

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

**MORTGAGEES' RESPONSE TO RECEIVER'S EIGHTH INTERIM APPLICATION  
AND MOTION FOR COURT APPROVAL OF PAYMENT OF FEES AND EXPENSES  
OF RECEIVER AND RECEIVER'S RETAINED PROFESSIONALS**

The Mortgagees<sup>1</sup> object to the Receiver's Eighth Interim Fee Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals ( the "8th Fee Application"), and specifically request that this Court deny the

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<sup>1</sup> The Mortgagees are Freddie Mac; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; 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 benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1; Federal National Mortgage Association ("Fannie Mae"); BMO Harris Bank N.A.; Midland Loan Services, a Division of PNC Bank, National Association; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Colony American Finance 2015-1; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; BC57, LLC; UBS AG; Thorofare Asset Based Lending REIT Fund IV, LLC; and Liberty EBCP, LLC.; Direct Lending Partner LLC (successor to Arena DLP Lender LLC and DLP Lending Fund LLC).

Receiver's request for a blanket super priority lien for administrative expenses on properties encumbered by their mortgages to the extent that the Receiver (a) fails to show that these properties and the secured creditors benefitted from his efforts in administering the Estate of Defendants EquityBuild, Inc., EquityBuild Finance, LLC, and their affiliates (the "Estate"), and (b) fails to provide an acceptable basis to surcharge his administration expenses among the properties. Not only should the Court question the propriety of another interim award at this time, but even if such an award is made, the Estate's lack of resources to pay the cost of the receivership does not warrant the imposition of its costs on the Mortgagees absent a showing that the Mortgagees benefitted from the Receiver's efforts. *See Bank of Commerce & Trust Co. v. Hood*, 65 F.2d 281, 283 (5th Cir. 1933) (even if a fund comprised of the proceeds of the general unsecured assets may be exhausted by the receivership charges against it, the secured creditors still cannot be charged those expenses if the charges did not benefit the secured creditors).

**I. The Receiver Cannot Prime the Secured Creditors To the Extent His Administration of the Estate Did Not Benefit the Secured Creditors.**

In his 8th Fee Application, the Receiver requests a super priority lien against all of the Estate's real properties, or the proceeds from their sale, ahead of the interests of all secured creditors. [Dkt. 778], pp. 18-26. The Receiver relies on the exact same grounds as his identical lien request contained in the Receiver's 7<sup>th</sup> Fee Application. [Dkt. 755], pp. 18-25. The Mortgagees responded to that lien request in detail in sections I – IV of their Response to the 7<sup>th</sup> Fee Application. [Dkt. 777], pp. 1-15. The Mortgagees incorporate their Response by reference as their Response to the lien request contained in the Receiver's 8<sup>th</sup> Fee Application.

The Receiver made similar arguments when he sought a super priority lien in his Motion to resolve disputed claims [Dkt. 638], par. 53 – 57. Mortgagees' Response to that Motion (Dkt. 708), pp. 21-24, as well as their detailed Response to the 7<sup>th</sup> and 8<sup>th</sup> Fee Applications, make clear

that all three of the Receiver's lien requests should be denied. In the interests of justice and judicial economy, the Receiver's repetitive lien requests should be addressed contemporaneously by the Court.

**II. The Court Should Withhold Approval of the Request for Payment of Fees and Expenses until a Proposed Distribution Plan is Approved and Require a 20% Holdback.**

The 8<sup>th</sup> Fee Application seeks approval of yet another burdensome fee on this insolvent estate on the same grounds as were asserted in the 7<sup>th</sup> Fee Application. As they did with the Receiver's lien request, the Mortgagees responded to the Receiver's fee request in detail in sections V – IX<sup>2</sup> of their Response to the 7<sup>th</sup> Fee Application. [Dkt. 777], pp. 15 - 23. Therefore, the Mortgagees incorporate those sections by reference as their Response to the fee request contained in the Receiver's 8<sup>th</sup> Fee Application, supplemented as follows to address the magnitude of the Receiver's latest fee request, and request withholding approval of the Eighth Fee Application until the Receiver files a proposed plan of distribution for the Estate or, at a minimum, require a 20% holdback of any fees awarded.

The fees requested by the Receiver to date are anything but moderate and reasonable and have directly caused this Estate to become insolvent resulting in the Receiver's request for an improper receiver's lien. The Eighth Fee Application requests a total of \$527,100.97 in fees and expenses for 91 days, the third highest fee request to date.

As set forth in the chart below, the Receiver has requested approval of a total of \$3,788,118.51 in fees. This Court has approved \$2,886,710.88 in fees and costs without a single reduction in fees or holdback (representing all fees and costs requested in the first, second, third,

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<sup>2</sup> Due to a clerical error, the Objection contains a duplication of some of the section numbers. The latter sections of the Objection that were labelled as V, VI, and VII, should have been identified as sections VIII, IX, and X.

fourth, fifth and sixth interim fee applications). Of these approved fees, \$1,249,837.09 are unpaid because the Receiver lacks sufficient funds to make these payments. Receiver's Eighth Status Report [Dkt. 757], p. 16. In other words, the Estate is insolvent and there will be no funds to paid unsecured creditors, yet the Receiver continues to pile on fees.

(the balance of this page intentionally has been left blank to accommodate the chart below)

<u>Fee Application</u>	<u>Fees &amp; Costs Requested</u>	<u>Fees &amp; Costs Approved</u>	<u>Holdback Amount</u>
First Interim Fee Application (08/17/18 – 09/30/18)	\$413,298.44	\$413,298.44	\$0.00
Second Interim Fee Application (10/1/18 – 12/31/18)	\$553,968.43	\$553,968.43	\$0.00
Third Interim Fee Application (01/1/19 – 03/31/19)	\$547,767.04	\$547,767.04	\$0.00
Fourth Interim Fee Application (04/1/19 – 06/30/19)	\$525,256.64	\$525,256.64	\$0.00
Fifth Interim Fee Application (07/1/19 – 09/30/19)	\$485,094.92	\$485,094.92	\$0.00
Sixth Interim Fee Application (10/1/19- 12/31/19)	\$361,325.41	\$361,325.41	\$0.00
Seventh Interim Fee Application (1/1/20- 3/31/20)	\$374,306.66	-	\$0.00
Eighth Interim Fee Application (4/1/20- 6/30/20)	\$527,100.97	-	\$0.00
<b><u>TOTAL</u></b>	\$3,788,118.51	\$2,886,710.88	\$0.00

The 8<sup>th</sup> Fee Application contains the Receiver's third highest fee request to date. This amount also does not take into account the extremely high operating costs of the Estate or payment of unpaid property taxes. As more fully set forth in the Mortgagees' objections, the Estate simply has no funds to continue this no-asset case and this Court should consider if the purposes for which this receivership has been filed can still be achieved.

### **III. Conclusion.**

The Receiver's fees, which approximate \$7,000 a day, cannot prime the Mortgagees' security interests as the Receiver has utterly failed to establish how they benefitted the properties over what could have been achieved in a foreclosure or bankruptcy proceeding, as requested by the Mortgagees. To the contrary, these expenses should have been avoided by comparing the amounts of the competing liens against the value of the secured properties, which would have led to only one conclusion -- that one of the liens ultimately will have priority over the other, but nothing will be left for the Estate. As such, the Receiver should have preserved the Estate's limited assets, rather than exhausting those resources on issues that do not benefit it, and certainly cannot surcharge the secured creditors' collateral for such misguided efforts.

Furthermore, regardless of its determination on the Receiver's request for a super priority lien, the Court should withhold approval of the 8th Fee Application until such time as the Receiver has filed with the Court a plan for distribution for the receivership estate and until the Court has the opportunity to thoroughly review the 8th Fee Application. Alternatively, the Court should reduce the Receiver's and his professionals' fees to a reasonable and moderate amount and withhold 20% pursuant to this Court's order appointing the Receiver.

Dated: September 16, 2020

Respectively Submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 16, 2020, I caused the foregoing **MORTGAGEES' RESPONSE TO RECEIVER'S EIGHTH INTERIM APPLICATION AND MOTION FOR COURT APPROVAL OF PAYMENT OF FEES AND EXPENSES OF RECEIVER AND RECEIVER'S RETAINED PROFESSIONALS** to be electronically filed with the Clerk of Court through the Court's CM/ECF system, which sent electronic notification of such filing to all parties of record.

/s/ Ronald A. Damashek