

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

<b>UNITED STATES SECURITIES AND</b>	)	
<b>EXCHANGE COMMISSION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>EQUITYBUILD, INC., EQUITYBUILD</b>	)	
<b>FINANCE, LLC, JEROME H. COHEN, and</b>	)	
<b>SHAUN D. COHEN,</b>	)	
	)	
<b>Defendants.</b>	)	

**Case No. 18 C 5587**

**Judge John Z. Lee**

**ORDER**

Before the Court is Jerome Cohen’s objection [512] to Magistrate Judge Young B. Kim’s report and recommendation [492] of August 27, 2019. For the reasons stated herein, the Court overrules the objection and adopts the report and recommendation in full. The Receiver’s motion to amend the Receivership Order to expressly identify and include specific Receivership Assets [265] is granted.

**STATEMENT**

**I. Background**

On August 15, 2018, the United States Securities and Exchange Commission (“SEC”) filed a complaint against Defendants Equitybuild, Inc. (“Equitybuild”); Equitybuild Finance, LLC (“Equitybuild Finance”); Jerome H. Cohen; and Shaun D. Cohen. *See* Compl., ECF No. 1. According to the complaint, Defendants operated a Ponzi scheme through which they fraudulently induced more than 900 investors to invest at least \$135 million in residential properties on the south side of Chicago. *Id.* ¶¶ 1–2. Shortly after the filing of the complaint, the

Court appointed a Receiver to marshal and preserve Defendants' assets. *See* Receivership Order, ECF No. 16.

The Receivership Order authorizes the Receiver to “use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, funds, . . . lands, premises, . . . and other assets” (“Receivership Assets”). *Id.* ¶ 8(A). He is also empowered to “take custody, control, and possession of all Receivership Assets.” *Id.* ¶ 8(B).

In March 2019, the Receiver filed a motion to amend the Receivership Order to expressly identify two assets: (1) a single-family home located at 1050 8th Avenue North in Naples, Florida (“the Naples Property”); and (2) a joint checking account ending in 3641 (“the 3641 Account”). *See* Mot. Amend at 2, ECF No. 265. Both assets are registered to Jerome Cohen (hereinafter, “Cohen”) and his wife. *Id.* The Receiver contends that these assets were funded with monies from the Equitybuild Defendants and their affiliates. *Id.* at 1–2. Cohen opposes the motion, arguing that other funds were used to pay for the Naples Property and that a Florida homestead exemption precludes a forced sale or imposition of a lien on the property. Cohen’s Resp. Opp. Mot. Amend at 2–5, ECF No. 301. The Receiver has submitted evidence that Equitybuild had transferred the funds for the down payment on the Naples Property. *See* Mot. Amend, Exs. 1–2, ECF No. 265-1.

This Court referred the Receiver’s motion to Magistrate Judge Kim, who scheduled a hearing on the motion for July 10, 2019. *See* ECF No. 357. At the hearing, Ann Tushaus—a Senior Accountant with the SEC’s Division of Enforcement—testified that the “vast majority” of money deposited into the 3641 Account and used to purchase the Naples Property came from

investor funds tied to Defendants' Ponzi scheme. *See* R. & R. at 3–7, ECF No. 492 (summarizing Tushaus's testimony).

Cohen's participation with respect to the July 10 hearing left much to be desired. First, he failed to file a list of witnesses and exhibits prior to the hearing, as ordered by the magistrate judge. *See* ECF Nos. 357, 393. Then, after the magistrate judge ordered him to appear in person for the July 10 hearing, Cohen failed to show up to court. *See* ECF No. 448. He was given a second chance to appear on August 14, 2019—a date he selected, *see* ECF No. 457—but less than an hour before the scheduled hearing, Cohen informed the court that he was “unable to attend” due to “health issues” and financial difficulty, *see* ECF No. 473.

Magistrate Judge Kim issued an order finding Cohen's explanation “disingenuous” and “lacking in sufficient details to lend any credibility.” *See* ECF No. 475. Cohen responded that he lacked the financial resources to attend the hearing and had suffered an “autoimmune challenge.” Cohen's Reply at 1–2, ECF No. 480. Despite such serious attestations, he did not provide any supporting documentation.

Based upon the parties' submissions, Magistrate Judge Kim issued a Report and Recommendation on the Receiver's motion, finding that Cohen had failed to “show[] good cause for notifying the court an hour before the hearing that he would not appear, on the date that he himself had selected three weeks earlier.” R. & R. at 9. The magistrate judge therefore recommended sanctioning Cohen for failing to comply with court orders by (1) finding that he had forfeited his opposition to the Receiver's motion to amend and (2) construing the hearing evidence in the Receiver's favor. *Id.* The magistrate judge also found that, in any event, the Receiver's evidence demonstrated that the Naples Property and the 3641 Account qualified as Receivership Assets, and recommended granting the Receiver's motion. *Id.* at 9–14.

Cohen filed an objection to the Report and Recommendation, stating that the Receiver's characterization of the evidence, as well as the SEC's accounting and testimony, are "grossly inaccurate." Cohen's R. 72 Obj. at 1, ECF No. 512. He further states that his "reasons for not attending [the August 14 hearing] are genuine." *Id.* at 2.

## **II. Legal Standard**

"When a magistrate judge prepares a report and recommendation for a district court, the governing statute provides that the district court shall make a *de novo* determination with respect to any contested matter." *Kanter v. Comm'r of Internal Revenue*, 590 F.3d 410, 416 (7th Cir. 2009) (quotation marks omitted); 28 U.S.C. § 636(b). The court must decide the case based on an independent review of the evidence and arguments without giving any presumptive weight to the conclusion of the magistrate judge; however, the court may be persuaded by the magistrate judge's reasoning, while still engaging in an independent decisionmaking process. *Mendez v. Republic Bank*, 725 F.3d 651, 661 (7th Cir. 2013).

## **III. Analysis**

Based upon its own review of the record, the Court wholeheartedly agrees with Magistrate Judge Kim's recommended sanction against Cohen. As explained above, Cohen repeatedly failed to comply with court orders, despite being given multiple chances to do so. Most egregiously, even after Magistrate Judge Kim had allowed Cohen to select the date on which he would appear in connection with the Receiver's motion, Cohen failed to show up. To make matters worse, he waited until the day of the scheduled hearing to notify the court and provided no evidence to support his explanation as to why he was unable to attend.

Nothing in Cohen's objection dictates a different result. Cohen merely states that his "bank account is frozen as are all his credit cards and debit cards," and that he "has no additional

sources to borrow from.” Cohen’s R. 72 Obj. at 2. But this is not new information, as Cohen’s assets have been frozen since August 2018. *See* Receivership Order at 2–3. Accordingly, Cohen was aware, when he selected the August 14 hearing date, of his financial limitations. Yet, he gave the magistrate judge no indication that traveling to the hearing would be an issue.

The Court has inherent authority to rectify abuses to the judicial process by sanctioning offending conduct. *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). “[T]he sanction selected must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction.” *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998). Given the record of Cohen’s failures to comply with court orders in this case, particularly as pertains to the Receiver’s motion, the Court agrees that Magistrate Judge Kim’s recommended sanction is proportionate. Accordingly, the Court finds that Cohen has forfeited his opposition to the Receiver’s motion and will construe the hearing evidence in favor of the Receiver.<sup>1</sup>

Furthermore, the Receiver’s uncontested evidence clearly demonstrates that the Naples Property and the 3641 Account qualify as Receivership Assets. Initially, the Court notes that Cohen did not object to the identification and inclusion of the 3641 Account as a Receivership Asset, thereby waiving any argument on that issue. *See Ennin v. CNH Indus. Am., LLC*, 878 F.3d 590, 595 (7th Cir. 2017) (“Failure to respond to an argument generally results in waiver.”).

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<sup>1</sup> The Court’s conclusion that Cohen has forfeited his opposition to the Receiver’s motion is unaffected by Cohen’s November 24, 2019 “Response” to Magistrate Judge Kim’s Report and Recommendation, *see* ECF No. 587. This response was filed nearly three months after the Report and Recommendation and over two months after Cohen’s objection, and is thus, as Cohen acknowledges, “extremely late.” *Id.* at 2. Moreover, the response—which asserts that Cohen began experiencing fatigue and chronic fevers “between September and October” 2019, *id.*, and was diagnosed with Hemophagocytic Lympho-Histiocytosis in November 2019—does not account for why Cohen failed to give the magistrate judge an indication that traveling to the August 2019 hearing would be an issue or why he waited until less than an hour before the hearing to notify the court that he would not be showing up.

In any event, the Court agrees with the characterization of the hearing evidence as set forth in the magistrate judge's Report and Recommendation, *see* R. & R. at 3–7, 9–10, and finds based on the evidence that the 3641 Account qualifies as a Receivership Asset.

The same is true as to the Naples Property. Again, the Court agrees with the magistrate judge's assessment of the hearing evidence, which “show[s] that the funds used [to purchase the Naples Property] came from [i]nvestor [m]onies tied to Cohen's Ponzi scheme.” *Id.* at 3–7, 10–14. And the Court further agrees with the magistrate judge that the Florida homestead exemption does not apply. Article X, section 4(a) of the Florida Constitution exempts a homestead from “forced sale under process of any court” and precludes any “judgment, decree or execution” from attaching a lien thereon, but this exemption is “not to be so liberally construed as to make it an instrument of fraud or imposition upon creditors.” *In re Fin. Federated Title & Tr., Inc.*, 347 F.3d 880, 886 (11th Cir. 2003); *see also S.E.C. v. Kirkland*, No. 6:06-CV-183, 2008 WL 1787234, at \*1, \*4–5 (M.D. Fla. Apr. 11, 2008) (permitting a receiver to proceed with the sale of an alleged homestead where there was a direct link between fraudulent activity connected to a Ponzi scheme and the proceeds used to purchase and maintain the property). Given the evidence showing that the Naples Property was procured with the fruits of Cohen's fraud, the Court finds that the exemption does not apply.

In sum, the Court agrees with Magistrate Judge Kim's recommended sanction against Cohen and concludes that the recommendation to grant the Receiver's motion to amend is well-supported by the law and facts of this case. Cohen's objection is overruled.

**IT IS SO ORDERED.**

**ENTERED: 12/13/19**



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**JOHN Z. LEE**

**United States District Judge**