UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 18-CV-5587**
v.	)	**Hon. Manish S. Shah**
EQUITYBUILD, INC., *et al.*,	)	
Defendants.	)	

SEC'S RESPONSE TO GROUP 7 POSITION STATEMENTS OF BMO, CITIBANK, AND SABAL CAPITAL OPERATIONS, LLC

The SEC hereby responds to the Group 7 Position Statements of BMO Bank N.A. (ECF 1794), Citibank N.A. (ECF 1797), and Sabal Capital Operations, LLC (ECF 1798). As discussed below, because this Court and the Seventh Circuit have already addressed factually similar priority disputes in favor of investors who had recorded mortgages that were never validly released, the Court should find that such Group 7 investors likewise have priority.

A. Citibank (Properties 69 and 73) and Sabal (Property 70)[1]

In their Position Statements, Institutional Lenders Citibank and Sabal concede that for Properties 69, 70, and 73: (a) investors obtained and recorded valid first-in-time mortgages, and (b) no releases exist. (ECF 1797 at 2-4; ECF 1798 at 1-2). As the SEC's Position Statement (ECF 1795) notes, the Seventh Circuit has already determined that such facts readily answer the

[1] Citibank and Sabal's Position Statements are functionally identical, and themselves repeat the same arguments of the Group 6 Position Statements of Midland (ECF 1757) and UBS (1756), all of which were prepared by the same attorneys. Accordingly, the SEC's response to Citibank and Sabal advances the same arguments as its Group 6 Position Statement Response (ECF 1765).

question of priority in the investors' favor. *SEC v. EquityBuild, Inc*., 101 F.4th 526 (7th Cir. 2024).

Rather than accept that *EquityBuild* compels the finding that the investors have priority, Citibank and Sabal insist the decision necessitates the opposite outcome. Citibank and Sabal thus argue they have priority, despite no releases existing, because they are "entitled to releases…as a matter of Illinois law." (ECF 1797 at 4-5, 8-10; ECF 1798 at 3, 6-8). Citibank and Sabal assert this strained reading of *EquityBuild* even though the Group 7 facts are even worse for them than they were for BC57 in Group 1.

Unlike Group 7 properties 69, 70, and 73, in Group 1 BC57 actually obtained (fraudulent) releases. *See EquityBuild*, 101 F.4th at 529. However, because those releases did not satisfy the requirements of the Illinois Mortgage Act, the releases "were facially invalid" and "had no effect," such that the investors "maintain their interests in" the Group 1 properties. *Id.* at 532-33. Nevertheless, Citibank and Sabal claim that, per *EquityBuild*, once they paid money to Equitybuild Finance ("EBF"), "the prior Individual Investors and EBF were obligated to issue valid releases…as a matter of Illinois law." (ECF 1797 at 9; *see also* ECF 1798 at 7 (the same quote except Sabal references a purported obligation to issue "a valid release").[2]

Citibank and Sabal may be correct that *EquityBuild* held the Illinois Mortgage Act "obligates a mortgagee to issue a release of the mortgage upon full satisfaction of the debt underlying the lien." *See EquityBuild*, 101 F.4th at 531.[3] But that holding does not support the conclusion Citibank and Sabal demand: that the Court retroactively order the filing of releases that result in the Institutional Lenders having priority. Indeed, if Citibank and Sabal's desired

[2] As discussed below, BMO's Group 7 Position Statement parrots this argument for Property 2. (*See* ECF 1794 at 15-16).

[3] Like in Group 1, because the Group 7 investors were not repaid, their debt was never satisfied.

outcome was the proper one, the Seventh Circuit would have ordered it, and not reached the opposite finding that the investors have priority. Instead, the Seventh Circuit was explicit that "[b]ecause payment alone cannot extinguish a preexisting security interest without a valid release under the Illinois Mortgage Act, and because no valid release occurred," the investors' first-in-time mortgages had priority. *Id.* at 533.

Citibank and Sabal's reliance on the unpublished *5201 Washington* decision is similarly misplaced. In that case, unlike Properties 69, 70, and 73, *a release was publicly recorded*, and the question facing the court was whether the release was valid and authorized. *5201 Wash. Invs. LLC v. Equitybuild, Inc.*, 2024 IL App (1st) 231403-U, *P28-*P32 (Aug. 14, 2024). Thus, the threshold inquiry – the existence of a release – was already met when the court opined on the release's validity. Here, there were never releases, rendering *5201 Washington*'s analysis of the release's validity and authorization irrelevant.[4]

B. BMO (Property 2)

In its Position Statement, BMO does not dispute that for Property 2: (a) the investors recorded a valid, prior-in-time mortgage; (b) the investors never received payment associated with the purported release of their mortgage; and (c) "a release was executed, but never recorded." (ECF 1794 at 2, 5). As for that unrecorded release, it was not signed by the investors

[4] Even if the issue of authority mattered given the lack of releases, this Court twice has thoroughly analyzed the same documents Citibank and Sabal (and BMO) cite – the Collateral Agency and Servicing Agreements – and considered the same arguments Citibank and Sabal rehash. After doing so, the Court unambiguously held that "Equitybuild Finance lacked the authority to release the individual investors' mortgages." (ECF 1386 at 1, 14-28; *see also* ECF 1679 at 25 ("It is DLP's burden to show that Equitybuild Finance had the authority, actual or apparent, to release the Individual Investors' mortgage…DLP has not done so.")).

who held the prior recorded mortgage. Rather, it was signed by Shaun Cohen, in his capacity as President of EquityBuild Finance. (*See* ECF 1794-4).

BMO thus faces a similar fact pattern to the one the Court considered for institutional lender Direct Lending Partners ("DLP") for Group 2: "whether a purported release should be binding upon mortgagees who did not sign the releases themselves." (ECF 1679 at 20 n.11). In deciding for the Group 2 investors over DLP, the Court found that because the party executing the release (EquityBuild Finance) was a "different entity" than the investors listed on the prior mortgage, DLP "could not release the mortgage unless it was the Individual Investors' assignee or legal representative." (*Id.* at 21). The Court then analyzed the relevant documents, including the same Collateral Agency and Servicing Agreements at issue for BMO (and for BC57 in Group 1), to determine that EquityBuild Finance lacked the authority – actual or apparent – to release the investors' mortgage. (*Id.* at 21-25).

The facts are worse for BMO than they were for DLP because, unlike in Group 2, the fraudulent release here was never recorded.[5] Nevertheless, BMO fails to even acknowledge the Court's holding for Group 2 (or Group 1). Instead, BMO simply repeats the exact same arguments made by BC57 in Group 1 (*see* ECF 1152 at 15-28) and DLP in Group 2 (*see* ECF 1559 at 2-6). BMO thus re-argues that: (a) the investors' prior mortgage was released by virtue of payment to EquityBuild Finance (but not the investors); (b) the Illinois Fiduciary Obligations Act establishes BMO's priority; (c) the investors expressly authorized EquityBuild Finance to

[5] The fact the purported release was never recorded readily distinguishes BMO's situation from the one addressed in *5201 Washington*: whether subsequent purchasers could rely on the recorded release to qualify as *bona fide* purchasers. 2024 IL App (1st) 231403-U, at *P24-*P26. Notably, BMO's Position Statement does not cite *5201 Washington* or assert *bona fide* purchaser status.

release their mortgage; and (d) BMO reasonably relied on the fraudulent release and payoff statement. (ECF 1794 at 7-15).[6]

This Court has advised that while "decisions on one group of properties do not have preclusive effect for other groups…applying the law to a similar set of facts will garner a similar result." (ECF 1679 at 20 n.11). Here, there is no meaningful difference between the facts facing DLP in Group 2 and BMO in Group 7. The Court has already considered BMO's arguments when correctly applying Illinois and Seventh Circuit law to similar facts. The outcome should be the same.

For the foregoing reasons, the SEC respectfully requests the Court find that for Group 7 Properties 2, 69, 70, and 73, the investors have priority and are entitled to a distribution of the proceeds of the properties' sale.

Dated: December 16, 2024

Respectfully submitted,

/s/ Benjamin Hanauer

Benjamin J. Hanauer (hanauerb@sec.gov)
175 West Jackson Blvd., Suite 1450
Chicago, IL 60604
Phone: (312) 353-7390
Facsimile: (312) 353-7398

Attorney for Plaintiff
U.S. Securities and Exchange Commission

[6] BC57 also raised each of these arguments before the Seventh Circuit. *See SEC v. Equitybuild, Inc.*, Appeal No. 23-1870, Docket 8 (BC57 Appellate Brief, June 14, 2023), at pp. 13-30, 32-41.

CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing Position Statement Response, via ECF filing, to all counsel of record and Defendant Shaun Cohen, and to all claimants via the Receiver's email distribution list, on December 16, 2024.

/s/ Benjamin Hanauer
Benjamin J. Hanauer
175 West Jackson Blvd., Suite 1450
Chicago, IL 60604
Phone: (312) 353-7390
Facsimile: (312) 353-7398

One of the Attorneys for Plaintiff