

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

UNITED STATES SECURITIES)	
AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-cv-5587
)	
EQUITYBUILD, INC., EQUITYBUILD)	Hon. Manish S. Shah
FINANCE, LLC, JEROME H. COHEN,)	
AND SHAUN D. COHEN,)	
)	
Defendants.)	

**GROUP 6 RESPONSIVE POSITION STATEMENT
OF CERTAIN INDIVIDUAL INVESTORS**

The undersigned Group 6 individual investors (collectively, the “Certain Individual Investors”), jointly submit this Responsive Position Statement in support of their claims and those of the other Individual Investors¹ and in support of the Receiver’s recommendations regarding priority of the mortgages at issue for this group.

The Receiver recommended that the Certain Individual Investors’ mortgages have priority over those of Institutional Lenders UBS AG (“UBS”) and Midland Loan Services (“Midland”), a recommendation supported by the SEC and the Certain Individual Investors. ECF Nos. 1740, 1754, 1755. Not surprisingly, UBS and Midland both disagree and argue that their respective mortgages should be in first priority. They do this even as they acknowledge that the Individual Investors’ mortgages were first recorded and never released. ECF Nos. 1756, 1757.

¹ Like in their Position Statement, the Certain Individual Investors refer to the lenders identified in the Exhibits A to the EquityBuild Mortgages as the “Individual Investors.”

The fact that even UBS and Midland acknowledge the Individual Investors' mortgages were recorded first and not released should end all inquiries here. This acknowledgement means there can be no doubt that the Individual Investors' mortgages have first priority. Indeed, this is exactly what the Seventh Circuit held in the appeal of the Group 1 priority decision, succinctly explaining: "Without a properly executed and delivered release, the lien persists." *See SEC v. EquityBuild, Inc.*, 101 F.4th 526, 531-532 (7th Cir. 2024) (citing *Fed. Nat'l Mortg. Ass'n v. Kuipers*, 732 N.E.2d 723, 727 (Ill. App. Ct. 2000)). Thus, UBS and Midland's acknowledgment that there is no release here means the Individual Investors' mortgages' liens persist and that renders the rest of UBS's and Midland's arguments moot.²

To try to avoid this inevitable outcome and having seen their fellow-institutional lender try and fail to argue that payment is enough to release a mortgage in Group 1, UBS and Midland now advance a new, two-step argument: First, they argue that the payments made to EquityBuild entitled them to valid releases and, second, they argue that entitlement means that their mortgages should have higher priority. ECF Nos. 1756 and 1757 at 11-12. In making this argument, UBS and Midland notably only argue that the Individual Investors' mortgages *should have been* released; they do not argue that they actually *were* released, which again dooms their arguments by further demonstrating that there is no dispute that the Individual Investors' mortgages were not released.

Even if that were not enough to doom this new argument, it would still fail because it conflates having the potential right to a release with the higher priority that might result if that right were pursued and upheld. Indeed, in their new argument, UBS and Midland assume that their

² Similarly, both UBS and Midland spend a significant portion of their Position Statements addressing authority. ECF No. 1756 at 6-10; ECF No. 1757 at 8-10. Those arguments, however, are of no moment because the undisputed facts show that no releases were issued, regardless of whether it was by an agent with actual or apparent authority.

claimed entitlement to those releases is the same as actually receiving them, such that their mortgages should now have priority over the Individual Investors' unreleased mortgages. ECF No. 1756 at 12; ECF No. 1757 at 12. Noting in the record, the Illinois Mortgage Act, or the cited caselaw supports this. Indeed, UBS and Midland effectively assume the entitlement they now claim makes it as if they prevailed in a non-existent, hypothetical litigation in which they brought claims under the Illinois Mortgage Act seeking issuance of the releases that they claim their loans were predicated on, but that they acknowledge they never received. *Id.* No such litigation ever occurred, of course, meaning it remains the case that no release was ever issued.³

The cases on which UBS and Midland rely similarly offer no support. First, they rely on *Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 195 (3d Dist. 1970), which involved a subsequent mortgagee that pursued the litigation that neither UBS nor Midland pursued here by seeking the issuance of a mortgage release as provided for in the Illinois Mortgage Act. Since neither UBS nor Midland brought such a suit (or did anything else to obtain the releases they claim their loans required), it is wholly inapplicable. Next, they cite to *M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52, for the proposition that where two innocent parties must suffer due to fraud of another, the burden should fall upon the party that allowed the wrongdoer to commit the fraud. UBS and Midland seemingly believe this applies here to favor them over the Individual Investors. Not so.

For *Mallinckrodt* to favor them, UBS and Midland implicitly ask the Court to ignore the record and their own submissions which demonstrate that it is actually UBS and Midland that further helped EquityBuild commit its fraud by failing to consider or act on any of the numerous

³ To the extent that UBS and Midland might be arguing that this Receivership is the action in which those releases should be ordered, they have failed to actually ask the Court to order the issuance of those releases, let alone justify such a request.

red flags that EquityBuild repeatedly flashed in front of them. In their submissions, UBS and Midland acknowledge a number of facts that make clear that they knew or should have known of the continued existence of the Individual Investors' mortgages. *See, e.g.*, ECF No. 1756 at 3-4; ECF No. 1757 at 3. They also acknowledge that the representations and documents upon which they primarily relied in making their loans came solely from EquityBuild, the borrower. *See, e.g.*, ECF No. 1756 at 2; ECF No. 1757 at 2. UBS and Midland acknowledge this even as those representations and documents included things that were confusing, at best, and fraudulent, at worst. This included payoff letters coming from one EquityBuild entity—EquityBuild Finance—that directed payoffs be made to a different entity—EquityBuild Inc.—even as both entities were related to the borrowers. *See, e.g.*, ECF No. 1756 at 3-4. These acknowledgements undercut UBS's and Midland's arguments regarding priority, demonstrating not only that they failed to get the releases to which they now claim they are entitled, but that they were also aware of issues that should have alerted them to issues with EquityBuild's entire endeavor.⁴

Given all of this, as well as the additional points raised in the Certain Individual Investors Position Statement, ECF No. 1755, it remains the case that the issues for these Group 6 properties are straightforward and easily resolved. And because no releases were issued, that resolution requires accepting the Receiver's recommendation and holding that the Individual Investors' valid, first-position mortgages that were never released have priority over the UBS and Midland mortgages. Accordingly, the Court should order the distribution of the assets recovered by the

⁴ Further undercutting the idea that the Individual Investors, on the one hand, and UBS and Midland, on the other, are similarly situated innocent parties that would suffer equally here is the fact that both UBS and Midland obtained title insurance for their loans. *See, e.g.*, ECF No. 1756 at 2-3; ECF No. 1757 at 2-5. If the conditions of those loans were as UBS and Midland now claim, that title insurance should step in to cover their losses. No similar backstop exists for the Individual Investors.

Receiver to the Individual Investors *pro rata* based on their relative interests in those mortgages,
as recommended by the Receiver.

Dated: October 15, 2024

ARTHUR AND DINAH BERTRAND;
LINDA AND STEVEN LIPSCHULTZ
R. D. MEREDITH GENERAL
CONTRACTORS 401K,
JORAL SCHMALLE
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By: /s/ Max A. Stein
One of their attorneys

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