that as such officer, being authorized so to do, signed the name of the corporation as such officer.



Notary Public

Notary Public: Kelly Bonham
My Commission expires: 02-04-2017



Prepared by/Return to:
First American Title
Kelly Bonham; 801-261-2359
Kelly Bonham
P.O. Box 571797
Salt Lake City, UT 84157-1797
Ref No.: 58300 003535109233-140614-SM (OC)

RELEASE OF ASSIGNMENT OF RENTS

FirstMerit Bank, N.A., hereby certifies that the interest secured by the following Assignment of Rents has been released and said Assignment of Rents is hereby discharged, which Assignment of Rents is made between Ohio Commons, LLC, an Illinois Limited Liability Company as Grantor and FirstMerit Bank, N.A. as Grantee which is dated 11-30-2011, and was recorded on 12-19-2011, as Entry No. 1135311145, in Book n/a, at Page(s) n/a of the records of the County Recorder of Cook County, Illinois, and cover real property situated in said county described as follows:

Legal Description: Lots 9 and 10 in the Subdivision of Lots 1 to 4 inclusvie in Block 8 in Drexel and Smith's Subdivision of the W 1/2 of NW 1/4 and W 1/2 of W 1/2 of SW 1/4 of Sec11, T38N, R14E of the Third Principal Meridian
Parcel ID Number: 20-11-114-001-0000
Property Address: 5001-C5S Drexel, Chicago IL 60615

Dated this 13 day of May, 2014

FirstMerit Bank, N.A.
Lori Whitehead
Lori Whitehead, Authorized Agent
by Power of Attorney dated 06-19-2013; #1322808061

State of Utah
County of Salt Lake

This instrument was acknowledged and executed before me this 13 day of May, 2014 by Lori Whitehead for First American Title Company who acknowledge to be the Authorized Agent of Firstmerit Bank, N.A. by Power of Attorney dated 06-19-2013; #1322808061, and that as such officer, being authorized so to do, signed the name of the corporation as such officer.

Kelly Bonham
Notary Public



Notary Public: Kelly Bonham
My Commission expires: 02-04-2017