

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

**JOINT MOTION TO DETERMINE CLAIMS PROCESS  
FOR SINGLE CLAIM PROPERTIES**

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 (“U.S. Bank, as Trustee”), Midland Loan Services, a Division of PNC Bank, NA (“Midland,” together with U.S. Bank, as Trustee, the “Claimants”), and Kevin Duff, Receiver (“Receiver,” together with the Claimants, the “Parties”) respectfully file this Joint Motion (“Motion”) requesting the Court to determine the process and resolve certain disputes regarding the proposed claims process for single claim properties (that is, those properties in which no investors or any other parties have submitted a claim apart from Claimants) (collectively, the “Non-Investor Single Claim Process”). In support of this Motion, the Parties states as follows:

**INTRODUCTION**

Since at least March 3, 2021, the Claimants and the Receiver have endeavored to negotiate a mutually acceptable claims process to resolve the Claimants’ proofs of claim and any other interests in the net proceeds from the sales of the properties against which the Claimants submitted

the only claim. The Claimants and the City of Chicago are the only parties to submit proofs of claim and the only parties asserting a lien on the Properties.<sup>1</sup> No other person or entity has submitted a proof of claim against the Properties. The Court previously directed the parties to submit an “abbreviated process for those properties where there aren’t any competing claims.” [Dkt. 980, at 7] Unfortunately, despite extensive negotiations and each Parties’ good faith efforts, the Parties have reached an impasse on certain limited issues, thereby requiring the Court’s guidance and determinations on certain discreet issues for the proposed Non-Investor Single Claim Process. The Claimants’ proposed version of the process is attached as **Exhibit A**. The Receiver’s proposed version of the process is attached as **Exhibit B**. This motion attempts to isolate the areas of the parties’ disagreement for the Court’s consideration and determination.

### **BACKGROUND**

On September 10, 2020, U.S. Bank, as Trustee and as the only party to submit a claim to the Receiver with respect to certain properties, filed its Motion for Priority Determination and Turnover of Sale Proceeds [Dkt. 785], which Midland joined and supported through the Claimants’ Reply in Support of Motion for Priority Determination and Turnover of Sale Proceeds [Dkt. 817] (collectively, the “Turnover Motion”). *But see, supra*, note 1 (identifying claims by the City of Chicago against properties against which Midland has suggested it is the sole claimant). The Receiver filed a response in opposition to the Turnover Motion [Dkt. 806].

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<sup>1</sup> The Properties are identified in Exhibits A and B. There are no disputes between the Claimants and the Receiver as to the identity of the Properties. Of the 28 properties identified for this process, 12 include potentially adverse liens in the title record and 3 include a filing releasing a prior EquityBuild mortgage lien that is potentially invalid. The other 13 properties have no adverse liens reflected in the title record. In addition, the City of Chicago has asserted claims to the Receiver against two properties, 8517 S Vernon and 9610 S Woodlawn.

On January 29, 2021, the Court held a status hearing addressing the issues raised in the Turnover Motion. On April 28, 2021, the Court entered its Order [Dkt. 980] granting in part and denying in part the Turnover Motion. The Court granted the Turnover Motion “to the extent that it seeks to resolve any issues relating to properties for which it is the sole claimant outside of the broader claim-priority adjudication process.” (4/28/21 Order, p. 7.) This is consistent with the Court’s statement on January 29, 2021: “I think it makes sense to have a different, perhaps more abbreviated process for those properties where there aren’t any competing claims.” (1/29/21 Tr. at 17:7-9.) During the same hearing, the Court stated it would consider either a joint proposal or competing proposals of the parties. (1/29/21 Tr. at 55:7-9.) This Motion is also consistent with this Court’s February 9, 2021 Order Regarding Claims Resolution Process No. 2 [Dkt. 941], in which the Court directed the Parties to “confer and attempt to propose to the Court a mutually acceptable plan to address the resolution of issues concerning properties against which only one Claimant has asserted a claim.” (2/9/21 Order, ¶ 18(b).)

The Parties are filing this motion in light of the Court’s prior comments and orders. For the Court’s convenience, the Parties detail below their respective points of agreement and disagreement as related to the proposed Non-Investor Single Claim Process.

**A. Scope and Timing of the Single Claim Process**

The Claimants and the Receiver disagree on the timing of whether the proposed Non-Investor Single Claim Process should proceed concurrently with the Contested Claims Process.

*Claimants’ Position.* The Claimants request that the Non-Investor Single Claim Process proceed immediately. The issues presented in the single claim process are very limited in nature because there is no investor or any other party claiming an interest in the properties. The Non-Investor Single Claim Process involves only two claimants U.S. Bank, as Trustee and Midland.

While there are 28 Properties at issue in the Non-Investor Single Claim Process, there are only six claims (two by US Bank, as Trustee and four by Midland) to evaluate. The only question on each of these six claims is very narrow in scope: whether the Receiver plans to object on the basis that the liens are invalid or subject to subordination. Over two years ago, the Claimants produced relevant documents to the Receiver that allow the Receiver to determine whether he has a good faith basis to challenge the Claimants' claims. There is no reason to delay further. Moreover, it is in the best interest of all parties, including the estate, to resolve the single claims as quickly as possible to avoid additional fees and expenses by all parties.

Receiver's Position. As an initial matter, the parties disagree about whether the process proposed by the Claimants is sufficiently abbreviated and efficient. The Receiver's position is that the Claimants' proposed process is inconsistent with the Court's directive to submit an *abbreviated* process because it does not allow the Receiver to complete a threshold investigation and evaluation of the Claimants' claims without first creating a litigious framework that may prove unnecessary. The Claimants' process also includes discovery that the Receiver believes is more expansive than necessary, as thus more similar to the disputed claims process that the Claimants sought to avoid by asking for a separate process. And the Claimants' process seeks to address and resolve issues that are already the subject of separate Court orders, including with respect to application of the receiver's lien and the allocation of fees and costs.

With certain important limitations, that are specified below, the Receiver believes that certain steps of the Non-Investor Single Claim Process can and should proceed concurrently with the disputed claims process that is underway for Group 1 – but that the Non-Investor Single Claim Process must be implemented in a manner which avoids interference with and delay of the Receiver's work related to the Group 1 of the disputed claims process. The current schedule for

Group 1 continues through January 2022. The Receiver is actively reviewing the 171 claims and issues relating to the five properties and 139 claimants in Group 1. The volume of records currently under review includes (i) 2.90 GB including over 30,000 pages from institutional lender BC57, and (ii) 11.57 GB in proofs of claim records and 1.65 GB in additional production from the investor and other claimants.<sup>2</sup>.

To allow for the proposed Non-Investor Single Claim Process (that is the subject of this motion) to run concurrently with Group 1 of the disputed claims process, the Receiver proposes that:

- (a) the Parties work together to gather any records from certain third parties that will be needed to evaluate the claims at issue and any challenge thereto;
- (b) the Claimants respond to an agreed subset of the standard discovery requests that all institutional lender claimants must respond to in the disputed claims process;
- (c) the Receiver will make every effort to start review of materials produced in discovery by the Claimants, and other materials provided with the Claimants' proofs of claims, while Group 1 is proceeding;
- (d) the Receiver will make every effort to work towards completing this process generally concurrently with the end of process for Group 1 properties; and
- (e) the Receiver will submit a status report to the Court with respect to the Non-Investor Single Claim Process on or before December 17, 2021. If the Receiver determines that concurrent efforts with respect to the Non-Investor Single Claim Process significantly interferes with and interrupts the ongoing efforts to work through Group 1, the Receiver will update the

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<sup>2</sup> Claimants' depiction of their claims against these 28 properties as involving "only six claims" is misleading. Group 1 involves only one institutional lender claim and five properties and the work evaluating that claim has been substantial.

Court and advise the Court at that time of how much additional time the Receiver estimates will be necessary to work through the Non-Investor Single Lien Process.

- (f) the Court provide a referral to Magistrate Judge Young B. Kim for purposes of exploring whether a settlement or other joint resolution can be reached as to any of the Claimants and/or properties that are the subject of this proposed Non-Investor Single Claim Process.

**B. Timing of Receiver's Notice to Contest Claim**

The Claimants and the Receiver disagree on the timing of when the Receiver must disclose whether he intends to challenge the Claimants' liens and proofs of claim.

Claimants' Position. The Claimants request that the Receiver disclose whether he challenges the Claimants' liens or claims within 28 days after the Non-Investor Single Claim Process is approved and before the Parties engage in any further discovery. The Claimants believe it is wasteful of estate assets, the Court's time, and the Receiver's limited resources for all parties to engage in additional discovery prior to the Receiver's review of documents already in his possession.

At this point, the only issue is whether the Receiver plans to object to the Claimants' claims. The Claimants are not requesting that the Receiver provide a full statement of his objection; he merely needs to state that he is objecting and provide the basic factual allegations supporting any objection. There is no need for the Receiver to gather additional information to decide whether or not to object. The Receiver possesses the information necessary to do so and has possessed this information for over two years. The Claimants have already provided the Receiver with the information that he represented he needed to evaluate the claims. Specifically, within months of the start of the case, the Receiver requested and the Claimants (and other Institutional Lenders) provided extensive documentation regarding their loans and mortgages so that he could understand

their claimed liens. In connection with the proof of claim filings, the Receiver requested a detailed accounting of the Claimants' loans and additional documentation supporting their claims. The Claimants provided that information no later than July 2019. The purpose of providing all of this information to the Receiver was to enable him to evaluate the claims. Yet, despite having this information for over two years and not having reviewed what the Claimants already provided, the Receiver wants more information before taking a position on the Claimants' claims. How can the Receiver know additional discovery is necessary when he has not even reviewed the documents in his possession?

The Receiver requests that the Claimants produce documents responsive to Requests for Production 6 through 8 and an answer to Interrogatory 5 from the Standard Institutional Lender Discovery used in the Contested Claims Process. These requests generally seek information related to the Claimant's due diligence on EquityBuild's ability to pay, underwriting files and title insurance policies. They largely repeat the requests contained in the proof of claim form.<sup>3</sup>

None of this discovery is necessary. Claimants act as agents for securitization trusts that own the notes at issue. In each case, they acquired the notes and underlying liens after (sometimes months after) the loans closed based on standard securitization documentation that relies on title policies as well as representations and warranties from the loan originator that the loan meets the trust's purchase criteria. In such cases, whatever knowledge the loan originator may have had cannot be imputed to the trusts. *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp.2d 1271, 1281 (D. Utah 2009) ("Merely showing information from a loan broker or an original lender's file is insufficient to prove that a holder in due course or bona fide purchaser for value took the property with knowledge about such information."). The Claimants' files do not raise any red flags. Even

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<sup>3</sup> Midland already provided all documents responsive to these requests in connection with its proofs of claim. US Bank has provided the majority of these documents with its proofs of claim.

if they did, the Receiver would be in a position to say (subject to the requirements of Rule 11) that he objected to the Claimants' status as bona fide purchasers and holders in due course. As such, the requested discovery is not relevant and not needed for the Receiver to decide whether he objects. Finally, the Receiver has possessed the EquityBuild files since the inception of this case. All of this documentation (from both the Claimants and EquityBuild) provide robust information for the Receiver to determine whether he has can pass muster under Rule 11 for a good faith basis to contest the Claimants' liens and proofs of claim.

The Claimants do not take the position that the Receiver is not entitled to additional discovery. Rather, the Claimants' position is that the Receiver does not need *more* discovery *now* to determine whether he has a good faith basis on which to object or even to determine if an objection makes sense for the estate. Indeed, the Receiver admits he already has a substantial amount of documents from the Claimants in his possession—in addition to all of the EquityBuild documents he possesses. The Receiver wants to fully discover his claim objection before deciding whether to assert one. This is exactly backwards from how litigation normally proceeds.

Finally, it makes no sense to allow the Receiver three months (until mid-December) to issue a status report in which he (hopefully) will agree to a date by which he plans to take a claim position. It is this very type of delay that has caused this three-year old case to drag on.

Receiver's Position. The Receiver fundamentally disagrees with the Claimants' position both because the timing they request for disclosure of the Receiver's position is unrealistic and because the limited discovery the Receiver seeks is of records he does not possess and puts little to no burden on the Claimants.

The Claimants' proposed 28-day deadline for the Receiver to disclose whether he challenges the Claimants' liens or claims is unrealistic because it presupposes that the Receiver

has already determined whether he challenges the Claimants' liens or claims *before* the process has been approved by the Court. Midland and U.S. Bank have themselves produced with their proofs of claim approximately 1.12GB and 322.3MB of records and data, respectively, consisting of nearly 10,000 pages. And as Claimants recognize themselves, such claims "involve potentially highly complicated factual and legal issues," which necessarily take time to evaluate. Conducting an adequate review and also determining whether and on what bases to challenge those claims and reducing that to a writing that provides notice in just 28 days—concurrently with the Group 1 process—would prejudice the Estate and the interests of other unsecured claimants who may benefit should the Receiver decide to challenge the Claimants' claims.

The limited discovery that is being sought by the Receiver through this proposal involves records and information the Receiver needs to complete his due diligence to determine whether to challenge the Claimants' claims and are not in his possession. This limited discovery includes: (i) written document requests (to be jointly prepared with the Claimants) directed to (a) the originators of the loans against the Properties that form the basis for the Claimants' liens, and (b) the title companies who prepared the title commitments and insured these loans; and (ii) Claimants' answers and documents in response to three (3) of the document requests and one (1) interrogatory of the standard discovery requests previously approved by the Court (to which the Claimants do not object to responding, other than suggesting that such responses be provided *after* the Receiver has already determined whether or not he will challenge the claims (Ex. A at ¶ C(ii)).

Claimants' reliance on *SEC v. Madison Real Estate*, 647 F. Supp. 2d 1271, 1281 (D. Utah 2009) – to argue that discovery from the loan originator is not necessary – is misplaced. In that case, the district court found a lack of evidence that the party who had purchased the loan had information that would put it on inquiry notice. But this does not mean that discovery is

unnecessary. Indeed, discovery from the party from whom Claimants acquired the loans would reveal not only what those originators knew but potentially also what information was provided to the Claimants that may have put them on inquiry notice about the Cohen's fraud. In addition, the Claimants have said that if discovery were to be sought from these third parties, they themselves also would seek discovery from them.

And, as noted, the discovery the Receiver seeks may result in the Receiver deciding he will not oppose some or all of the Claimants' claims, which could avoid the waste of time, money, and distraction to other efforts of the Receiver.

In sum, the Receiver needs time to review claim submissions, standard discovery responses, and third-party discovery before determining whether to contest the validity or amount of the Claimants' claims.

### **C. Specific Discovery Issues**

#### **i. Receiver's Disclosure of Legal and Factual Basis of Challenge**

The Receiver disagrees with the Claimants' proposal in Section I(D)(i) of the Claimants' proposed process (Exhibit A), which requires the Receiver to provide the legal theories and factual basis for his challenge to the Claimants' liens and proofs of claim.

*Claimants' Position.* The intent of Section I(D)(i) is to serve as a contention interrogatory as this information is necessary and relevant in the event the Receiver contests the Claimants' liens or claims. The Claimants believe this requirement is necessary in addition to the other interrogatory requests because the Court is utilizing a summary proceeding rather than a plenary proceeding and is not requiring a formal Rule 8 pleading from the Receiver. Section I(D)(i) goes to the heart of the Receiver's contentions and this should be disclosed upfront to the Claimants.

The Receiver's suggestion that I(D)(i) be relegated to the status of an interrogatory is unworkable. The Receiver can object to interrogatories. His refusal to agree to "provide the legal theories and, in general, the factual bases of his position," even with the proviso that he need not marshal his evidence suggests that he intends to object to answering a similar interrogatory. Exhibit A, § I(D)(i). In a process where the Receiver is not required to meet even the minimal requirements of Rule 8, discovery of the legal and factual bases of the Receiver's position is crucial.

The Claimants do not suggest bad faith on the Receiver's part. Rather, the Claimants want the Receiver to agree to a certain base level of contention discovery. After all, the Claimants provided even more information as to their contentions more than two years ago. Turnabout, at this point, is fair play.

Receiver's Position. The Receiver believes the separate requirement of Section I(D)(i) is unnecessary, can be adequately addressed using interrogatories, and is antithetical to the concept of an abbreviated process purportedly only involving single claims against the 28 properties identified by the Claimants. Under the Receiver's proposed process, the Receiver will provide a Dispute Notice which includes a short and plain statement of facts setting forth the legal basis for the dispute, and Claimants will have 5 interrogatories, one or more of which could be used for Claimants' proposed contention interrogatory. The Claimants' supposition that the Receiver will not respond to such an interrogatory in good faith is unfounded. Moreover, turning a claims process into a complaint process is a bad precedent not only for this case but also for other future receiverships.

**ii. Number of Interrogatories and Requests for Production.**

The Parties agree to interrogatories and requests for production but disagree on the number of interrogatories and requests for production.

Claimants' Position. The Claimants believe each party shall have 7 interrogatories and 7 requests for production. Note that discovery in this context will only be needed if the Receiver contests the Claimants' liens and claims. The basis for the Receiver's challenge will involve potentially highly complicated factual and legal issues and the Claimants have a right to defend against the Receiver's claims. The Receiver previously indicated his challenges may be based on fraud and equitable subordination. Each of these legal theories involve complicated factual and legal analysis, which warrants 7 interrogatories and 7 requests for production.

Receiver's Position. The Receiver believes that 5 interrogatories and 5 requests for production would be adequate.<sup>4</sup> The premise for having a separate process for these claims was that it would be a more abbreviated process than the disputed claims process, which has the same 10 document request and 10 interrogatory limit proposed by Claimants.

**iii. Production of Witness by Receiver.**

The Receiver is unwilling to produce a witness as contemplated by Section I(D)(i) of the Non-Investor Single Claim Process, which requires the Receiver to produce a knowledgeable witness who can opine on the factual bases of the Receiver's claims.

Claimants' Position. The Claimants believe deposing a witness knowledgeable of the factual bases of the Receiver's claims is imperative to their ability to defend against the Receiver's

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<sup>4</sup> Fundamentally, the Receiver believes that additional discovery beyond the limited discovery he has identified is unnecessary and inconsistent with the Claimants' position that their claims are undisputed and the concept of an abbreviated claims process for their claims. In addition, because the Claimants already possess or have access to *all records of EquityBuild* through the CloudNine records database, there is no reasonable basis for propounding any requests for production to the Receiver. However, as a concession to attempt to find a reasonable middle ground and in recognition of the difference of opinion with the Claimants as to scope of discovery, the Receiver has included the limited number of discovery requests in his proposal. He reserves the right to respond to such requests on the basis that all such responsive documents and information is equally available to and/or already in the possession of the Claimants.

opposition to the Claimants' liens and claims. As discussed above, the Receiver has not agreed to any level of contention discovery.

Receiver's Position. The Receiver will not produce any witness for deposition. The Receiver does not control or employ any fact witness. The Receiver is not a fact witness. And contention interrogatories contemplated by the proposed processes are more than adequate to discover the factual basis of any challenge to the Claimants' liens. Moreover, requiring the Receiver or a member of his legal team to sit for a deposition will result in a waste of time and expense and would greatly detract from the Receiver's ability serve the Estate in other areas. This is particularly true given that the Claimants already have all of the documents that the Receiver has. In essence, such a deposition would only serve to force the Receiver to do work to corral facts that the Claimants themselves can do.

**D. Mechanism for Receiver's Holdback for Additional Liabilities, Fees, and Expenses**

The Parties disagree as to the Receiver's holdback of his fees and expenses. The Parties generally agree that the Receiver may hold back any fees or expenses that he has requested that the Court allocate against a given Property but which the Court has not granted. The disagreement relates to holdbacks for additional fees or expenses.

Claimants' Position. The Claimants propose that the Receiver holdback only fees or expenses directly related to a Property and that the Receiver provide a detailed accounting and explanation of all costs and expenses the Receiver seeks to withhold from distribution pending further orders from the Court. We understand that the Receiver will provide allocations for fees incurred through June 30, 2021 on or before November 11, 2021. Dkt. 1064. Thus, the operative issue is a holdback for property-specific fees incurred after June 30, 2021.

For the Receiver's fees and expenses incurred after June 2021 and that are directly related to a Property, the Claimants propose that the Receiver provide a detailed accounting and explanation of all costs and expenses the Receiver seeks to withhold and may hold back from distribution, subject to the Claimants' right to contest these amounts, including through any appeal. The Claimants request a detailed accounting because it is imperative to know whether a fee or expense relates to a specific Property or not. All of the Properties were sold prior to June 30, 2021 and U.S. Bank, as Trustee's properties were sold as early as April and August 2020. As such, they require no further management or care. Thus, any property-specific fees or expenses should be minimal if they exist at all.<sup>5</sup> To the extent that the Receiver contends that it is proper to holdback amounts for taxes or other priority distributions, he should be required to identify and account for these specifically. Property taxes were already paid, income taxes are not chargeable to the Properties, and there is no priority above secured debt. Any such charges would be extraordinary requiring a specific request and allocation.

Receiver's Position. This issue involves not only fees and expenses to be paid or withheld for work performed by the Receiver and his firm, but also potentially for taxes and insurance deductibles.

In addition, the timing for disclosure of certain information is impacted by the fact that the Receiver is still in the process of preparing and revising: (A) schedules for allocation of more than 30,000 task entries in connection with both a fee and expense allocation motion that the Receiver is working to file by November 11, 2021 (Docket Nos. 1030, 1064); (B) a fee application for the Third Quarter of 2021, including fee allocations for all properties, that the Receiver is working to

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<sup>5</sup> Notably, all of the fees related to the process of determining whether there were additional claims against the Properties were incurred prior to June 30, 2021. Any further objections or claims processing by the Receiver is for the sole benefit of the unsecured creditors and not properly chargeable against the Properties.

file by November 15, 2021; and (C) a funds restoration motion that is in process but will take several additional weeks to complete and will address allocation of insurance premiums for the benefit of all properties, including properties that are the subject of this motion, as well as reimbursement for other property-related costs fronted by the Estate for certain properties. These efforts and these corresponding motions also are dependent in part on the efforts and cooperation of others, including property managers, a third party consultant, and accounting firm representatives.

The Court's orders have already established and approved the procedures and methodology for allocation of fees and costs to the Properties. The Receiver believes any disputes regarding the allocation of the Receiver's lien to the Properties will be addressed through the motion the Court has indicated it would refer to Magistrate Judge Kim (Docket Nos. 1030, 1064), and objects to any separate process that would multiply the Receiver's work in this regard.<sup>6</sup>

As noted above, the Receiver also is actively working to prepare additional filings that will address and disclose information regarding allocated fees and expenses, consistent with prior Court orders. The Receiver proposes that to the extent that the Receiver's Allocation Motion or subsequent fee applications have not been ruled upon or the funds approved by the Court have not been paid to the Receiver or others to whom amounts are due, then the amount of a holdback from distribution to Claimants include no less than the total of:

- (i) the amounts allocated to the Properties in the Receiver's Allocation Motion;
- (ii) the amounts allocated to the Properties in connection with any fee application that is not addressed by the Receiver's Allocation Motion;

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<sup>6</sup> The Receiver notes that he does not agree with the Claimants' characterizations of this Court's order granting the Receiver's Lien.

- (iii) the amount to be withheld for potentially due taxes consistent with the amounts identified by the Receiver's tax advisors; the amount of all deductibles on any applicable insurance policy; and
- (iv) 5% of the net sales proceeds in each separate property account (calculated prior to payment of any of the foregoing amounts) to cover fees, costs, or other liabilities subsequently discovered or incurred).

At the end of the proposed process, the Court can issue such other orders that are necessary or appropriate to adjust the amounts for any such distribution and/or holdback.

The Claimants suggest that the Court should only allow a holdback of amounts "directly related to a Property," but this should not be construed in a manner that is inconsistent with the allocation methodology approved by the Court (Dkt. 824 at 5) which includes allocation not only of fees and expenses that are specifically allocated to a property but also its proportional share of approved fees and expenses that are properly allocated to all properties or a subset of properties.

Additionally, the Receiver disagrees with Claimants' assertion that "income taxes are not chargeable to the Properties, and there is no priority above secured debt." The Receivership Estate is treated as a Qualified Settlement Fund ("QSF") and any tax liability of the estate will have to be paid by the Receiver. The amount of capital losses and expenses and their impact on tax liability is presently unknown as not all applicable the tax returns have been completed and the period by which the tax authorities must respond has not expired. Accordingly, the Receiver's tax advisors have advised the Receiver that he should not agree to a process where all of the proceeds from the sale of a property are distributed before all tax liabilities have been determined and satisfied.

**CONCLUSION**

Despite several months of negotiations and the Parties' good faith efforts to try to reach a mutually agreeable proposal on these matters, the Parties have been unable to reach a final single claim process. The Parties, therefore, seek the Court's assistance to resolve their disputes and approve a single claim process.

Dated: October 29, 2021

Respectfully submitted,

/s/ Michael Rachlis  
Michael Rachlis  
Jodi Rosen Wine  
Rachlis Duff & Peel, LLC  
542 South Dearborn Street, Suite 900  
Chicago, IL 60605  
Phone (312) 733-3950  
Fax (312) 733-3952  
mrachlis@rdaplawn.net  
jwine@rdaplawn.net  
*Attorneys for Kevin B. Duff, Receiver*

/s/ Jill Nicholson  
Jill Nicholson (jnicholson@foley.com)  
Andrew T. McClain (amccclain@foley.com)  
Foley & Lardner LLP  
321 N. Clark St., Ste. 3000  
Chicago, IL 60654  
Ph: (312) 832-4500  
Fax: (312) 644-7528  
*Counsel for 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*

/s/ Thomas B. Fullerton  
Thomas B. Fullerton (6296539)  
Akerman LLP  
71 S. Wacker Drive, 47th Floor  
Chicago, IL 60606  
(312) 634-5700  
thomas.fullerton@akerman.com

Michael D. Napoli (TX 14803400)  
Akerman LLP  
2001 Ross Avenue, Suite 3600  
Dallas, TX 75201  
(214) 720-4360  
michael.napoli@akerman.com  
*Counsel for Midland Loan Services,  
a Division of PNC Bank, National Association*

# **EXHIBIT A**

**Claims Process for Non-Investor Single Claim Properties**

As directed by the Court in its Order Regarding Claims Resolution Process No. 2 (Dkt. No. 941, ¶ 18(b)) and its Order of April 28, 2021 (Dkt. No. 980), this process governs resolution of the proofs of claim submitted by claimants (“Claimant” or “Claimants”) against the following properties of the receivership estate for which only one claim was submitted to the Receiver (each a “Property” and collectively, the “Properties”):

<u>Property ID No.</u>	<u>Address</u> <sup>1</sup>
16	1017 W 102nd Street
17	1516 E 85th Place
18	2136 W 83rd Street
19	417 Oglesby Avenue
20	7922 S Luella Avenue
23	8030 S Marquette Avenue
24	8104 S Kingston Avenue
25	8403 S Aberdeen Street
27	8529 S Rhodes Avenue
31	11318 S Church Street
45	2129 W 71st Street
65	6749-59 S Merrill Avenue
66	7110 S Cornell Avenue
21	7925 S. Kingston**
29	9212 S. Parnell**
30	7210 S. Vernon*
32	6825 S. Indiana*
34	406 E 87 <sup>th</sup> Place*
36	6554 S. Rhodes*
37	7712 S. Euclid*
38	8432 S. Essex*
39	3213 S Throop*
41	8107 S. Kingston*
42	8346 S. Constance**

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<sup>1</sup> Properties marked with an \* are those for which only one claim was submitted but there are potentially adverse liens in the title record. Properties marked with an \*\* are those where a filing releasing a lien prior to that of the claimant exists, but which release is potentially invalid. Properties with no special designation have no adverse liens in the title record.

43	10012 S LaSalle*
44	9610 S. Woodlawn*
46	6759 S. Indiana Ave*
48	8517 S. Vernon*

This process is intended to fully resolve the single claim brought against each of the Properties as well as any claim that any other potential claimant could have brought against each of the Properties and all claims of the Receiver, including any claims for a receiver's lien or holdback amounts.

**I. Claims Resolution Process**

**A. Notification of Receiver's Position on Claims**

Within 28 days after entry of the Court order approving these claims procedures, the Receiver shall notify counsel for each of the Claimants if the Receiver intends to contest the validity of the Claimants' liens on the Properties or the amounts in the proofs of claim and provide each Claimant a Dispute Notice (defined below).

If the Receiver does not contest the Claimant's lien or amounts due but does seek to withhold expenses, then the parties will immediately proceed with Section II below.

For any claim for which the Receiver contests the validity or amount of the claim, the Receiver will provide the Claimant with a notice of dispute (the "Dispute Notice") which shall include a short and plain statement of facts setting forth the legal basis for his dispute. In the event that the Receiver disputes the amount of a claim, the Receiver shall state (i) what he believes to be the correct amount; (ii) which elements of the claim he disputes; (iii) the basis for disputing each such element; and (iv) a detailed accounting and explanation of all costs and expenses the Receiver seeks to pay from the sale proceeds. Motions to dismiss shall not be allowed as to the Dispute Notice.

If the Receiver intends to contest the validity of any liens or amounts due, then the validity of the applicable lien(s) and the related proof(s) of claim will be decided using the Contested Claims Process outlined below.

**B. Settlement Referral for Contested Claims**

All claims for which the Receiver has provided a Dispute Notice are referred to Magistrate Judge Young B. Kim for purposes of conducting a settlement conference. For the avoidance of doubt, the start of the Contested Claims Process shall not be delayed by any settlement conference, unless agreed to by the parties.

**C. Contested Claims Process**

This Contested Claims Process shall proceed before District Court Judge Lee. The process for discovery and resolution of this Contested Claims Process shall proceed in accordance with the procedures described herein. For avoidance of doubt, the Contested Claims Process will proceed concurrently with the process set forth by the Order Regarding Claims Resolution Process No. 2 (Dkt. No. 941) and concurrently with any other dispute resolution process.

The Contested Claims Process shall begin as set forth above and the parties shall have sixty (60) days after service of the Dispute Notice to take limited discovery (the “Contested Claim Discovery Period”). Discovery shall be as set forth in the Federal Rules except that:

- (i) the Receiver shall provide the legal theories and, in general, the factual bases his position (he need not marshal all evidence that may be offered at trial);
- (ii) Claimants shall (a) answer Document Requests No. 6, 7 and 8, and Interrogatory No. 5, of the Standard Discovery to Institutional Lenders that have been approved by the Court, and (b) produce all responsive documents in connection with these requests for production and interrogatories to the extent not already produced or answered. (Dkt. No. 928, Ex. C)
- (iii) each party will be limited to 7 interrogatories;
- (iv) each party will be limited to 7 requests for production;

- (v) no requests for admission may be served;
- (vi) each party will be limited to three depositions;
- (vii) There will be no third party discovery except for title companies and loan originators, which shall be limited to subpoenas for records and/or testimony from the loan originator and/or title company for the liens asserted by Claimants, without leave of court;
- (viii) the Receiver may not be deposed, however, the Receiver shall produce a knowledgeable witness who can opine on the factual bases of the Receiver's claims; and
- (ix) no expert discovery is permitted.

The Contested Claim Discovery Period and the foregoing limitations on discovery may be enlarged or extended by agreement of the parties or by leave of Court.

Within 21 days of the close of the Contested Claim Discovery Period, the Receiver shall file his position statement setting forth the Receiver's factual and legal basis for contesting the Claimant's lien or amounts due and any amounts claimed due by the Receiver including any amounts related to a receiver's lien ("Position Statement"). The Position Statement shall include as exhibits all documents relied on by the Receiver for his legal and factual bases for contesting the claim and for any amounts claimed due.

Within 21 days after the Receiver files his Position Statement, the Claimant may file a written response to the Position Statement with supporting evidence ("Claimant's Response").

Within 14 days after the filing of the Claimant's Response, the Receiver may file a reply.

After the time for a reply has passed, the Court will set a hearing on the Position Statement and Claimant's Response. Each party will be afforded the opportunity to present evidence in support of their positions. After completion of the hearing, the Court will issue an order resolving all issues related to the claim, including (i) the Claimant's entitlement to a deficiency claim, and (ii) the amount and priority of any lien claimed by the Receiver related to fees and expenses already

approved by the Court, if it has not already done so. Claimants and the Receiver reserve all rights to pursue any and all appellate remedies.

The Receiver shall disburse all amounts due the Claimant, except for the Holdback Amount as set forth below, within 14 days after the Court's order becomes final and non-appealable.

**II. Distribution of Funds for Uncontested Claims**

If the Receiver does not contest the validity or amount of the claim asserted against a Property, then the procedures under this Section II shall apply.

Within 14 days of the Receiver's notice that he does not intend to contest the validity or amount of the claim asserted against a Property, the Receiver will distribute the remaining net balance of the sale proceeds from the Property held by the Receiver in a segregated account, except for the Holdback Amount as set forth below, to the Claimant.

**III. Holdback of Funds for Additional Liabilities, Fee, and Expenses**

The Holdback Amount for a Property shall consist of (a) all fees or expenses that the Receiver has moved the Court to allocate to that property but upon which the Court has not ruled; plus (b) all fees or expenses directly related to a Property that are still subject to approval or allocation by the Court (the "Remaining Fees and Expenses"). The Receiver shall provide a detailed accounting and explanation of the Remaining Fees and Expenses that the Receiver seeks to withhold.

The Receiver will withhold the Holdback Amount from the distributions required by Sections I and II. Within three (3) business days of an order regarding any of the fees and expenses contained in the Holdback Amount becoming final and non-appealable, the Receiver shall deduct the approved portion of the fees and expenses from the sale proceeds and pay the remainder of the Holdback Amount related to such fees and expenses to the appropriate Claimant.

# **EXHIBIT B**

**Claims Process for Single Claim Properties**

As directed by the Court in its Order Regarding Claims Resolution Process No. 2 (Dkt. No. 941, ¶ 18(b)), this process governs resolution of the proofs of claim submitted by claimants (“Claimant” or “Claimants”) against the following properties of the receivership estate for which the only claim submitted to the Receiver was the Claimant’s (each a “Property” and collectively, the “Properties”):

<u>Property ID No.</u>	<u>Address<sup>1</sup></u>
16	1017 W 102nd Street
17	1516 E 85th Place
18	2136 W 83rd Street
19	417 Oglesby Avenue
20	7922 S Luella Avenue
23	8030 S Marquette Avenue
24	8104 S Kingston Avenue
25	8403 S Aberdeen Street
27	8529 S Rhodes Avenue
31	11318 S Church Street
45	2129 W 71st Street
65	6749-59 S Merrill Avenue
66	7110 S Cornell Avenue
21	7925 S. Kingston**
29	9212 S. Parnell**
30	7210 S. Vernon*
32	6825 S. Indiana*
34	406 E 87 <sup>th</sup> Place*
36	6554 S. Rhodes*

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<sup>1</sup> Properties marked with an \* are those for which only one claim was submitted but there are potentially adverse liens in the title record. Properties marked with an \*\* are those where a filing releasing a lien prior to that of the claimant exists, but which release is potentially invalid.

37	7712 S. Euclid*
38	8432 S. Essex*
39	3213 S Throop*
41	8107 S. Kingston*
42	8346 S. Constance**
43	10012 S LaSalle*
44	9610 S. Woodlawn*
46	6759 S. Indiana Ave*
48	8517 S. Vernon*

This process is intended to fully resolve the single claim brought against each of the Properties as well as any claim that any other potential claimant could have brought against each of the Properties that are the subject of this single claim process, and all claims of the Receiver, including any claims for a receiver's lien or holdback amounts.

**I. Claims Resolution Process – Preliminary Proceedings**

In an effort to streamline proceedings, minimize costs to the parties and the Estate, and maximize judicial efficiency, this matter is referred to Magistrate Judge Young B. Kim for purposes of exploring whether a settlement or other joint resolution can be reached as to any of the Claimants and/or properties that are the subject of this proposed Non-Investor Single Claim Process.

While Group 1 of the Disputed Claims Process is before the Court (see Order Regarding Summary Proceedings for Group 1, Dkt. 1006), the Receiver and Claimants will work together to draft written document requests directed to the originators of the loans against the Properties that form the basis for the Claimants' liens, and the title companies who prepared the title commitments and insured these loans. The Receiver shall serve subpoenas on those parties with the jointly prepared document riders.

Additionally, during this period, Claimants shall: (i) answer Document Requests No. 6, 7 and 8, and Interrogatory No. 5, of the Standard Discovery to Institutional Lenders that have been approved by the Court; and (ii) produce all responsive documents in connection with these requests for production and interrogatories. (Dkt. No. 928, Ex. C).

The Receiver will make every effort to complete his review of (i) the Proofs of Claim and supporting materials submitted by Claimants, (ii) the Claimants' standard discovery responses and document productions, and (iii) the discovery obtained from the loan originators and title companies, concurrently with the Group 1 proceedings before the Court. During this period, the Receiver will attempt to provide notice of this Court's order initiating this process for these Properties to those who potentially have adverse liens in the title record by using last known addresses as well as posting such order on the Receiver's website, so that any such lienholder will have an opportunity to be heard.

On or before December 17, 2021, the Receiver will submit a status report to the Court. The Receiver will advise the Court whether his work relating to Group 1 has or will interfere with his ability to complete this process concurrently, and will propose a date by which he will notify counsel for each of the Claimants if he intends to contest the validity of any of the Claimants' liens on the Properties or the amounts in the proofs of claim.

If the Receiver provides notice that he does not contest the validity or amount of any claim, then the process described in Section III below will commence as to that claim.

For any claim for which the Receiver contests the validity or amount of the claim, the Receiver will provide the Claimant with a notice of dispute (the "Dispute Notice") which shall include a short and plain statement of facts setting forth the legal basis for his dispute. In the event that the Receiver disputes the amount of a claim, the Receiver shall state: (i) what he

believes to be the correct amount; (ii) which elements of the claim he disputes; and (iii) the basis for disputing each such element.

The Claimants shall have no obligation to review any materials produced by third-parties unless and until the Receiver provides notice that he intends to contest the validity of their liens on an inquiry notice, fraudulent conveyance, or some other avoidance theory, and they will be granted sufficient time to do so in Section II below.

## **II. Claims Resolution Process – Contested Claims**

### **A. Settlement Referral for Contested Claims**

All claims for which the Receiver has provided a Dispute Notice are referred to Magistrate Judge Young B. Kim for purposes of conducting a settlement conference. With notice to the Claimant, the Receiver shall provide a copy of the Dispute Notice to Judge Kim's courtroom deputy along with the docket reference to these procedures and this referral. Judge Kim may extend the schedule set forth herein in his discretion as fairness and justice require.

### **B. Contested Claims Discovery**

The parties shall have sixty (60) days to take limited additional discovery (the "Contested Claim Discovery Period"). Discovery shall be as set forth in the Federal Rules except that:

- (i) each party will be limited to 5 interrogatories;
- (ii) each party will be limited to 5 requests for production;
- (iii) no requests for admission may be served;
- (iv) each party will be limited to three depositions;
- (v) There will be no third party discovery except for title companies and loan originators, without leave of court;
- (vi) Neither the Receiver nor any Rule 30(b)(6) representative of the Estate may be deposed; and

(vii) no expert discovery is permitted.

The Contested Claim Discovery Period and the foregoing limitations on discovery may be enlarged or extended by agreement of the parties or by leave of Court.

**C. Position Statements**

Within 21 days of the close of the Contested Claim Discovery Period, the Receiver shall file his position statement setting forth the Receiver's factual and legal basis for contesting the Claimant's lien or amounts due ("Position Statement"). The Position Statement shall include as exhibits all documents relied on by the Receiver for his legal and factual bases for contesting the claim.

Within 21 days after the Receiver files his Position Statement, the Claimant may file a written response to the Position Statement with supporting evidence ("Claimant's Response").

Within 14 days after the filing of the Claimant's Response, the Receiver may file a reply.

After the time for a reply has passed, unless it determines that the issues may be summarily determined without a hearing consistent with due process, the Court will set a hearing on the Position Statement and Claimant's Response. Each party will be afforded the opportunity to present evidence in support of their positions, consistent with any Court order regarding such hearing and its parameters.

The Court will issue a ruling with respect to each claim contested by the Receiver.

**III. Interim Distribution of Funds**

Within 21 days of (a) the Receiver's notice that he does not intend to contest the validity or amount of the claim asserted against a Property (except to the extent of any amounts sought by the Receiver pursuant to the Receiver's lien or by a fee application to the Court), or (b) the date, following the Contested Claims Process, that a Court order requiring distribution to the

Claimant from funds held by the Receiver in the segregated account for the Property becomes final and non-appealable, the Receiver will submit a plan to distribute to the Claimant the net balance of the sale proceeds from the Property held by the Receiver in a segregated account less the Holdback Amount as described in Section IV below (the “Interim Distribution Plan”).

The Receiver’s determination that he will not contest a claim shall not be deemed a waiver of his right to object to a claim against the estate for any deficiency amount or to hold, receive, or use any amounts that are identified in Section IV below consistent with orders of the Court.

**IV. Holdback of Funds for Additional Liabilities, Fees, and Expenses**

The Receiver will file a motion, in accordance with the schedule set by the Court (*e.g.*, Dkt. No. 1064), to approve the Receiver’s proposed allocation of fees to the particular properties (“the Receiver’s Allocation Motion”) in accordance with the Court’s August 27, 2021 Order (Dkt. No. 1030). The Receiver also intends to file a funds restoration motion that is in process but will take several additional weeks to complete and will address allocation of insurance premiums for the benefit of all properties, including properties that are the subject of the Non-Investor Single Claim Process, as well as reimbursement for other property-related costs fronted by the Estate for certain properties. Until those motions and any quarterly fee applications that impact the properties that are the subject of the Non-Investor Single Claim Process are ruled upon, the Receiver will retain a Holdback Amount in the segregated account for each of the Properties, which Holdback Amount shall be no less than the total of: (i) the amounts allocated to the Properties in the Receiver’s Allocation Motion; (ii) the amounts allocated to the Properties in connection with any fee application that is not addressed by the Receiver’s Allocation Motion; (iii) the amount to be withheld for potentially due taxes consistent with the amounts identified by

the Receiver's tax advisors; (iv) the amount of all deductibles on any applicable insurance policy; and (v) 5% of the net sales proceeds in each separate property account (as of the date of the Order approving the Claims Process for Single Claim Properties) to cover fees, costs, or other liabilities subsequently discovered or incurred) (in total, the "Holdback Amount"). Once the Court has ruled on the Receiver's Allocation Motion, any approved amounts will be paid to the Receiver from the segregated accounts, and the Holdback Amount shall be reduced consistent with the Court's orders.

The Holdback Amount shall remain in the segregated account for each of the Properties to satisfy, subject to further order of the Court, all fees and expenses approved pursuant to the Receiver's Allocation Motion, the Receiver's funds restoration motion, all taxes, all other priority liabilities, insurance deductibles corresponding to policies applicable to the Properties, and all approved fees and costs for the Receiver and his retained professionals incurred subsequent to June 30, 2021.

Following payment of all fees and expenses approved pursuant to the Receiver's Allocation Motion, the Receiver's funds restoration motion, all approved taxes or other priority liabilities, insurance deductibles corresponding to policies applicable to the Properties, and any other approved allocation to the Properties of fees and costs for the Receiver and his retained professionals incurred subsequent to June 30, 2021, the net remaining balance of the Holdback Amount shall be distributed to the Claimant pursuant to the Receiver's final distribution plan in this action, unless otherwise ordered by the Court.