Appeal No. 24-2254

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

KEVIN B. DUFF, RECEIVER,
Court-Appointed Receiver-Appellee,

v.

SHATAR CAPITAL PARTNERS,
Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
The Honorable Manish S. Shah
1:18-cv-5587

Brief of Appellee-Receiver Kevin B. Duff

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-2254

Short Caption: SEC, et al., v. Shatar Capital Partners

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Kevin B. Duff, Receiver for EquityBuild, Inc., EquityBuild Finance, LLC, and affiliates, and affiliate entities of
Defendants Jerome Cohen and Shaun Cohen. A list of the entities in the Receivership is attached as Exhibit 1 hereto.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Rachlis Duff & Peel, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

none

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Michael Rachlis Date: May 2, 2025

Attorney's Printed Name: Michael Rachlis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Exhibit 1
List of the Entities in the Receivership

109 N. Laramie, LLC	8153 S Avalon LLC	South Side Development Fund 7 LLC
11318 S Church St Associates	8209 S. Ellis, LLC	South Side Development Fund 8 LLC
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3400 Newkirk, LLC	8745 S Sangamon LLC	SSDF1 Holdco 2 LLC
400 S. Kilbourn, LLC	8801 S Bishop St Associates	SSDF1 Holdco 3 LLC
4520 S Drexel LLC	8809 S Wood Associates	SSDF1 Holdco 4 LLC
4520-26 S Drexel LLC n/k/a SSDF1 4520 S Drexel LLC	9158 S Dobson LLC	SSDF2 1139 E 79th LLC
4528 Michigan LLC	Amalgamated Capital Fund II LLC	SSDF2 Holdco 1 LLC
4533-37 S Calumet LLC	Amalgamated Capital Fund III LLC	SSDF2 Holdco 2 LLC
4611-17 S. Drexel, LLC	Chicago Capital Fund I LLC	SSDF2 Holdco 3 LLC
4750 Indiana LLC	Chicago Capital Fund II LLC	SSDF3 Holdco 1 LLC
4755 S Saint Lawrence Associates	Chief Management LLC	SSDF3 Holdco 2 LLC
5001 S Drexel LLC	EB 6558 S. Vernon LLC	SSDF4 6217 S. Dorchester LLC
5411 W Wrightwood LLC	EB Property Holdings LLC	SSDF4 6250 S. Mozart LLC
5450 S. Indiana LLC	EB South Chicago 1 LLC	SSDF4 638 N Avers LLC
5618 S MLK LLC	EB South Chicago 1 Manager, LLC	SSDF4 701 S 5th LLC
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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Jodi Rosen WIne Date: May 2, 2025

Attorney's Printed Name: Jodi Rosen Wine

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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28 U.S.C. § 1331 1

JURISDICTIONAL STATEMENT

The Receiver agrees that the jurisdictional statement of the Appellant is complete and correctly cites to and relies upon: 28 U.S.C. § 1331, as the basis for the District Court's subject matter jurisdiction; and 28 U.S.C. § 1291, the collateral order doctrine, and this Court's prior decision in *SEC v. Wealth Mgmt. LLC,* 628 F.3d 323 (7th Cir. 2010), as the basis for the Court of Appeal's jurisdiction. The Appellant's jurisdictional statement also correctly indicates the relevant filing dates establishing the timeliness of the appeal.

STATEMENT OF ISSUES

Did the District Court abuse its discretion in approving the Receiver's proposed distribution plan and methodology with respect to (i) disallowing Shatar Capital Partners ("Shatar" or the "Institutional Lender") from recovering interest and (ii) applying the netting rule to determine the amount of Shatar's potential recovery?

Did the District Court abuse its discretion in ruling that the individual lenders (hereinafter, the "Investor Lenders") have priority over Shatar when it determined, *inter alia,* that: (i) Shatar was on inquiry notice that there were other investors who had secured interests in

properties at 7749 Yates and 5450 Indiana; (ii) a diligent inquiry would have revealed earlier investor mortgages in 7749 Yates and 5450 Indiana; and (iii) the Investor Lenders had equitable mortgages in 5450 Indiana?

STATEMENT OF THE CASE

A. The Ponzi Scheme

Father and son, Jerome Cohen and Shaun Cohen, owned and controlled EquityBuild, Inc., EquityBuild Finance, LLC, and numerous affiliated entities which owned and operated various real estate holdings, principally on the southside of Chicago. [Dkt. 1 at 1][1] The Cohens claimed that they had a method to locate undervalued property and solicited loans and investments with promises of large returns. [*Id.* at 1-2] But the business was a massive fraud. [*Id.*] The Cohens were operating a Ponzi scheme and violating federal securities laws which involved, *inter alia,* over-inflating the values of properties to make them attractive to lenders and investors, creating multiple secured interests in the same properties, manipulating the timing of the recording of various interests, and taking

[1]Unless otherwise noted, references to "Dkt. __" are to the record below, references to "Br. ___" are to Shatar's Opening Brief, and "A__" are to the Appendix attached to Shatar's Opening Brief.

various other actions to ensure they received fresh monies to pay the obligations to various lenders and investors needed to keep the scheme alive. [*Id.*]

The United States Securities and Exchange Commission commenced this action on August 15, 2018 to stop the Defendants' scheme and securities violations. [*Id.* at 3] A consent judgment was entered a short time thereafter. [Dkt. 40] The SEC sought, and the District Court appointed, a receiver to take charge of EquityBuild's business and assets. [Dkt. 16]

The receivership is complex and substantial, involving 108 real estate properties,[2] more than 1,600 residential units, and approximately 2,500 claims against the estate that were submitted by 900 claimants and exceed $150,000,000. [*See, e.g.,* Dkt. 638 at 8, 18-20; Dkt. 720 at 1; Dkt. 107 at 10] Maintenance, preservation, and orderly disposition of the properties and the proceeds from their sales has been a primary and substantial focus of the Receiver. [*See, e.g.,* Dkt. 107, 258, 348, 467, 567, 624, 698, 757, 839] Most of the properties were multi-family residential

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[2] When certain adjacent properties are counted separately, the number of properties is 116.

buildings in various states of repair and disrepair. [*See, e.g.,* Dkt. 107 at 21-22; Dkt. 348 at 9-12; Dkt. 638 at 3] The COVID-19 pandemic, and its impact on the economy in general and rental income and risk to the real estate market in particular, heightened the challenges of maintaining and preserving these properties. [*See, e.g.,* Dkt. 699 at 4] Between April 2019 and February 2022, the Receiver sold all the properties, and by order of the District Court the net sales proceeds were kept in segregated accounts and the existing liens on each property attached to the funds in the corresponding account. [*See, e.g.,* Dkt. 633, 715]

EquityBuild's records, debts, and the assertions of its lienholders have shown that central to the Cohens' fraud was purposeful confusion and obfuscation of secured interests and the use of inflated property values. [*See, e.g.,* Dkt. 348 at 19; Dkt. 720 at 1; Dkt. 749 at 3] The Cohens would, for example, offer the same lending opportunity twice, telling each lender they were in first position. [*E.g.,* Dkt. 638 at 4] The Cohens' scheme resulted in mortgages on properties that in the aggregate were sometimes multiples of the actual value of the properties. [*Id.*] The Cohens created a labyrinthian network of over 158 separate corporate entities as cover for their activities. [*See* Dkt. 241 at 3] At the heart of

this complexity are competing, purportedly secured, claims asserted by both institutional lender claimants (*e.g.,* Shatar) and individual investor claimants (*e.g.,* the Investor Lenders) against properties in the estate. [*See* Dkt. 757, Exhibit 8; *see also* Dkt. 693, Exhibit 1 (claims organized by property)]

B. The Claims Review Process

Given the number of claimants, properties, and disputes among those who claimed to have first priority interests, the Court undertook a lengthy and detailed procedure to develop a summary process allowing for the review, discovery, and resolution of claims. The claims were then grouped by estate properties to determine the priority of claimants to the net available funds from the sales of the specific properties securing their liens. [Dkt. 638, 863, 938, 940, 941 (orders establishing components of claim process)]

C. The Group 2 Claims Process

Group 2 was originally comprised of five properties: (a) 5450-52 S Indiana Avenue (Property 4); (b) 7749-59 S Yates Boulevard (Property 5); (c) 1700-08 Juneway Terrace (Property 1); (d) 6160-6212 S Martin Luther

King Drive (Property 79); and (e) 6949-59 S Merrill Avenue (Property 101). There were 307 total claimants in Group 2.

Shatar is the institutional lender who claims a secured interest in two of these properties: 5450 Indiana and 7749 Yates (the "Subject Properties"). The other three properties in Group 2 are resolved and not part of this appeal. There are 70 Investor Lenders who claim a secured interest in 5450 Indiana and 69 claiming a secured interest in 7749 Yates. [Dkt. 1460, 1476 (order and framing report for Group 2)] All Group 2 proof of claim forms and supporting documents were produced to each claimant in Group 2 and all EquityBuild records (in excess of 1.1 terabytes in volume) were produced and made available to all claimants. [Dkt. 941 at 4; Dkt. 1460 at 3]

Additionally, as part of the approved claims process [Dkt. 941; Dkt. 1476], written and oral discovery was exchanged between the Group 2 participants. A 30(b)(6) deposition was taken of Shatar. Documents and deposition testimony from the discovery process were submitted to the Court by the SEC, the Receiver, as well as various claimants including

Shatar and certain Investor Lenders. [Dkt. 1553, 1556, 1557, 1562, 1564, 1571, 1582, 1583, 1587, 1602-1[3]]

For his part, the Receiver and his retained professionals examined each of the claims submitted, the discovery identified above, EquityBuild's documents and internal correspondence, and the position statements submitted by Group 2 claimants associated with the Subject Properties. Based on that review, he made recommendations on the validity of the claims and the amounts claimed, consistent with the goal of presenting a distribution plan for valid claims, pursuant to which the District Court could order distribution of monies from the segregated property accounts to claimants. Additionally, and pursuant to its February 9, 2021 Order, the Court directed the Receiver to make recommendations regarding priority. [Dkt. 941]

Consistent with the Court's instructions and the Receiver's duties, the Receiver provided recommendations on priority and proposed distributions for the Group 2 claimants, including but not limited to Shatar and the Investor Lenders who asserted an interest in the 5450

[3] *See* Order granting Receiver's request for leave to file Sur-Response. [Dkt. 1614; Dkt. 1625, 3/1/24 Tr. at 12 ("the surresponse is filed. You don't need to file it separately.")]

Indiana and 7749 Yates properties. [*See* Dkt. 1571 at 4-8, 12-22 & Exs. 2-3, 7, 10-12 thereto] The Receiver's recommendations addressed, *inter alia*, the validity of claims, whether each claim is secured or unsecured, and the maximum amount to be distributed to each claimant if sufficient funds were available. [*Id.*, Exs. 2, 3, 7]

Regarding the priority dispute between Shatar (the Institutional Lender) and the Investor Lenders with respect to 5450 Indiana and 7749 Yates, the Receiver recommended that the Court find that the earlier-in-time Investor Lenders' mortgages have priority over Shatar's mortgage. [Dkt. 1571 at 4-8 & Exs. 10-12] The Receiver adopted and incorporated the arguments of other claimants in support of that position. [*E.g.,* Dkt. 1564 at 8-18] The written mortgage agreements between the Investor Lenders and EquityBuild in regards to the Subject Properties were mostly completed *well before* the agreement with Shatar was made. [Dkt. 1571 at 6-7; Dkt. 1602-1 at 7-9 and Exs. 3-6] Further, there was no evidence that those Investor Lenders were paid off from the proceeds of the Shatar loan. [Dkt. 1571 at 6]

Most claimants asserting claims against those properties sought amounts in addition to the unpaid principal amounts that remained due

from EquityBuild. For example, many claimants sought unpaid interest for the time frame after the establishment of the Receivership (whether it be termed contract interest or default interest). Other claimants sought to recover various types of penalties and attorneys' fees. The Receiver recommended that none of those categories beyond return of principal (following appropriate set-off of all amounts already returned to claimants) be allowed for any claimant, for numerous reasons not limited to the fact that the net funds available from the sales of the Subject Properties was, in each instance, less than the aggregated total of principal owed to the claimants on the properties [*See* Dkt. 1571 at 7; *see also* Exs. 2, 3 & 7 thereto]

The Receiver further based the rejection of such requests on the fact that the EquityBuild companies and portfolio operated as a Ponzi scheme where new investor monies were commingled and used to continue operations, including the payment of earlier investor obligations. That was alleged with specificity by the SEC in its Complaint, and the Cohens did not deny the Ponzi scheme, having entered into a consent judgment.[4]

[4] The existence of the Ponzi scheme was admitted by Shaun Cohen in a video sent to various investors shortly before the SEC Complaint was filed (a video that was relied upon by the Court as part of the "substantial

[Dkt. 40] The testimony provided to the District Court in support of the motion for the establishment of the Receivership evidenced the Ponzi scheme [*see, e.g.*, Dkt. 578, 8/17/18 Tr.], as did later testimony and the District Court's ruling regarding the turnover of Jerry Cohen's home in Naples, Florida. [*See, e.g.,* Dkt. 492 at 3-7 (magistrate judge ruling discussing forensic accountant's testimony); Dkt. 603 at 5-6 (affirming magistrate judge ruling; "the [District] court agrees with the magistrate judge's assessment of the hearing evidence, which show[s] that the funds used [to purchase the Naples Property] came from [i]nvestor monies tied to the Cohen's Ponzi scheme" (*citing* Dkt. 492 at 3-7, 10-14)] The District Court's later entry of a monetary judgment found that the Cohens had been operating a Ponzi scheme. [*See* Dkt. 533 at 2 ("Accordingly, the Cohens began running a Ponzi scheme, using new investors' funds to pay earlier investors' interest payments.") (citing Dkt. 1, ¶ 45); *see also* A.9 ("The Cohens, through EquityBuild, Inc., EquityBuild Finance, and other

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evidence demonstrating the defendants have been using investment proceeds from later investors to pay the supposed returns of prior investors, thereby effectively operating a Ponzi scheme" to support his temporary restraining order leading to the Order Appointing Receiver). [Dkt. 578, 8/17/18 Tr. at 71:9-21] In that video, Shaun Cohen stated, in part, that EquityBuild subsidized interest payments from new investments (the definition of a Ponzi scheme). [Dkt. 1, ¶ 63]

subsidiaries, perpetrated a Ponzi scheme by using money from later investors to pay returns to earlier investors.")]

The Cohens' Ponzi scheme commingled funds and used new funds from investor lenders and institutional lenders to pay exorbitant profits in the form of interest to prior and existing lenders and investors which were not tied directly nor exclusively to income generated by the real estate assets associated with their loans and/or investments. [A.9] For this reason, the Receiver recommended that all claimants' claims be set-off by the amount of all pre-receivership distributions that they received from EquityBuild in order to achieve a ratable distribution of remaining assets among all of the defrauded investors. [Dkt. 1571 at 16-18; Dkt. 1602 at 1-6] *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) ("The 'winners' in the Ponzi scheme, even if innocent of any fraud themselves, should not be permitted to 'enjoy an advantage over later investors sucked into the Ponzi scheme who were not so lucky.'") (citation omitted). Under the "netting rule," amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. *Id.* at 771. And the fact that the claimants

may be innocent victims does not change the analysis, as described by this Court in another Ponzi scheme case:

> The money used for the trades came from investors gulled by fraudulent representations. Phillips was one of those investors, and it may seem "only fair" that he should be entitled to the profits on trades made with his money. That would be true as between him and [the Ponzi scheme operator]. It is not true as between him and either the creditors of or the other investors in the corporations. He should not be permitted to benefit from a fraud at their expense merely because he was not himself to blame for the fraud. All he is being asked to do is to return the net profits of his investment—the difference between what he put in at the beginning and what he had at the end.

Scholes v. Lehmann, 56 F.3d 750, 757-58 (7th Cir. 1995).

The set-off amounts included in the Receiver's recommendations [Dkt. 1571, Exs. 2, 3 & 7] were taken from the claimants' sworn proof of claim submissions, verified standard discovery responses, and position statements which were reviewed and gathered during the claims process, as well as other information available to all participants.

D. The District Court Determined that the Investor Lenders Have Priority.

On June 20, 2024, following extensive briefing, the District Court issued its priority determination ruling. [Dkt. 1679, attached to Appellants Appendix at A.1-43] In that ruling, the Court determined that

the Investor Lenders have priority in regards to the 7749 Yates and 5450 Indiana properties in which Shatar also claims priority. [*Id.*]

E. The District Court Entered a Distribution Plan for the Group 2 Subject Properties.

Consistent with the Court's ruling, the Receiver prepared and submitted a final distribution plan for the Group 2 properties which included the Yates and Indiana properties. The Court entered that distribution plan (as amended) on July 15, 2024. [Dkt. 1699, included in Appellant's Appendix at A.44-77)] The final distribution plan was consistent with the Receiver's recommendations in that amounts other than principal were disallowed, set-offs for prior amounts received were applied, and certain claims were found to be invalid. Even with these adjustments, the funds available for distribution from the 7749 Yates and 5450 Indiana properties are insufficient to pay the maximum recommended distribution amounts. [A.54-59]

F. The District Court Did Not Address Issues Raised by the Receiver in Regards to the Receiver's Fraudulent Conveyance Claim.

Having determined that the Investor Lenders had priority with respect to the Subject Properties, the District Court did not address the issues associated with the Receiver's disclosure notifying Shatar of the

Receiver's intent to proceed with a fraudulent conveyance and/or avoidance claim which would establish that, *inter alia,* Shatar was on inquiry notice of the Cohens' fraud, such that its loan to EquityBuild should be deemed unsecured. [*See* Dkt. 1537 at 5-12 and Exs. 1-15 thereto] The District Court found its resolution of the priority dispute between the claimants rendered it unnecessary to reach such issues. [A.42]

SUMMARY OF ARGUMENT

The District Court's ruling approving the Receiver's distribution plan falls well within its broad authority and deserves significant deference. The District Court did not abuse its discretion in its Group 2 rulings on claimant priority and on the amounts to be distributed, and should be affirmed.

Shatar challenges two narrow aspects of the distribution plan approved by the District Court: (1) the exclusion of interest, fees, and costs from any recovery; and (2) the treatment of amounts received by a claimant prior to the receivership as partial compensation for its losses by application of the netting rule. But the District Court's decisions on

both of these issues are well within the Court's discretion and supported by the record.

As to Shatar's challenge regarding priority, the District Court's legal determinations were sound and the factual findings underlying its judgment were supported by undisputed evidence and not clearly erroneous.

STANDARD OF REVIEW

"Because the district court has 'broad equitable power in this area,' [this Court] reviews the [district] court's decision approving the distribution plan deferentially, for abuse of discretion." *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 841 (7th Cir. 2015) (*citing Wealth Mgmt.,* 628 F.3d at 332); *see also SEC v. Huber*, 702 F.3d 903, 908 (7th Cir. 2012).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Approving the Methodology and Calculations of the Receiver's Distribution Plan.

Shatar's challenge to the District Court's approval of the distribution plan for the Indiana and Yates properties is limited. This aspect of the appeal solely focuses on the elements of the District Court's

ruling that any recovery by Shatar would not exceed the amount of its principal invested, deducting any amounts received from EquityBuild: "The Individual Investors should receive *pro rata* shares of the money in the 5450 S. Indiana bank account [and the 7749 Yates bank account], using a net loss calculation method. If there are funds remaining, then Shatar should recover its principal using a net loss calculation." [A.37]

As a threshold matter, if this Court finds that the Investor Lenders have priority, then these limited issues raised by Shatar are moot because after distributions to the Investor Lenders on a priority basis there will be no more funds available to distribute to Shatar. The District Court recognized this circumstance both in its ruling, cited *supra*, and in its decision to consider as moot the Receiver's fraudulent conveyance and avoidance claim. [A.42] The Investor Lenders have not appealed any aspect of the District Court's rulings below. As such, if this Court affirms the District Court's priority ruling (which it should, as further discussed in Section II, *infra*), all the issues that Shatar has raised on the distribution plan are moot because after distributions are made to the Investor Lender claimants on a priority basis there will be no proceeds remaining from the sale of the Subject Properties to distribute to Shatar.

However, even if there were proceeds available to distribute to Shatar, its assertion that the District Court erred in using its discretion to limit recovery to the return of principal using a net loss calculation should be rejected, consistent with this Court's prior opinions which all give deference to the District Court and its discretion to fashion and approve a distribution plan in a receivership.

A. The District Court Did Not Abuse Its Discretion by Excluding Recovery of Interest by All Claimants on the Indiana and Yates Properties.

This Court has repeatedly held that a district court has broad discretion to fashion and approve a just and equitable distribution plan. *Wealth Mgmt.*, 628 F.3d at 332; *SEC v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009)). In *Wealth Management*, this Court explained:

> In supervising an equitable receivership, the primary job of the district court is to ensure that the proposed plan of distribution is fair and reasonable. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC,* 467 F.3d 73, 84 (2d Cir. 2006). The district court has broad equitable power in this area . . . .

Id. at 332.

The *Wealth Management* court went on to note the propriety of a court fashioning equitable remedies so that similarly situated claimants are treated in a similar fashion:

> We start with the principle that where investors' assets are commingled and the recoverable assets in a receivership are insufficient to fully repay the investors, "equality is equity." *Cunningham v. Brown,* 265 U.S. 1, 13, 44 S.Ct. 424, 68 L.Ed. 873 (1924). Distribution of assets on a pro rata basis ensures that investors with substantively similar claims to repayment receive proportionately equal distributions. Courts have routinely endorsed pro rata distribution plans as an equitable way to distribute assets held in receivership in this situation. *See, e.g., Forex Asset Mgmt.,* 242 F.3d at 331–32 (affirming pro rata distribution even where objecting investors' funds were segregated in a separate account and never commingled, noting that whether funds are commingled or traceable is "a distinction without a difference") . . . .

Id. at 333.

This Court later reaffirmed and reiterated the point that a distribution plan's methodology and the determination of claim amounts are within the district court's discretion to approve. *See, e.g., Huber*, 702 F.3d at 908 ("The cases treat the receiver's choice among allocation schemes as one within the discretion of the district court to approve or disapprove, like other aspects of the administration of a receivership.") (citing *Wealth Mgmt.*; other citations omitted).

Other circuits agree, rejecting many of the arguments that Shatar employs here:

> [I]n fashioning relief in an equity receivership, a district court has discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit. *See*

> *Holmberg v. Armbrecht,* 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946) ("Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."); *see also Quilling,* 572 F.3d at 299 (quoting *Liberte Capital Group v. Capwill,* 148 Fed. Appx. 426 (6th Cir. 2005)) ("Contractual claims notwithstanding, the insurance policies Liberte purchased were made part of an equitable receivership subject to the court's discretion."); *United States v. Durham,* 86 F.3d 70, 73 (5th Cir.1996) ("No one can dispute that tracing would have been permissible under the circumstances of this case ... [h]owever, the court in exercising its discretionary authority in equity was not obliged to apply tracing."); *United States v. Vanguard Investment Co.,* 6 F.3d 222, 227 (4th Cir. 1993) ("[A] district court in its discretionary supervision of an equitable receivership may deny remedies like rescission and restitution where the equities of the situation suggest such a denial would be appropriate."); *Elliott,* 953 F.2d at 1569 ("We cannot say that the district court abused its discretion by disallowing tracing.").
>
> In this case, it was proper for the district court to summarily reject appellants' statute of limitations and various contract law arguments in favor of treating appellants like all other similarly situated claimants. Indeed, the district court is authorized and expected to determine claims in an equity receivership based on equitable, rather than formalistic, principles.

Broadbent v. Advantage Software, Inc., 415 Fed. Appx. 73, 78-79 (10th Cir. 2011) (affirming distribution plan which included offsets for monies previously received).

Here, the District Court properly followed this Court's precedential decisions to treat similarly situated claimants similarly for purposes of a

distribution plan, as it applied the same methodology to all secured lenders for the Indiana and Yates properties, whether they are Investor Lenders or whether they are the Institutional Lender. These claimants were similarly situated based on the facts of the matter, to wit: EquityBuild signed mortgage loan packages, accepted loan funding, and committed to the claimants that their loans were in first position. Further, the District Court's equitable approach is appropriate and necessary given the fact that the amounts at issue fall well below those claimants' claims for recovery. Given the similarly situated nature of the claimants and the lack of funds to make all claimants whole, the District Court's decision to treat all of the secured claimants equally in regards to the exclusion of any amounts beyond principal, is well within the District Court's authority and discretion.

Also, the District Court's decision that "it is reasonable to disallow claims for penalties, interest, and fees" [A.13-14] is consistent with and supported by the law. *See, e.g., Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 163 (1946) ("The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings.");

see also Matter of Fesco Plastics Corp., Inc., 996 F.2d 152, 155 (7th Cir. 1993); 11 U.S.C. § 502(b)(2). One of the many purposes of the rule excluding such amounts from claims is that the courts are charged with preserving and protecting the estate for the benefit of all interests involved. *Vanston,* 329 U.S. at 163; *see also, e.g., SEC v. Capital Cove Bancorp LLC,* No. SACV 15-980-JLS (JCx), 2015 WL 9701154 at *12 (C.D. Cal. Oct. 13, 2015) (excluding interest promotes the orderly and efficient administration of the receivership estate for the benefit of all creditors) (*citing SEC v. Hardy,* 803 F.2d 1034, 1038 (9th Cir. 1986)). This legal principal is admitted by Shatar. [Br. at 52]

Shatar's challenges to these well-grounded decisions of the District Court are comprised of lackluster arguments and little if any legal support, leaving it far short of the high bar to establish that the District Court abused its discretion *See, e.g., U.S. v. Warner*, 498 F.3d 666, 680 (7th Cir. 2007) ("A district court also abuses its discretion if the record contains no evidence on which the court could have relied or if its findings of fact are clearly erroneous.").

Shatar does not address *Wealth Management* and its progeny whose guidance was followed by the District Court—an implied admission (and

now a waiver) that it cannot reconcile its argument with the legal basis for the District Court's decision. Instead, Shatar's primary authority is *In re Real Prop. Located at [Redacted] Jupiter Dr.,* No. 2:05-CV-01013-DB, 2007 U.S. Dist. LEXIS 65276 (D. Utah June 7, 2007). [Br. at 54, 56-58] Shatar concedes (in a footnote) that the opinion is actually a recommendation of a special master (albeit later adopted by the court). [Br. at 56] *In re Real Prop. Located at [Redacted] Jupiter Dr. Salt Lake City, Utah*, 2:05-CV-1013, 2007 WL 7652297 (D. Utah Sept. 4, 2007).

Beyond its lack of precedential value, *Jupiter Drive* is distinguishable on its face from this case. In *Jupiter Drive,* the investors were not similarly situated to the secured lenders because "[n]one of the Investors received a security interest in the property." *Id.* at *2. And it did not involve circumstances, like here, where the fraudulent scheme involved manipulation and obfuscation of secured interests and priority. In that way, *Jupiter Drive* is also unlike this situation because "no particularized equitable basis ha[d] been advanced that would warrant preferring the junior secured claimants over the more senior…."[5] *Id.* at

[5] Moreover, even under those inapposite circumstances, *on the basis of equity*, the special master in *Jupiter Drive* decided to allow the secured creditors only simple interest and disallowed all other forms of interest,

*8. As such, the District Court rejected Shatar's arguments that were based on *Jupiter Drive*, relying instead on authority disallowing secured creditors' asserted contractual right to interest, which it found to "better articulate and apply the rules for distributing assets in an equitable receivership." [A.14]

Shatar's other citations and efforts to distinguish authorities relied upon by the District Court similarly fail. For example, Shatar's citation to *Ticonic v. Nat'l Bank v. Sprague*, 303 U.S. 406, 411-12 (1938) is of no moment, as that matter involved the question of whether the claims of secured and unsecured claimants should be treated similarly. Additionally, Shatar's effort to limit *Vanston* and the Supreme Court's disallowance of interest as solely related to bankruptcy issues which were superseded by later bankruptcy code provisions, fails to recognize that *Vanston* involved a receivership, and its principles still govern receivership issues.[6]

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fees, and penalties. Additionally, in that context, the special master endorsed the tolling of interest for claims of the same priority, recommending *on the basis of equity* that, to the extent there were insufficient assets to pay claims of equal priority, a *pro rata* method was to be used.

[6] The bankruptcy code itself recognizes the general rule that interest stops once a petition is filed. *See* 11 U.S.C. § 502(b)(2). *See also In re*

And, to that end, other receivership cases cite *Vanston* for the same reasons that the District Court does here. In *Capital Cove Bancorp*, the district court disallowed the accrual of post-receivership interest, noting how allowing such interest would harm junior and unsecured creditors, and that staying interest payments satisfied the "'primary purpose' of receiverships, which is 'to promote the orderly and efficient administration of the estate' for the benefit of creditors." 2015 WL 9701154 at *11-12 & n.10 (*citing Hardy*, 803 F.3d at 1038 (granting motion to stay interest, and *citing Vanston* and other authorities)); *see also, e.g., SEC v. Capital Consultants, LLC,* No. Civ.00–1290–KI, 2002 WL 32502451 (D. Or. May 24, 2002) (granting receiver's motion to exclude post-petition interest that was not received as of the date of the receivership).

Shatar's attempt to shrug off *Central Sleep Diagnostics*, 801 F.3d at 841, fails for at least two reasons. First, it is a precedent from this Court, which arises from a receivership setting. Second, it correctly applies the law discussed above: the Receiver recommended disallowing

Milham, 141 F.3d 420, 423 (1998) (finding over-secured creditor has no entitlement to be paid post-petition interest at contractual rate).

interest as a matter of equity, the District Court accepted that recommendation, and this Court affirmed, finding no abuse of discretion—precisely the situation presented here.

The final distribution plan approved by the District Court, which treats similarly situated claimants similarly given the nature of the fraud, the complexity of the receivership, and the limited funds available for distribution, represents a proper exercise of the District Court's discretion. The District Court's distribution plan disallowed all secured claimants' requests for amounts sought beyond principal, whether it be for interest, penalties, commissions, or attorneys' fees. That plan is well supported by the prior decisions of this Court, and especially given the facts and circumstances created by the Cohens and their Ponzi scheme. The District Court's ruling should be affirmed.

B. The District Court Did Not Abuse Its Discretion in Applying the Netting Rule for Amounts Claimed by Shatar.

Consistent with the Receiver's recommendation, the District Court applied what is referred to as the "netting rule" as part of the distribution plan at issue. [A.20] The application of the netting rule treats monies received by a claimant prior to the receivership as a set-off against the

claimant's gross contribution amount, thereby establishing the claimant's net loss. Shatar challenges the application of the netting rule, claiming that the Receiver did not meet the burden associated with establishing the *sine qua non* of a Ponzi scheme. [Br. at 60] The argument is unsupported in fact and law.

As an initial matter, the application of the "netting rule" is part and parcel of the court's discretion in approving a receiver's distribution plan, as this Court has repeatedly recognized. *See, e.g., Central Sleep Diagnostics*, 801 F.3d at 841 (*citing Wealth Mgmt.,* 628 F.3d at 332); *Huber,* 702 F.3d at 904-07 (affirming distribution plan). The use of the netting rule is part of that discretion, and very appropriately used in Ponzi schemes cases because early investors may have received some return on their investment, not from legitimate sources, but rather from money solicited later. *Scholes v. Lehmann,* 56 F.3d 750 (7th Cir. 1995).

Recently, the Ninth Circuit upheld application of the netting rule in the context of its approval of bar orders associated with certain settlements, which a claimant whose claim was unsuccessful challenged as inequitable. In rejecting this and other arguments, the Ninth Circuit recognized the authority and propriety of the district court to use a

"payment formula . . . that applied equally to all investors" to deny recovery on appellant's claim where "the receivership had sufficient funds only to pay defrauded investors a percentage of their net <u>losses</u> and the district court determined that [appellant] was, instead, a net Ponzi-scheme winner." *SEC v. Peterson,* 129 F.4th 599, 610 (9th Cir. 2025) (emphasis in original).

Furthermore, and contrary to the express and/or implied arguments advanced by Shatar, netting principles are applied in cases even where no Ponzi scheme is established. For example, in *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, the district court applied a netting rule in its approval of a distribution plan associated with a fraud. No. 07 C 3598, 2010 WL 960362, at *8 (N.D. Ill. Mar. 15, 2010), *aff'd* sub nom. *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401 (7th Cir. 2011).

However, even if the establishment of a Ponzi scheme was required to apply the netting rule, the record here reflects that the District Court found that the EquityBuild companies and portfolio operated as a Ponzi scheme—where new investor and other lender monies were commingled and used to continue operations including by paying earlier investors and

other lenders. As discussed, *supra,* a judgment has been entered on the SEC's Complaint which alleges such a scheme (and upon which testimony was received and relied upon to establish the receivership) and the Cohens did not deny the Ponzi scheme. [Dkt. 40] The District Court's later entry of a judgment on a receivership asset again found and relied upon the fact that the Cohens had been operating a Ponzi scheme. [*See* Dkt. 533 at 2 ("Accordingly, the Cohens began running a Ponzi scheme, using new investors' funds to pay earlier investors' interest payments.") (citing Dkt. 1, SEC Complaint, ¶ 45)]

In both instances, the Court heard testimony from the SEC's forensic accountant, Ann Tushaus, who established beyond dispute based on her forensic analysis of EquityBuild's records that the Cohens had operated EquityBuild as a Ponzi scheme. [*See, e.g.,* Dkt. 578, 8/17/18 Tr. at 24-37; Dkt. 492 at 3-7 (Magistrate Judge Kim ruling discussing forensic accountant Tushaus' testimony at 7/10/2019 hearing); Dkt. 603 at 5-6 (affirming magistrate judge ruling); "the [District] court agrees with the magistrate judge's assessment of the hearing evidence, which 'show[s] that the funds used [to purchase the Naples Property] came from [i]nvestor monies tied to the Cohen's Ponzi scheme" (citing Dkt. 492 at 3-

7, 10-14)] There is no reasonable debate that a Ponzi scheme was found to exist as to EquityBuild's operations and repeatedly so determined by the District Court. Shatar's response suggests that this is enough only to establish Ponzi activity as to the Cohens, but not EquityBuild. [Br. at 62] That argument makes a distinction without a difference given the Cohens' domination of EquityBuild—those "new investor funds to pay earlier investors' interest payments" that comprised the scheme were paid by the Cohens through EquityBuild and its related entities.

Shatar next argues that even if there is evidence of a Ponzi scheme, it does not support application of the netting rule here because the Receiver did not prove that the transactions for the two specific properties were Ponzi scheme related. [Br. at 61] The argument is wrong both as a legal and factual matter.

As a legal matter, once a Ponzi scheme has been established, courts are entitled to use the Ponzi scheme presumption as to all parts of the scheme: "[T]he existence of a Ponzi scheme demonstrates actual intent as [a] matter of law because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors." *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th

171, 181 (2d Cir. 2021); *citing Picard v. Estate (Succession) of Igoin* (*In re BLMIS*), 525 B.R. 871, 892 n.21 (Bankr. S.D.N.Y. 2015). "Once a fraudulent scheme is shown to be a Ponzi scheme, a presumption arises that ***all of the transactions that are a part of the Ponzi scheme were made with the intention to hinder, delay, or defraud creditors, a critical element of a fraudulent conveyance. The Ponzi scheme presumption relieves the trustee of the burden of proving that each transaction was made with the intention to hinder, delay, or defraud creditors***." *In re Taneja*, No. 08-13293-RGM, 2012 WL 3073175, at *4 (Bankr. E.D. Va. July 30, 2012), *aff'd*, 743 F.3d 423 (4th Cir. 2014) (emphasis supplied). These are not novel principles. "The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have all utilized the Ponzi scheme presumption." *Ritchie Capital Mgmt., LLC v. Stoebner*, 779 F.3d 857, 862 n.6 (8th Cir. 2015) (citing *Wing v. Dockstader*, 482 Fed. Appx. 361, 363 (10th Cir. 2012) (unpublished); *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir. 2011); *In re AFI Holding, Inc.*, 525 F.3d 700, 704 (9th Cir. 2008); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006); *In re Mark Benskin & Co.*, 59 F.3d 170, Nos. 94-5421,

94-5422, 1995 WL 381741, at *5 (6th Cir. 1995) (unpublished table decision) (per curiam)).

There is no law in this Circuit to the contrary. Indeed, courts in this Circuit have acknowledged the approach before, but ultimately ruled that in specific case there was not enough evidence to establish the presumption. *In re Equip. Acquisition Res., Inc.*, 502 B.R. 784, 795 (Bankr. N.D. Ill. 2013) ("The Plaintiff has failed to convince the court that the Ponzi scheme presumption should apply here."). That is the opposite of this case, where the District Court has seen enough to convince it that a Ponzi scheme occurred here.

Shatar largely avoids this law, but instead relies upon one infrequently cited decision from the district court in Utah. *SEC v. Management Solutions*, 2013 U.S. Dist. LEXIS 120277 (D. Utah Aug. 22, 2013). That case is distinguishable on numerous grounds. In *Management Solutions*, there were no determinations by the Court that the operation at issue operated like a Ponzi scheme, as is the case here. The Court simply stated that "an effort to apply such a 'Ponzi presumption' in *all* securities fraud cases which have some Ponzi scheme characteristics is inappropriate. The Receiver's proposed blanket finding

and its contemplated future use is far too simplistic in this context, and may penalize innocent action as far as the objectors are concerned . . . ." No. 2:11–CV–1165–BSJ, 2013 WL 4501088 at *20 (D. Utah Aug. 22, 2013). Again, that case is clearly distinguishable because here the District Court was presented with evidence of—and found the existence of—the Ponzi scheme, and it was not merely the Receiver's say-so.

Shatar's effort to rely upon *In re Taneja* also fails. In that case, the court found that the fraudulent actor was conducting a fraud and using the money to buy themselves things (such as homes)—*not* taking new investments and using them to pay-off old investors (the hallmark of a Ponzi scheme). *Id.* at *8. To the contrary, as discussed, there is significant evidence in the record below to show that EquityBuild was operating as a Ponzi scheme and that it had the hallmark trait of using new investments to pay off old investors, as the District Court found, and the judgment reflects.

Further, and contrary to Shatar's arguments, the District Court properly relied upon evidence that the Shatar loans were operating as part of the EquityBuild Ponzi scheme. Indeed, the head of Shatar (Ezri

Namvar a/k/a the "Beverly Hills Madoff")[7] was himself a former Ponzi scheme operator, who was very sophisticated in understanding the hallmarks and operations of a Ponzi scheme. [Dkt. 1537 at 5-6] Regardless, here, Namvar looked into EquityBuild, and was well-versed in EquityBuild's business operations. He understood that EquityBuild's business model involved "crowdfunding" investors who were promised a first-priority mortgage lien, itself a huge red flag suggesting a Ponzi scheme. [*See* Dkt. 1537 at 5-12] Importantly, while Shatar had been told that the Yates acquisition was a purchase money mortgage, in fact, Shatar learned well before any closing that its loan was a refinance of the Yates property because EquityBuild had already purchased the property using the crowdfunding techniques to obtain funds from the investor-lenders which—as Namvar understood—were red flags.

Shatar attempts to separate its financing of the Yates and Indiana properties to argue that the evidence regarding the unexpected Yates

[7] Gene Maddaus, *Ezri Namvar Is the New Bernie Madoff and the Most Reviled Man in Town*, LA WEEKLY, July 21, 2011, https://www.laweekly.com/ezri-namvar-is-the-new-bernie-madoff-and-the-most-reviled-man-in-town/.

property closing and the "relatively modest sum" that EquityBuild received from the Indiana closing did not put it on inquiry notice. [A.28-29] But Shatar's $1,800,000 loan was secured by both properties, and Shatar insisted that the loan to value ("LTV") for its loan not exceed 56%. Thus, Shatar required EquityBuild to contribute about $1.5 million toward the purchase of the two properties, which Shatar collectively valued at $3,225,000. [Dkt. 1602 at 11 & n.10] This is not a "relatively modest sum" and this evidence along with Shatar's familiarity with EquityBuild's business model—*i.e.,* that all EquityBuild Finance private mortgage notes were fully secured and the investor lenders were protected with a first lien position on the property, and that EquityBuild Finance purportedly had over $100 million of lender/clients' funds under asset management [Dkt. 1537 at 6 and Ex. 3]—supports the District Court's finding of inquiry notice.

Indeed, before extending the loan, Shatar's Namvar expressly raised a concern about EquityBuild's business structure, and recognized the need to make sure the refinancing of already closed deals was "allowed and kosher, in case the proceeds [are] not distributed and/or going toward new deals." [*Id.* at 7 and Ex. 4] Despite this understanding,

Shatar did nothing to further investigate the secured interests promised to the investors who provided the $1.5 million that Shatar required EquityBuild to contribute to its loan closing to keep the LTV at 56%.

Further to the scheme, EquityBuild manipulated the timing of the recording of the Investor Lenders' loans so that Shatar's would be recorded first to accomplish the obtaining of monies from Shatar, despite the exact promise being made to obtain the Yates monies and agreements. The evidence in the record established that EquityBuild was operating a Ponzi scheme through its acquisition of the Yates and Indiana properties, which operated in the fraudulent framework of the whole EquityBuild scheme.

C. The District Court's Determination Regarding Excluding Recovery of Interest and Applying the Netting Rule Is Consistent with Prior Rulings From This Court and Law of the Case.

This appeal is not the first time this Court has had the opportunity to address a distribution plan which applied both the netting rule and excluded the recovery of interest and was approved by the District Court as part of this claims process in this action. *See SEC v. EquityBuild, Inc.*, 101 F.4th 526 (7th Cir. 2024) (hereafter, "*EquityBuild I*"). The District Court's rulings on the distribution plan at bar with respect to the

recovery of interest and the netting rule are consistent with this Court's decision in *EquityBuild I.* In this regard, this Court's determination in the prior appeal is properly applied as law of the case, at least with respect to the issues concerning the distribution plan, including the recovery of interest and the netting rule, and a further basis for affirmance.

‼ It is well established under the law of the case doctrine that "matters decided on appeal become the law of the case to be followed in all subsequent proceedings in the trial court and, on second appeal, in the appellate court, unless there is plain error of law in the original decision." *Evans v. City of Chicago,* 873 F.2d 1007, 1013-14 (7th Cir. 1989) (internal quotes and citation omitted). The law of the case doctrine "is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Evans v. City of Chi.,* 873 F.2d at 1014 (quoting *Barrett v. Baylor,* 457 F.2d 119, 123 (7th Cir. 1972)). Issues which are "decided either expressly or by necessary implication . . . will be binding on remand and on a subsequent appeal." *Parts & Elec. Motors, Inc., v. Sterling Elec., Inc.,* 866 F.2d 228. 232 (7th Cir. 1988) (applying law of case doctrine).

In *EquityBuild I,* this Court affirmed the District Court's approval of a final distribution plan for the first group of claimants that had their claims considered by the District Court pursuant to the process established and described *supra.* In that instance, the District Court found that the investor lender claimants held first-priority secured interests in five properties in which BC57 (an institutional lender) also claimed a first position secured interest. This Court's opinion focused upon issues raised by BC57 with respect to the District Court's determination of priority, but the entire distribution plan was on appeal and ultimately affirmed. To that point, the final distribution plan for Group 1 claims that was affirmed by this Court limited distributions to the return of principal and applied the netting rule. [Dkt. 1451, ¶¶ 7-8]

Shatar now challenges those same rulings. However, a necessary implication of this Court's affirmance of the distribution plan at issue in *EquityBuild I*—which excluded any recovery of pre- and post-Receivership interest, default interest, and other fees, and applied the netting rule—was an endorsement of the District Court's decision to disallow interest recovery and to apply the netting rule. Because the District Court's rulings with regard to claims against the Subject

Properties, including Shatar's claim, are consistent with this law of the case, the District Court's decisions on these issues should be affirmed.

II. The District Court Did Not Abuse Its Discretion in Its Priority Determination, Which Is Grounded in Numerous Factual Determinations Based on Evidence Obtained through the Claims Process.

In order to resolve claims, the District Court used its discretion to implement a claims process to address and unwind an indisputably complicated web of deceit involving the purported granting of first position secured interests to numerous claimants, whereby these disputed issues of priority would be litigated through summary proceedings involving groups of similarly-situated claimants. [Dkt. 941] As discussed, *supra,* the process allowed for discovery and detailed submissions from the Group 2 claimants including, but not limited to, claimants for the Indiana and Yates properties. [Dkt. 1476] Nothing in Shatar's opening brief challenges the establishment or procedures of the claims process, the sales process which allowed the funds to be available for distribution, or the individual components of that process.

Shatar challenges the priority determinations of the Court based solely on the following factual determinations: (i) the District Court erred in his finding that Shatar was on inquiry notice that there were other

investors who had interests in 7749 Yates and 5450 Indiana [Br. at 23-29]; (ii) the District Court erred in concluding that a diligent inquiry would have revealed the early investor mortgages in 7749 Yates and 5450 Indiana [Br. at 29-42]; and (iii) the Investor Lenders had equitable mortgages in 5450 Indiana. [Br. at 42-51]

As demonstrated in the record below, the District Court determined that the Investor Lenders had priority, based on evidence including, *inter alia,* evidence from the Receiver (whom the District Court had asked make a recommendation on the issue) and certain Investor Lenders, as well as evidence that was developed in the record through the discovery process. Based on that record, and given the wide discretion the District Court has in a federal equity receivership, the District Court neither made a clear error in its factual findings nor abused its discretion in applying those findings to the law. In that regard, the Receiver adopts the arguments of the certain-investor appellees before this Court [*see* Appeal Dkt. 22 at 18-29], and offers the following on these issues.

Inquiry notice. Shatar challenges the District Courts' factual determination that Shatar was on inquiry notice as to the investor's interests in the Yates and Indiana properties. [Br. at 24-29; 48-29]

The Receiver notes that several of the arguments raised on appeal by Shatar were not raised before the District Court, and as such are properly deemed waived. *Bradley v. Village of University Park, Illinois,* 59 F. 4th 887, 897 (7th Cir. 2023) (discussing waiver concept and noting that "[a]n appellant may waive a non-jurisdictional issue or argument in many ways, such as by failing to raise the issue or argument in the district court . . . ."). This includes Shatar's argument that the inquiry notice issue cannot be applied to it because the people that Shatar would have reached out to would not have admitted that the Investor Lenders had such interests. [Br. at 19, 21 29]

As to the Yates property, it is not disputed that the Investor Lenders' mortgages for the Yates property were executed *prior* to Shatar's mortgage. Shatar does not dispute Illinois law or its effect here: if Shatar was on inquiry notice of the Investor Lenders' earlier executed mortgages at the Yates property—whether based on actual or constructive notice—then Shatar would not have priority. [Br. at 24-26]

Shatar's appeal is solely based on its assertion that the District Court erred in its factual finding that Shatar was on inquiry notice that there were other investors at 7749 Yates. [Br. at 24-29] However, there

was substantial evidence before the District Court that Shatar was on inquiry notice of such Investor Lenders in Yates, and that factual finding is entitled to significant deference. [A.4-7, 26-37]

Shatar's brief identifies a host of facts which themselves support the District Court's finding. For example, it is undisputed that Shatar's loan on the Yates property was originally discussed as a purchase money mortgage, but that ultimately it was *not* structured as a purchase money mortgage—with Shatar's full knowledge and scrutiny. [Br. at 12-13] Instead, the Yates purchase was funded through crowdfunding efforts, which Shatar understood to be EquityBuild's method of conducting business and which bore red flags (*i.e.,* hallmarks of a Ponzi scheme) which Shatar purportedly seeks to avoid, but nevertheless moved forward. [Dkt. 1537 at 179; *see also* Dkt. 1602, Ex. A-16, 11/1/23 30(b)(6) Tr. at 113:8-114:22] As the District Court noted, "a prudent person would have been alarmed to find out one of the properties which was supposed to be purchased with her loan had already been purchased—it suggests that the money for the purchase was supplied by someone else." [A.31]

And the record reflects even more support for the District Court's finding. Shatar had been working with someone who it knew or should

have known was a Yates individual investor. Specifically, Shatar's 30(b)(6) representative, Ezri Namvar, was in contact with EquityBuild investor Doron Kermanian regarding investing in EquityBuild. On March 17, 2017, Kermanian signed documents and wired funds to EquityBuild for a share of the EquityBuild mortgage on 7749 Yates, and specifically asked EquityBuild to contact "my partner ezri namvar regarding both the property and also the company equity finance." [Dkt. 1537, Group Ex. 10, *see also* Ex. 11] In fact, not later than the fourth quarter of 2016, Kermanian had been discussing investments in EquityBuild with Namvar. [*Id.*, Ex. 3, Shatar Dep. Ex. 4; *see also* Ex. 2, 11/1/23 Tr. at 29:13-20] Shatar even paid Kermanian a referral fee in conjunction with Shatar's investments in the Indiana and Yates properties. [Dkt. 1537, Ex. 12, Shatar 6502-03] Put differently, the record indicates Shatar had actual knowledge that Yates had Investor Lenders, and it participated in discussions regarding EquityBuild investments with Kermanian, who was one of those investors.

As to the Indiana property, Shatar also argues that that the District Court erred in regards to its conclusion that Shatar was on inquiry notice of investors. [Br. at 48-49] Shatar's argument hinges on its

characterization that its mortgage on the Indiana Property was a purchase-money mortgage where "funds went directly from the Shatar lenders, through escrow, to the third-party seller of the Indiana property which was completely unaffiliated with Equitybuild." [Br. at 49] That is, however, absolutely contrary to the record.

In fact, Shatar's loan on Indiana was secured by *both* the Yates and Indiana properties. It is clear from Shatar's own internal analysis of the loan, that it was considering the aggregate value of the two properties in its decision to loan $1.8 million for a 56% loan-to-value of the security.[8] [Dkt. 1602, Ex. A-7, Shatar e-mail discussing transaction] The only reason Shatar was able to obtain this secured position on Indiana was EquityBuild's contribution of $1.5 million of investor monies to the Yates transaction, which was completed before the Indiana property closing. [Dkt. 1602, Ex. A-8, Master statement on Yates transaction] All of this was important to Shatar in making the loan, as demonstrated by the reaction of Ezri Namvar, who—when he was told EquityBuild would

[8] The Yates property purchase price was $1,550,000 and the Indiana property purchase price was $1,675,000, for a total of $3,225,000; the loan amount was $1,800,000, for an LTV of 56%. [Dkt. 1602, Ex. 7]

receive approximately $86,000 from the subsequent closing of the Indiana property—reacted as follows:

> What ???
> I thought the borrowers are putting over 1.5 million to close the purchases. Can someone explain this 2 me? [Dkt. 1602, Ex. A-9, e-mail from Shatar regarding transaction]

The District Court properly recognized the interplay of all of these issues and how it created inquiry notice: "A reasonably prudent person who believed that Shatar's loan was going to be used to purchase 5450 S. Indiana and 7749 S. Yates, and that Equitybuild needed to put up more money to complete the transaction, would be alarmed that Equitybuild was actually getting money out of the transaction." [A.32]

Beyond all of this (and more) record evidence, Shatar does not cite a single authority to support its assertion of an abuse of discretion on these inquiry notice issues. Because the record contains evidence on which the District Court's factual determinations were based or upon which the court could have relied, there is no abuse of discretion. *See Warner*, 498 F.3d at 680 ("A district court also abuses its discretion if the record contains no evidence on which the court could have relied or if its findings of fact are clearly erroneous.").

Diligent Inquiry Not Performed. The District Court undertook a detailed analysis of the facts germane to the question of the failure of Shatar to perform a diligent inquiry associated with the Yates and Indiana refinancing. [A.32] The question as to whether Shatar's inquiry was diligent as to the Yates and Indiana loans involves a "question of what is reasonable under particular circumstances [which] is normally a question of fact." *See Horizon Fed. Sav. Bank v. Selden Fox & Assocs.,* No. 85 C 9506, 1989 WL 135377 (N.D. Ill. Oct. 13, 1989) (discussing obligations of investors in securities fraud matters: "Ordinary prudence requires a reasonable investor under certain circumstances to investigate") (citing *Teamsters Local 282 Pension Tr. Fund v. Angelos,* 839 F.2d 366, 371 (7th Cir. 1988)). Shatar admits that the issue associated with the determination of diligent inquiry is "a fact driven, case specific determination that cannot made in the abstract." [Br. at 31]

Further, Shatar does not contest that it can be charged with knowledge of facts from a diligent inquiry [Br. at 29], which can include an existing lien, which would then take priority over its own lien. *See, e.g., Life Sav. & Loan Ass'n of America v. Bryant,* 125 Ill. App. 3d 1012, 1019 (1st Dist. 1984) ("One who takes a mortgage upon property with

knowledge either actual or constructive, of an earlier although unrecorded conveyance of it, takes it subject thereto and will not be permitted to placing his mortgage first on the record to gain priority over the earlier lien.").

Shatar's argument to avoid such authority (or other applicable authority, such as *Stump v. Swanson Dev. Co.*, 2014 IL App (3d) 110784), essentially boils down to its claim that because EquityBuild was operated by "professional liars" and the like, that Shatar would not have been able learn anything from any diligent inquiry. [Br. at 40] In other words, that any effort to perform a diligent inquiry would have been futile, and so the failure to perform a diligent inquiry cannot be considered here.

Once again, Shatar failed to raise any such issue before the District Court. As such, the argument has been waived. *See Bradley* 59 F.4th at 897.

However, even if Shatar has not waived the issue, the facts simply do not support that position. For example, once Shatar learned that the Yates property was *not a* purchase money mortgage, but a refinance, it could have insisted upon receiving the paperwork executed with Yates investors to see and understand what the deal was between EquityBuild

and those lenders. Had it done so, Shatar would have learned that EquityBuild, in fact, promised such Investor Lenders that they had a first position secured mortgage.

Shatar could have also approached Kermanian—the Investor Lender in the Yates mortgage who received a referral fee from Shatar relative to Shatar's loan on Yates and Indiana—to discuss the Yates situation. Any documents obtained from such an inquiry could then have also been compared to materials Shatar was already provided, which had the information about EquityBuild's business and reflected that EquityBuild crowdfunded and promised first position security mortgages to investor lenders as part of those transactions. [*See* Dkt. 1537 at 5-10; Ex. 6]

Additionally, since EquityBuild had assured Shatar that "on all refinances we send out rollover documents to our lenders asking them if they would like their funds back or if they would like to rollover their funds into a new deal" and provided Shatar with "the standard rollover forms we use" [*id.* at Ex. 5], Shatar could have demanded to see the rollover forms executed by these investors. And if those inquiries failed to yield the transactional documents, that would have been further

reason to *not* proceed as Shatar did. As the District Court noted based on the record, "[t]he facts that Shatar could have learned through a diligent inquiry would have led it to know that other investors already had a mortgage against 7749 Yates." [A.32]

The law also does not support Shatar's position. As Shatar concedes, there is no mandatory authority supporting its futility argument. [Br. at 36] Shatar's reliance upon *In re First Independence Capital Corporation*, 181 Fed. Appx. 524 (6th Cir. 2006), an unpublished 2006 Sixth Circuit decision, is not only weak precedent, but factually inapposite. [Br. at 36-39] In that case, the Sixth Circuit found that the *only* parties to which an inquiry could have been made were the fraudsters themselves. *Id.* at 529-30. As discussed, that was not the situation for Shatar, who had other third-party contacts from whom it could inquire (*i.e.,* Kermanian, to whom it paid a referral fee for the very loan at issue). And, going directly to the fraudsters themselves to request the specific information that would have been part of a diligent inquiry would have been fruitful—even if no information was provided. In fact, EquityBuild's refusal to provide information about the crowdfunding Yates investors would itself have raised a red flag. As a result, the

District Court has firm ground for its factual finding that a diligent inquiry would not have been "patently futile," but rather would have raised further red flags that a prudent investor would have investigated. *Id*. at 530.

Equitable Mortgages. The District Court properly found that the record reflects there were mortgages associated with the Indiana property held by the Investor Lenders that were completed at or before the time the Shatar transaction was completed. [Dkt. 1564 at 17-18 and Ex. A thereto] Those mortgages were in writing, signed by the parties, and include a promissory note secured by a mortgage on an identified property, as well as a mortgage instrument. EquityBuild accepted the loan proceeds from the investors at or around the time these agreements were executed, routinely acknowledging receipt of investor-lenders' wire transfers. [*See* Dkt. 1602 and Exs. A-3 – A-6]

The District Court's finding that such agreements were equitable mortgages is consistent with the facts and the law. [A.34-36] Shatar's argument boils down to the position that Illinois law requires that the money provided by an investor needs to be used towards the purchase of the property that is the subject of the equitable mortgage. That is not

Illinois law, which solely requires that a written agreement evidence the intent that the property described therein will act as security for the obligation. *See, e.g., Hibernian Banking Ass'n v. Davis,* 295 Ill. 111, 117 (1920). The authorities relied upon by Shatar do not say more, and certainly do not create the requirement that Shatar hopes to advance that the money lent must be used for the acquisition of the property.

In sum, there was no abuse of discretion or legal error, regardless of the standard of review, in the District Court's application of the facts and the law based on the record before it on the priority determination.

CONCLUSION

For the foregoing reasons, as well as those submitted by the other appellees, the Receiver respectfully requests that this Court affirm the District Court' s order approving the distribution plan for Group 2. If the District Court decision is reversed in any capacity, the Receiver requests that that matter be remanded to the District Court for further proceedings to address any such issues or matters deferred that would need to be addressed as a result of this Court's decision.

Dated: May 2, 2025

Kevin B. Duff, Receiver

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Type-Volume Certification

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32(a), (b), and (c) of this Court, because the brief contains 10,316 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

/s/ Michael Rachlis
Michael Rachlis

Certificate of Service

I hereby certify that on May 2, 2025, I electronically-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this appeal are registered CM/ECF users and that service will be accomplished by and through the CM/ECF system.

/s/ Michael Rachlis
Michael Rachlis