

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

**CERTAIN MORTGAGEES' (I) RESPONSE TO MOTION FOR ENTRY OF AN ORDER  
(1) ESTABLISHING CLAIMS BAR DATE, (2) FINDING THAT THE  
RECEIVER GAVE FAIR, ADEQUATE, AND SUFFICIENT NOTICE TO ALL  
INTERESTED PARTIES, AND (3) APPROVING PROOF OF CLAIM FORM  
AND SUMMARY PROCEDURES; AND (II) CROSS MOTION TO SET DISCOVERY  
SCHEDULE AND HEARING ON LIEN PRIORITY  
ON AN EXPEDITED BASIS AND FOR RELATED RELIEF**

The following mortgagees (collectively, "Mortgagees") respectfully file this combined response and motion ("Motion") requesting that the Court set a discovery schedule and hearing regarding the Mortgagees' lien priority on an expedited basis and for related relief: (1) Freddie Mac; (2) Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; (3) 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; (4) 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; (5) 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; (6) 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; (7) 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; (8) Federal National Mortgage Association (“Fannie Mae”); (9) BMO Harris Bank N.A.; (10) Midland Loan Services, a Division of PNC Bank, National Association; and (11) BC57, LLC. In support of this Motion, the Mortgagees state as follows:

### **SUMMARY**

1. The Mortgagees respectfully file this Motion because they have not been nor are they currently adequately protected. Indeed, neither the Mortgagees nor anyone else who may claim a security interest in the real estate at issue is being adequately protected. As such, an expeditious resolution of lien priority is necessary.

2. Given the lack of progress and transparency and a failure to abide by even the most routine administrative matters required by the Court in its receiver order (“Receiver Order”) entered on August 17, 2018 [DKT. 16], the Mortgagees respectfully request that the Court: (1) establish a discovery schedule that would allow for the immediate rolling production of information by the Receiver necessary for the determination of the Mortgagees’ lien priority and (2) establish a hearing date for determination of the Mortgagees’ lien priority on an expedited basis. More specifically, the Mortgagees request that the claims bar date period be shortened to 60 days and that the hearings on lien priority occur within 30 days after the claims bar date.

3. Moreover, the Mortgagees further request that the Court require the Receiver to: (a) withhold and segregate principal and interest payments and escrow for taxes, insurance, and replacement reserves as required under the loan documents with respect to each property

(collectively, the “Segregated Amounts”), (b) specifically earmark the Segregated Amounts for the payment of principal and interest and other amounts under the loan documents for each of the respective properties, and (c) prohibit the use of such Segregated Amounts for administrative expenses, especially while the claims process is pending and no determination of lien priority has been made.<sup>1</sup>

### **BASIS FOR MOTION**

4. For the reasons set forth below, the Mortgagees’ interests are not being adequately protected.

#### ***A. The Receiver Has Not Paid Principal and Interest to the Mortgagees.***

5. The Receiver was appointed on August 17, 2018. During the entire duration of the receivership and for almost seven months, the Mortgagees have not been paid any amounts due and owing under their respective loan documents, including principal and interest as required under the loan documents. Nor during this period has the Receiver escrowed or even allocated for any payments of principal or interest or other amounts as required under the various loan documents. As such, the parties’ respective collateral positions continue to decline during the pendency of the receivership without any adequate protection.

6. Not only is the failure to make such payments in contravention of the loan documents, but also squarely contravenes existing case law. In fact, a receiver cannot unilaterally withhold payment to secured mortgagees as noted by the SEC’s own leading real estate Ponzi scheme case. *S.E.C. v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1276 (D. Utah 2009); *see also 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] citing with

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<sup>1</sup> Of course, the Mortgagees also request the immediate release of such Segregated Amounts to the prevailing Mortgagees once a determination on lien priority is issued.

favor the *Madison* decision for proposition that “the rights of receivers can be no greater than those of their predecessors in title.”) (“Memorandum Opinion”). Indeed, the *Madison* court held that lenders were required to be restored to their status quo under their mortgages, including the payment of principal and even default interest. *Madison*, 647 F. Supp. 2d at 1284-85.

7. Here, the Receiver has used the lien priority dispute as a shield to avoid making any payments to any secured creditors in the case. Instead, the Receiver has used these parties’ collateral to fund an administrative expense war chest.<sup>2</sup>

8. This conundrum was created solely by the Receiver. While denying the validity of the Mortgagees’ collateral without being required to put forth evidence establishing lien priority or even escrowing principal and interest payments the Mortgagees, the Receiver has: (a) impermissibly swept the Mortgagees’ collateral into a general account and (b) amassed an administrative war chest rather than making the required principal and interest payments. *Cf.* Memorandum Opinion, pp. 8-9.

9. The Receiver contends that he is not obligated to make any payments to the Mortgagees and if he were, he must determine lien priority first. While the Receiver’s position has an appealing and intuitive simplicity, it is utterly belied and undermined by the facts in this case.

10. This receivership has materially dragged on for almost seven months<sup>3</sup> – with no specific timing or even a proposal for discovery or a resolution of lien priority. Indeed, the current

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<sup>2</sup> This war chest includes fees of the Receiver and his law firm, which for the period ending December 2018, exceeds \$904,000.00, as set forth in the Receiver’s Second Status Report (“Receiver Report”). [DKT. 241, pp. 22-23].

<sup>3</sup> Underscoring the length of the priority dispute, Freddie Mac filed its motion regarding the Receiver’s commingling of rents on October 17, 2018, almost 5 months ago. As such, the lien priority dispute is not a new issue to the Receiver.

procedural status of the case has created a perverse disincentive for the Receiver to resolve the lien priority dispute in an expeditious matter. For example, every day that the Receiver does not create a discovery protocol or move towards a resolution of the lien priority issues is another day that the Receiver will not make principal and interest payments to the Mortgagees and will use such funds instead for administrative expenses.

11. Further, the Receiver has ignored this Court's request to work with the Mortgagees to build a discovery protocol as part of the claims process.

12. On February 7, 2019, this Court ordered the Receiver to file his motion setting forth a proposed claim process by February 22, 2019. The claims process was to include a procedure for limited discovery as directed by Judge Lee at the December 18, 2018 status hearing:

THE COURT: It seems to me that that sort of limited discovery may be something that can be built into the claims process... Because while certain interest-holders may want some limited discovery, others may not. So perhaps that's something the receiver can thank [sic] about and talk to the various parties about, so that whatever questions they have can be addressed in the information that the receiver has.<sup>4</sup>

13. The Receiver did not ask for the Mortgagees' position regarding discovery and did not build any discovery component into the Receiver's claims procedure ("Claims Motion"), as requested by this Court. Claims Motion, DKT. 241.

14. In fact, the Claims Motion acknowledges that the "Receiver has not set a time for the processing of claims" but is instead asking that the court set a status for *30 days after the claims bar date* "to report at least initially on the general response to the claims process." Claims Motion,

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<sup>4</sup> At this hearing, counsel also requested that the Receiver turn over to the Mortgagees documents referenced in the Complaint, including certain assignments in which SEC alleged that "the investors assigned to Equitybuild Finance, as the "Collateral Agent," all of their rights and powers under the Notes and mortgages." Complaint, ¶ 25. DKT. 1. Such documents were referenced at the outset of this case, are highly relevant to the lien priority dispute, and still have not been produced to the Mortgagees – even though the Receiver has demanded and received extensive documentation from the Mortgagees.

p. 9.<sup>5</sup>

15. This is further exacerbated by the fact that the Receiver has requested that the claims bar date not occur until 4 months (120 days) after the Court approves the Claims Motion.

*Id.* at p. 5.<sup>6</sup>

16. Making matters even worse, the Receiver also notes that he “anticipates that investigating and calculating the claims of investors and creditors will take at least a year from the proposed bar date . . . .” *Id.* at p. 4.

17. This means that no determination will be made regarding the Mortgagees’ liens for 24 months (or 2 years) from the Receiver’s appointment – at the earliest. This also means that the Mortgagees will not have been paid any principal or interest regarding their respective collateral for at least 2 years. As such, no secured parties (including the Mortgagees) are being adequately protected during the pendency of this receivership.

***B. Receiver’s Failure to Timely Pay All Property Taxes by March 1, 2019.***

18. With respect to certain properties, the Receiver has failed to pay property taxes by the required March 1, 2019 due date and such properties are amassing penalties at 18% per annum.

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<sup>5</sup> The Claims Motion provides no statements regarding discovery other than that discovery “can be discussed at the proposed status conference” which is 5 months after this Court sets the claims bar date. Claims Motion, pp. 9-10.

<sup>6</sup> The Mortgagees also submit that the claims process requested by the Receiver was unduly delayed and also unacceptably drawn out. Compare the timing of the claims process here versus a recent SEC Receivership before the District Court of the Northern District of Illinois which involved multiple stock issuers and an estimated 40,000 shareholders. *S.E.C. v. Pearson*, Case No. 14-3785 (N.D. Ill. 2014). The *Pearson* SEC receiver was appointed on May 22, 2014. The receiver filed her claims bar date motion two months later on July 23, 2014, and requested a claims bar date of September 30, 2014. As such, the claims bar date was set 131 days after the *Pearson* receiver’s appointment (approximately 4 months). Compare this to the current matter where the proposed claims bar date is *a minimum* of 315 days after the Equitybuild Receiver’s appointment. Also compare the Equitybuild case to the *Pearson* case in which the *Pearson* receiver made monthly mortgage payments to the secured lender while the commercial real estate was in her possession. Receiver’s Second Quarterly Status Report, at p. 19 and Ex. A., *S.E.C. v. Pearson*, Case No. 14-3785 (N.D. Ill. filed October 29, 2014) [DKT. 99].

19. The Receiver had failed to pay taxes even though the Receiver had collected sufficient rents from certain of the properties as alleged “Owner Distributions” to pay the taxes. Indeed, as Exhibit 1 demonstrates, a minimum of \$496,330.61 in Owner Distributions have been removed by the Receiver and were placed in the general receiver account. Ex. 1. It is believed that additional Owner Distributions beyond \$496,330.61 have been removed since the Receiver’s appointment.

20. However, rather than earmarking those funds for the known March 1, 2019 property tax bills, the Receiver impermissibly commingled those funds and used income that could have been used to pay taxes to prop up and support other unrelated and failing properties. This is exactly the reason why Freddie Mac filed its motion to prevent commingling on October 17, 2018. As noted herein, the concerns raised by Freddie Mac were wholly justified, as those concerns have wholly borne themselves out.

21. Freddie Mac and other Mortgagees repeatedly attempted to confirm that the taxes would be paid prior to the March 1, 2019 deadline, and the Receiver’s counsel simply responded “we are looking at the tax payment questions and will follow up with you on those issues as soon as we can.” Finally, at 10:39 p.m. on February 28, 2019 (the day before the real estate taxes were to be paid to the Cook County Treasurer), the Receiver provided the Mortgagees with the Receiver’s plan for payment of the taxes due the following day. According to the Receiver, “[t]here are properties in the Receivership for which the amounts available are not sufficient to pay all outstanding taxes due on March 1 either because a property has had insufficient income to pay the amounts due, **or because the Receiver does not have enough funds at this time to restore rents.**” Ex. 2, (emphasis added).

22. Indeed, certain Mortgagees affirmatively came out of pocket to advance funds to

protect their collateral. For example, Freddie Mac was left with only a few business hours to make up the shortfall on six (6) properties by both releasing tax escrow funds in the amount of \$10,210.29 and making advances of \$42,151.26, in order to protect its collateral from being further encumbered by default interest. Furthermore, certain other properties' taxes have still not have been paid and are accruing interest at 18% per annum.

23. The Receiver's Second Status Report ("Receiver Report") notes, "In the coming weeks, the Receiver, working in connection with his counsel, accountants, and property managers will provide the lenders with documents and reporting information required by the February 13, 2019 order." Receiver Report, p. 13. DKT. 258.

24. More specifically, the information required by Magistrate Kim's Memorandum Opinion provides:

The Receiver must: (1) not commingle the Rents and use the Rents from each property solely for the benefit of that particular property; (2) separately account for the Rents and provide a monthly accounting upon request; and (3) restore the Rents, to the extent that there are enough funds now or later, if they have been used for the benefit of other properties.

Memorandum Opinion, p. 9.

25. In response to Magistrate Kim's direct order, the Receiver Report notes, "In the coming weeks, the Receiver, working in connection with his counsel, accountants, and property managers will provide the lenders with documents and reporting information required by the February 13, 2019 order." Receiver Report, p. 13.

26. While the Receiver acknowledges that he is required to provide such information, almost one month has passed since the entry of Magistrate Kim's order and no such information has been tendered to the Mortgagees.<sup>7</sup> The Mortgagees respectfully also request that the Receiver

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<sup>7</sup> Further, the Receiver continues to flaunt this Court's orders, deadlines, and local rules. The Receiver has not fully complied with the Receiver Order in that he has yet to provide values for the properties under his control, failed to



be given a deadline by which to furnish this information as the Mortgagees cannot be adequately protected unless and until the funds withdrawn by the Receiver – which as noted above are in the hundreds of thousands of dollars – have been restored.

***C. The Receiver Has Failed to Provide for a Mechanism to Address Litigation Once a Property Has Been Sold.***

27. Again, the Mortgagees are not adequately protected while the lien priority dispute exists and the Receiver begins to dispose of the properties. Here is why. Assume the Receiver is scheduled to close on the sale of a property on April 1, 2019. The Receiver then obtains a payoff statement from a Mortgagee with indebtedness dated as of April 1, 2019. At the time of the closing, the funds are sufficient to pay a Mortgagee's indebtedness in full based on the payoff statement obtained from that Mortgagee. However, the Receiver has indicated that he intends to withhold payment of the net proceeds (possibly for another year or more), while the Receiver litigates the Mortgagee's liens. During this period, the Mortgagee has not been paid any sale proceeds at the time of sale, or monthly principal and interest on its debt, which continues to accrue interest, default interest, costs, expenses, and attorneys' fees that are required to be paid under the loan documents. It is likely that the April 1 sale proceeds will not be sufficient to satisfy the indebtedness under the loan documents a year later. As such, the Mortgagees are left with the prospect of not being made whole as required by law. Furthermore, the Receiver has no authority to require a senior secured party to take a discounted payoff. Yet, this is exactly the scenario that happens if the Receiver is allowed to continue down the path he is taking. Such a scenario certainly

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timely file his status report (the second report was not filed until February 28, 2019, one month after it was due); failed to provide an inventory within 21 days of his appointment under Local Rule 66.1; and failed to file fee applications as required under the Receiver Order.

does not leave the Mortgagees adequately protected. This further underscores the need to have an expedited resolution of lien priority.

***D. The Receiver and Retained Personnel Have Failed to File Quarterly Fee Applications as Mandated by the Receiver Order.***

28. As previously noted, the Receiver continues to flaunt the obligations and deadlines imposed by this Court. The Receiver Order expressly provides:

Within forty-five (45) days after the end of each calendar quarter, the Receiver and Retained Personnel **shall** apply to the Court for compensation and expense reimbursement from the Receivership Estate (the “Quarterly Fee Applications”). The Receiver may file a fee application at the end of September 2018, November 2018, and January 2019, which otherwise must comply with the requirements of this Order that are applicable to Quarterly Fee Applications.

Receiver Order, ¶ 7. (emphasis added).

29. No fee applications have been filed in this case by the Receiver or his counsel despite this Court’s requirement that the Receiver and Retained Personnel **shall** file quarterly fee applications.

30. The reason such fee applications are required to be filed quarterly is to provide transparency as well as an opportunity for all parties in interest to object to the reasonableness of the fees and expenses being incurred in the case. To the extent the Court determines such fees are not reasonable, quarterly filings require the Receiver and any other Retained Professionals to take corrective action rather than incurring further unsupervised or unapproved fees.

31. This omission is certainly known by the Receiver. Yet not only has the Receiver ignored the Receiver Order but he has not even taken the minimal steps to request that the Court excuse the untimely filing of such fee applications.

32. Such disregard for the Receiver Order is troubling. The Receiver should not be permitted to use the Receiver Order as a sword against the parties in this matter yet concurrently utilize it as a shield – particularly when he himself fails to abide by the very terms of the Receiver Order.

33. The Receiver's failure to file timely fee applications also jeopardizes the Mortgagees' collateral where the Receiver and Retained Professionals may be seeking to use the Mortgagees' collateral without providing transparency and an opportunity for those parties to tender their objections to this Court.

***E. The Receiver Has Failed to Guard Against Conflicts of Interest Related to the Mortgagees' Collateral.***

34. The Receiver Order provides that the Receiver is under an ongoing duty to ensure that no conflicts of interest arise between the Receiver, his Retained Personnel, and the Receivership Estate. Receiver Order, ¶ 45.

35. Yet, notwithstanding this requirement, the Receiver proposes to sell certain properties to the very property managers who were in place prior to the receivership and who continue to currently manage those properties. *See* Receiver's First Motion of Court Approval of the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Liens, Claims, and Encumbrances ("Sale Motion"). DKT. 230. In fact, two of the six properties (or 33%) are being sold to the property manager responsible for those properties.

36. Those property managers are in a unique and favored position whereby they can utilize the rents (which constitute the collateral of the Mortgagees) to improve the properties and then ultimately purchase those properties themselves. These property managers also control the type of units that may be seen and inspected by potential third party purchasers as well as related access to property information, including rents, operating expenses, tenant delinquencies, property condition, etc. Moreover, the Receiver has not shared with the Mortgagees what due diligence has been provided to any of the prospective purchasers.

37. Such an ostensible and egregious conflict of interest also places the Mortgagees' collateral at risk. In fact, various financial institutions have established safeguards that expressly

prohibit property managers from buying the properties they manage to avoid the appearance of impropriety and to avoid self-dealing by property managers at the lenders' expense. No such safeguards are utilized here.

38. Furthermore, many Mortgagees have observed through financial reporting the exorbitant cost of unit maintenance, improvements, repairs and "turns" of units while the Receiver allows property taxes to go unpaid. Again, this is exemplary of how the Mortgagees' interests are not being adequately protected or safeguarded.

***F. The Receiver Has Failed to Provide the Necessary Information Required by the Receiver Order in his Receiver Report.***

39. Paragraph 65(D) of the Receiver Order requires the Receiver to file a quarterly status report that includes: "A description of all known Receivership Assets, including approximate or actual valuations, anticipated or proposed dispositions, and reasons for retaining assets where no disposition is intended . . ."

40. To date, nothing has been reported to the Court as to what the approximate or actual valuations are for the receivership's largest and most important asset class – the real estate. Nor has the Receiver described with any particularity the anticipated or proposed dispositions for such real estate.

41. To the extent the Receiver contends that he should not be publicly required to disclose such information, the Receiver Order should be amended to at a minimum require the Receiver to share with the Mortgagees what the Receiver believes to be the value of each of the properties. Magistrate Kim has previously blessed a similar protocol which directed the Receiver to share a proposed disposition of the properties to counsel and in-house counsel for the Mortgagees. Minute Order dated November 16, 2018, DKT. 155 ("[F]or the reasons stated in open court, the Receiver must provide a copy of the same unredacted liquidation plan to the attorneys

of record and designate the same as "highly confidential-attorneys' eyes only."). Regrettably, no such valuation information has to date been provided to the Mortgagees – even in circumstances where the Receiver is seeking this Court's approval to sell the properties and even after the Receiver has accepted an offer. Without this information, the Court cannot possibly make a determination if the sale of a property is in the best interests of the Mortgagees as well as the estate.

### **REQUESTED RELIEF**

42. Because the Mortgagees are not adequately protected for the multiple reasons set forth above, the Mortgagees respectfully request that the Court: (1) establish a discovery schedule that would allow for the immediate rolling production of information by the Receiver necessary for the determination of the Mortgagees' lien priority and (2) establish a hearing date for determination of the Mortgagees' lien priority on an expedited basis. More specifically, the Mortgagees request that the claims bar date period be shortened to 60 days and that the hearings on lien priority occur within 30 days after the claims bar date.

43. Moreover, this Court should require the Receiver to specifically earmark the Segregated Amounts for the payment of principal, interest, taxes, insurance, and other amounts under the loan documents for each of the respective properties, and prohibit the use of such Segregated Amounts for administrative expenses, especially while the claims process is pending and no determination of lien priority has been made.

44. As noted in the *Madison* real estate Ponzi scheme decision, a Receiver may not retain commercial real estate property in a receivership if: (1) the property's value does not exceed the value of the secured indebtedness and (2) the Receiver fails to satisfy the obligations of the mortgage on an ongoing basis and while the property is in receivership:

Because there is sufficient equity in the property, the court concludes that the advantages of keeping the property in the Receivership exceed the disadvantages

to Midland. **This conclusion, however, is contingent upon the Receiver restoring status quo to Midland and maintaining it. The Receiver has not serviced the loan or paid property taxes on Westgate Villas property since the Receivership assumed control of the property.** As discussed in Section I, to justify retaining property in a receivership, one must preserve the status quo of the lender.<sup>80</sup> **Accordingly, the Westgate Villas property may be retained by the Receivership as long as it brings current the regular, monthly principal and interest payments that have not been paid.**<sup>81</sup> **It must also continue to pay timely the regular, monthly principal and interest payments, as well as the property taxes, as long as the property is held by the Receivership. If the Receiver is unable to meet these terms, the Receiver must relinquish the property and allow it to proceed to foreclosure.**

*Madison Real Estate Grp., LLC*, 647 F. Supp. 2d at 1284–85 (emphasis added). This conclusion is further supported by Magistrate Kim’s Memorandum Opinion requiring the Receiver to restore rents removed from property. Memorandum Opinion, p. 9.

45. The problem that currently arises is that the Receiver is using the claims process to excuse his obligations to restore the parties to their status quo and to furnish the monthly payments as required. It is for this reason, that a resolution of lien priority on an expedited basis is essential. The Mortgages are not being adequately protected since the Receiver refuses to make any payments unless and until the lien priority dispute is resolved.

46. The Mortgagees are not requesting any relief that would be unduly burdensome to the Receiver, and, as set forth above, the Receiver has stated many times, the issue of lien priority is paramount in this matter.

47. The Receiver has repeatedly gone on record and represented to the Court that he is contesting the liens of the Mortgagees, including the liens of all Freddie Mac properties, and the 5001 S. Drexel property, properties held by Liberty EBCP, LLC; properties held by Wilmington Trust Series 2017-C1, and properties held by BC57, LLC. Such assertions must be raised in good faith pursuant to Rule 11 of the Federal Rules of Civil Procedure.

48. As such, the Receiver must have in his possession information or facts that he

believes provide a good faith basis for representing to the Court that he believes the Mortgagees do not hold first priority liens. As a result, there should be no delay in the Receiver turning over such information that is currently in the Receiver's possession and that serves as the basis of the Receiver's allegations to the Court.

49. Requiring such information from the Receiver is not cumbersome and is akin to the mandatory disclosure requirements in federal cases, which are utilized to expedite – rather than hinder – a resolution of litigation. FED. R. CIV. P. 26(a)(1).

50. In fact, the Receiver has touted that he has obtained and recovered substantial amounts of information to date as noted in the Receiver Report DKT. 258:

[T]he Receiver and his retained professionals have been reviewing and analyzing the following: (i) documents and correspondence sent to or received from the EquityBuild principals, to whose email accounts the Receiver has access; (ii) bank records from EquityBuild and its affiliate entities; (iii) EquityBuild documents (largely stored in cloud-based and other electronic media, although some received in paper form); (iv) available underlying transaction documents contained in the files of former Chicago-based EquityBuild counsel received to date; and (v) files produced by former EquityBuild securities counsel, accountants, and employees. Moreover, the Receiver has requested documents and records from the Cohens (including those called for by the Order Appointing Receiver), some of which remain outstanding.

**The Receiver and his retained professionals have also collected, reviewed, and analyzed all available loan documentation associated with the financing or refinancing, through various lenders, of substantially all of the EquityBuild portfolio during the 2017-2018 time frame.<sup>4</sup> Among other efforts, the Receiver and his professionals have endeavored to ascertain the terms of the loans and the current loan balances, and to obtain and review available due diligence materials submitted by EquityBuild in connection with the original loan applications.**

Receiver Report, pp. 4-5. DKT. 258

51. In fact, the Receiver Report further notes:

[T]he Receiver has: searched the cloud-based and other digital media received from the Receivership Defendants; reviewed information supplied directly by investors (including mortgages and account statements); and consulted available bank records. In addition, many investors have reached out to the Receiver to identify

themselves, the amount of their investment, and, in many instances, have provided documents.

*Id.* at p. 15.

52. It is patently unfair to allow the Receiver the benefit of this information in his possession for numerous months but refuse to provide it under the auspices of a lengthy and drawn-out claims procedure. Rather, the Receiver can simply provide information now that he has in his possession and that he is relying on to dispute the Mortgagees' lien position and/or that supports the Mortgagees' lien priority and can provide additional information on a rolling basis to supplement such information once the claims bar date has passed.

53. Instead, the Receiver is proposing that he be able to fashion his case against the Mortgagees without mandatory disclosure and with the benefit of having at least 13 months' worth of information before the discovery process may even begin or before any documents are even provided to the Mortgagees.

54. Such withholding of information is highly prejudicial to the Mortgagees and will require the Mortgagees to build their response on a substantially shortened timeframe. It is unmistakable that the Receiver has clearly built this tactical advantage into the Claims Motion – notwithstanding the District Court's admonition that the Receiver work with the Mortgagees regarding a discovery process.<sup>8</sup>

55. As such, it is essential that a process for rolling and expedited discovery be taken –

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<sup>8</sup> As a related matter, the Mortgagees note that the February 1, 2019 meeting at the Receiver's offices that was mentioned in the Receiver Report was held at the Mortgagees' request in an effort by the Mortgagees to resolve and streamline disputes such as this one which are burdensome and costly to all involved. Certain Mortgagees have even requested that the Mortgagees be given draft motions prior to presentation to the Court to give the parties ample time to address any disputes consensually. To date, this request has not been granted. At best, some Mortgagees have received certain motions the evening before such motions are filed. While the Receiver is under no obligation to share these motions in advance, it does certainly thwart the Mortgagees' efforts to engage in constructive dialogue with the Receiver in an effort to avoid the need for court intervention.



especially in relation to one of the absolute key issues in the entire receivership.

56. The Mortgagees request that expedited hearings on the Mortgagees' priority are held to ensure that secured creditors in this case are adequately protected and are not unduly prejudiced. Indeed, an expedited resolution benefits all involved because it puts to rest the threshold issue in this case.

57. The Mortgagees believe that the additional requested relief requiring the Segregated Amounts is certainly authorized both under the *Madison* decision and the law of this case.

58. For each of these reasons, the Mortgagees respectfully request the Court grant the relief requested herein.

Dated: March 13, 2019

Respectfully submitted,

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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

**DECLARATION OF MARK S. LANDMAN IN SUPPORT OF RESPONSE TO MOTION  
FOR ENTRY OF AN ORDER: (1) ESTABLISHING CLAIMS  
BAR DATE; (2) FINDING THAT THE RECEIVER GAVE FAIR, ADEQUATE, AND  
SUFFICIENT NOTICE TO ALL INTERESTED PARTIES; AND (3) APPROVING  
PROOF OF CLAIM FORM AND SUMMARY PROCEDURES AND CROSS MOTION  
TO SET DISCOVERY SCHEDULE AND HEARING ON LIEN PRIORITY  
ON AN EXPEDITED BASIS AND FOR RELATED RELIEF**

I, Mark S. Landman, pursuant to 28 USC 1746, state as follows:

1. I am a member of the law firm of Landman Corsi Ballaine and Ford P.C. and counsel for Freddie Mac in this action. I submit this Declaration in further support of the above-referenced motion.

2. Exhibit 1 is a compilation of "Owner Distributions" for various properties based on information received from the Receiver and/or his agents.

3. Exhibit 2 is a true and accurate copy of an email sent from the Receiver's counsel, Michael Rachlis, Esq., to me on February 28, 2019.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2019

/s/ Mark S. Landman  
Mark S. Landman

# EXHIBIT 1

**"OWNER DISTRIBUTIONS" BY PROPERTY**

6217 S. Dorchester	
Date	Amount
10/16/2018	\$ 3,165.34
11/16/2018	\$ 3,571.91
12/19/2018	\$ 14,479.19
1/15/2019	\$ 5,904.54
	<b>\$ 27,120.98</b>

5001 S. Drexel	
Date	Amount
9/17/2018	\$ 9,447.93
10/16/2018	\$ 10,526.33
11/16/2018	\$ 8,061.82
12/19/2018	\$ 8,676.63
	<b>\$36,712.71</b>

4520 S. Drexel	
Date	Amount
10/16/2018	\$ 21,371.64
11/16/2018	\$ 25,903.00
12/19/2018	\$ 28,399.65
1/15/2019	\$ 27,304.83
	<b>\$102,979.12</b>

4611 S. Drexel	
Date	Amount
10/16/2018	\$ 15,459.29
11/16/2018	\$ 19,921.77
12/19/2018	\$ 15,920.16
1/15/2019	\$ 16,907.16
	<b>\$ 68,208.38</b>

7110 S. Cornell	
Date	Amount
10/16/2018	\$ 3,602.22
11/16/2018	\$ 9,877.28
12/19/2018	\$ 3,210.92
1/15/2019	\$ 5,052.06
	<b>\$21,742.48</b>

1139 E. 79th	
Date	Amount
10/16/2018	\$ 7,366.85
11/16/2018	
12/19/2018	\$ 10,982.78
1/15/2018	\$ 7,632.83
	<b>\$ 25,982.46</b>

4533-37 S. Calumet	
Date	Amount
10/16/2018	\$8,903.11
11/16/2018	\$3,209.98
12/19/2018	\$6,331.45
1/15/2019	\$1,971.93
	<b>\$20,416.47</b>

7024 S Paxton	
Date	Amount
9/17/2018	\$7,442.95
10/16/2018	\$15,904.12
11/16/2018	\$10,040.54
12/19/2018	\$16,412.99
1/15/2019	\$9,331.56
	<b>\$59,132.16</b>

7635 East End Ave		
Date	Amount	Ending Balance
Oct-18		\$ 4,496.30
Nov-18		\$ 4,496.30
Dec-18		\$ 4,496.30
Jan-19		<b>\$4,496.30</b>

7836 South Shore		
Date	Amount	Ending Balance
Oct-18		\$ 10,000.00
Nov-18	\$628.46	\$ 10,628.46
Dec-18	\$4,155.66	\$ 14,784.12
Jan-19	\$10,683.49	<b>\$25,467.61</b>
	<b>\$15,467.51</b>	

7625 East End Ave		
Date	Amount	Ending Balance
Sep-18		\$ 2,164.65

Oct-18	\$21,162.20	\$ 23,326.85
Nov-18	\$21,639.20	\$ 44,966.05
Dec-18		\$ 44,966.05
Jan-19	\$8,158.12	\$53,124.17
	\$50,959.52	

7750 Muskegon		
Date	Amount	Ending Balance
Sep-18		\$ 214,637.36
Oct-18		\$ 214,637.36
Nov-18		
Dec-18		\$ 214,637.36
Jan-19		\$214,637.36

**"OWNER DISTRIBUTIONS" BY BORROWER**

EB South Chicago 1, LLC		EB South Chicago 2, LLC		EB South Chicago 3, LLC	
Date	Amount	Date	Amount	Date	Amount
	\$3,249.75	10/16/2018	\$2,965.54	11/16/2018	\$736.84
9/17/2018	\$7,230.84	11/16/2018	\$1,153.12	12/19/2018	\$1,282.51
10/16/2018	\$7,709.62	12/19/2018	\$6,644.07	1/15/2019	\$2,474.50
11/16/2018	\$5,857.02	1/15/2019	\$9,384.34		\$4,493.85
12/19/2018	\$18,920.67		\$20,147.07		
1/15/2019	\$42,967.90				

**OWNER DISTRIBUTIONS FROM ABOVE:**

**\$ 496,330.61**

\*Document does not include all owner distributions taken from properties. Additional owner distributions exist.

# EXHIBIT 2

## Mark Landman

---

**From:** Michael Rachlis <mrachlis@rdaplawn.net>  
**Sent:** Thursday, February 28, 2019 11:39 PM  
**To:** Mark Landman  
**Cc:** jnicholson@foley.com; eduff@rdaplawn.net; Nicole Mirjanich  
**Subject:** EquityBuild -- Property Taxes Regarding Freddie Mac Loans and Related Properties  
**Attachments:** RE Taxes - Freddie Mac loans - 02.28.19.pdf

Mark —

This email describes the Receiver's plan for payment of March 1, 2019 real estate taxes with respect to the above-referenced properties corresponding to your client's loan(s). In that regard, attached is a spreadsheet setting forth on a property by property basis the amount of taxes due, the amount the Receiver plans to pay by March 1, 2019, the amount(s) the Receiver is directing your clients to pay toward real estate taxes from reserves under your client's control, and any remaining balance for any unpaid taxes.

The Receiver has worked with the property managers and others to review currently available sources for available net income for the individual properties for payment of property taxes. Our timing has been impacted by receipt of important information for January 2019 from one of the property managers that only became available a short time ago. As you know, prior to February 13, 2019, the Court expressly permitted the Receiver to use net operating income for all of the properties within the EquityBuild portfolio to address costs associated with the portfolio, which occurred until that time. Consistent with the Court's recent order, the Receiver will be taking steps to restore rents to the accounts of individual properties if they have been used for the benefit of other properties.

There are properties in the Receivership for which the amounts available are not sufficient to pay all outstanding taxes due on March 1 either because a property has had insufficient income to pay the amounts due, or because the Receiver does not have enough funds at this time to restore rents. Where those amounts are not sufficient to pay all outstanding taxes, the Receiver's approach is as follows:

As your client is holding pre-existing EquityBuild funded tax reserves (and which therefore are part of the Receivership Estate), we are directing that the lender use those amounts to pay real estate taxes on the property(ies) for which the reserves are held.

Additionally, to the extent that your client is holding EquityBuild funded insurance reserves, and such reserves are necessary, we are directing the lender to pay amounts from those reserves as well to pay any tax deficiencies. Here, too, these funds are comprised of prior EquityBuild funds (in other words investor monies), and use of such dollars is further appropriate as the Receivership has directly paid eight months of insurance for the properties associated with your client's loans.

Finally, to the extent that unpaid taxes remain, the Receiver plans to use funds received from future net rent on a property by property basis to pay unpaid real estate taxes. The Receiver also expects additional amounts to become available following the sale of unencumbered properties in the first tranche of properties that are currently before the Court for approval that could be used for payment of taxes. Such funds will also be used to comply with the Court's February 13th Order. Finally, unpaid property taxes for any property that is sold can also be paid from proceeds of the sale. If there are any questions, please let us know. Thanks.

Michael

Michael Rachlis  
**Rachlis Duff Peel & Kaplan, LLC**  
542 S. Dearborn Street, Suite 900



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RACHLIS DUFF PEEL & KAPLAN, LLC  
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Property Address	Alternative Address	2018 First Installment	Receiver Payment	Tax reserves	Insurance reserves	RE Tax Balance
4520-26 S Drexel Boulevard		\$32,829.60	\$ 32,829.60	\$4,720.59		\$0.00
7109-19 S Calumet Avenue		\$3,535.72		\$2,845.54		\$690.18
6751-57 S Merrill Avenue	2136 East 68th Street	\$11,575.44	\$ 4,899.45	\$2,539.76		\$4,136.23
7110 S Cornell Avenue		\$18,943.74	\$ 4,684.30	\$1,680.24		\$12,579.20
638 N Avers Avenue		\$7,157.29		\$3,144.75		\$4,012.54
7024-32 S Paxton Avenue		\$19,954.25	\$ 8,797.37	\$0.00		\$11,156.88
4611 S Drexel Boulevard		\$27,350.04	\$ 27,350.04	\$6,304.18		\$0.00
6217-27 S Dorchester Avenue		\$8,496.49	\$ 8,496.49	\$1,221.72		\$0.00
6250 S Mozart Avenue	2832-36 W 63rd Street	\$12,725.23	\$ 3,235.44	\$12,515.65		\$0.00
7255-57 S Euclid Avenue	1940-44 E 73rd Street	\$10,655.85	\$ 3,143.79	\$1,001.70		\$6,510.36