

for the completion of Group 6 discovery to August 9, 2024. (Dkt. 1707) Disclosure as to the Receiver's avoidance claims was due on August 27, 2024, and the deadline for any lienholders to request leave of Court to take additional discovery relevant to the avoidance claim is September 10, 2024. (Dkt. 1637)

3. After being allowed to take significant discovery, the Receiver disclosed his avoidance claim on August 27, 2024. (Dkt. 1740) The Receiver alleges that, to the extent the Investor-Lenders are deemed not to have priority over UBS, UBS's security interest in the Properties is a voidable fraudulent transfer under the Illinois Fraudulent Transfer Act, 740 ILCS 160 (the "Act"). (Dkt. 1740, at 17) The Receiver states that if the Court "finds the investor lender mortgages have priority, and the Receiver then pays 100% of the maximum potential distribution from the proceeds of the sale to the individual investors (after setting-off distributions already received by those claimants on their investments), there will still be funds remaining in each of the accounts held for these six properties." (*Id.* at 5) So, the Receiver further acknowledges that "[w]hether UBS would be entitled to these remaining funds as a second-position lienor will depend on the Court's resolution of the Receiver's avoidance claim." (*Id.*)

4. The Act requires the Receiver to prove, among other things, that EquityBuild made a transfer or incurred an obligation "with actual intent to hinder, delay, or defraud any creditor of the debtor . . ." 740 ILCS 160/5(1). In addition, even if the Receiver were to prove a fraudulent transfer, UBS's security interest would remain valid if it accepted the security interest in good faith and for reasonably equivalent value. 740 ILCS 160/9(a).

5. The Receiver alleges the following "inquiry notice" standard governs a "good faith" analysis pursuant to the Act:

The first step in the inquiry notice analysis thus looks to the facts which a transferee knew. . . . The second and third steps of the

inquiry are whether the facts known by the transferee would have led a reasonable person to conduct further inquiry into the transferor's possible fraud, and whether diligent inquiry by the transferee would have discovered the fraudulent purpose of the transfer. . . . Thus, the "good faith" inquiry includes both subjective and objective components.

(Dkt. 1740, at 11)

6. The Receiver alleges that UBS cannot show "good faith" because, when it obtained its security interests, UBS allegedly was "aware of facts that would have led to a reasonable person to inquire further into the validity of the grant to it of purportedly first-position security interests," and that "such inquiry would have led to the discovery of the fraudulent purpose of EquityBuild's actions, including by previously granting first-position security interests to investor lenders in the same properties secured by the UBS loan, and then acting to deprive those investor lenders of their pre-existing security interests through fraudulent means and without the approval or authority of the investor mortgagees." (*Id.*) Although the Receiver calls his assertions "facts" that would have led a reasonable person to inquire further, his presentation is entirely conclusory. It fails to explain—in any cogent manner—how a reasonable inquiry into those "facts" would subjectively and objectively have put UBS on inquiry notice that EquityBuild was engaged in fraud. (*Id.* at 11-16)

7. Through this request for further discovery, UBS requests a period of 90 days to (a) identify and properly disclose individuals, corporate representatives and/or expert witnesses who may need to provide testimony in regard to either the Receiver's new allegations or UBS's defenses thereto and (b) actually conduct examinations of those individuals, corporate representatives and/or expert witnesses.

8. While UBS is not certain it will need any further written discovery, UBS also requests that it be granted leave to serve interrogatories and supporting document requests on the

Receiver to learn the evidence the Receiver believes he has to support all of the elements of the newly disclosed claim under the Act. The focus of that discovery would be a further inquiry into the bullet point “facts” that would allegedly have revealed that EquityBuild was engaged in fraud on the investor-lenders of the Properties. (Dkt. 1740, at 11-16)

9. The discovery requested by UBS should be allowed, as denying the request would deprive UBS of its due process rights, particularly given that the Receiver was permitted to plead his claim after engaging in discovery. UBS further states that allowing discovery to proceed on the Receiver’s newly asserted voidable transfer claim would not delay the Court’s existing schedule on the Receiver’s other claims against Group 6 Claimants and thus would not prejudice the Receiver.

WHEREFORE, Claimant UBS AG respectfully requests this Court grant its request for leave to take further discovery on the Receiver’s newly filed avoidance disclosure, allowing 90 days for such discovery, and such further relief as this Court deems just and proper.

Dated: Chicago, Illinois
September 10, 2024

Respectfully submitted,

UBS AG

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2024, I served the foregoing UBS AG'S MOTION FOR LEAVE TO TAKE FURTHER DISCOVERY: (i) electronically via the Court's ECF system on all counsel of record and (ii) by electronic mail to all claimants and counsel of record included on the Email Service List for Group 6.

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September 10, 2024

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