



2019 evidentiary hearing (Docket No. 448), or at his Court ordered examination date (Docket Nos. 454 and 457) to refute the Receiver's supported arguments that investor monies were used to purchase and maintain the Naples Property. Nor has he provided any evidentiary support or authority to refute the Report. For these reasons, his objections should be overruled and this Court should adopt the Report.

The Receiver supported his assertions that investor monies funded the purchase and maintenance of a single-family home in Naples, Florida (the "Naples Property") and a bank account (the "3641 Account") with financial records and an affidavit from the Receiver's accountant, Bernard Fish. (Docket No. 265 and Exhibits thereto; Docket No. 492 at 3) At the July 10, 2019 evidentiary hearing, the Receiver offered testimony from Ann Tushaus, a senior accountant with the SEC's Division of Enforcement. As noted in the Report, "Tushaus testified that 'the vast majority' of money deposited into the 3641 Account and used to purchase the Naples Property came from Investor Monies tied directly to Defendants' Ponzi scheme." (Docket No. 492 at 3, citing July 10, 2019 Hearing Tr. at 6) Tushaus supported her testimony with financial records – including bank records for EquityBuild, EquityBuild Finance, and Receivership Defendant Tikkun Holdings – and prepared summaries from those records. (Docket No. 492 at 3, citing July 10, 2019 Hearing Tr. at 8-9, Exs. 8, 16-24 and Docket No. 392, Exs. 1-7)

Judge Kim correctly rejected Cohen's argument that funds from a third-party source were used to purchase and maintain the home. (Docket No. 492 at 11-12, citing July 10, 2019 Hearing and Exs. 17-20, and 22-23 thereto; *see also* Docket No. 321) The Report affirms the Receiver's argument that funds deposited from this third-party source were spent before the purchase of the home, finding that balances in both the Tikkun account and 3641 Account did not have sufficient

funds to cover the down payment on the Naples Property. (Docket No. 492 at 11, citing July 10, 2019 Hearing and Exs. 17, 20 thereto; *see also* Docket No. 321) The Report also affirms that investor monies were used for mortgage payments and other expenses on the Naples Property, stating that during this time, the Tikkun account “essentially held nothing but funds from the EquityBuild Defendants, or Investor Monies.” (Docket No. 492 at 11-12, citing July 10, 2019 Hearing and Exs. 18-19, 22-23 thereto; *see also* Docket No. 321) The Court also correctly rejected Cohen’s argument that the third-party funds deposited in the Tikkun account, “loaned” to EquityBuild, and washed through the Receivership Defendants accounts were somehow untainted, where Cohen offered no evidence or authority to support this argument and the Receiver offered compelling evidence tracing these alleged repayments to investor monies. (Docket No. 492 at 12, citing July 10, 2019 Hearing and Ex2. 21, Schedules A, B-1 to B-7 thereto; *see also* Docket No. 321)

Judge Kim also correctly determined that Cohen waived any argument regarding the 3641 Account by failing to address in his response and failing to provide evidence to suggest that any portion of this account is off limits. (Docket No. 492 at 9-10; *see also* Docket No. 301 at 1-5; Docket No. 321 at 1; Docket No. 265 at 3 and Ex. 2; Hearing Tr. at 13, 48-49 & Ex. 18, Schedule A at 1-13) And, “[n]or could he given the evidence that the Receiver has provided, supported by affidavits from Fish and testimony by Tushaus, showing that the funds in the 3641 Account originated from deposits by EquityBuild and its affiliates.” (Docket No. 492 at 10) Cohen’s objections failed to address the 3641 Account let alone provide any evidence or authority to refute Judge Kim’s Report and should therefore be overruled.

**II. MAGISTRATE JUDGE KIM WAS WELL WITHIN HIS DISCRETION IN IMPOSING SANCTIONS ON JEROME COHEN FOR HIS CONTINUED DISREGARD FOR COURT ORDERS.**

Cohen appears disingenuous yet again by suggesting it was “impossible” for him to appear at the evidentiary hearing and Court ordered examination. Judge Kim was well within his discretion to impose sanctions on Cohen for his blatant and repeated disregard for Court Orders. *See, e.g., Wine & Canvas Dev., LLC v. Muylie*, 868 F.3d 534, 538-39 (7th Cir. 2017); *Downs v. Westphal*, 78 F.3d 1252, 1256-57 (7th Cir. 1996). Cohen was given several opportunities to provide his own testimony, witnesses, and exhibits. (Docket No. 492 at 7; *see also* Docket Nos. 301, 357, 393, 413, 445, 456, 448, 454, and 457) Strike one was his failure to submit a witness and exhibit list within the deadline set by the Court. (*Id.*; *see also* Docket No. 393) Strike two was his failure to appear at the July 10, 2019 evidentiary hearing, after unsuccessfully seeking to continue the hearing and being ordered by Judge Kim to appear at the hearing in person. (*Id.* at 7-8; *see also* Docket No. 448) Judge Kim gave Cohen another chance to appear in person to be examined by the Receiver and let Cohen choose a date for this proceeding. (*Id.* at 8; *see also* Docket No. 457) Cohen selected dates, Judge Kim then set the proceeding on one of those dates, and less than an hour before that proceeding was set to being, Cohen “informed the court that he was ‘unable to attend the hearing scheduled for today,’ alleging ‘health issues’ and financial difficulty without providing any evidence, resulting in the third strike against him. (R. 473, Cohen’s Resp. at 1.)” (Docket No. 492 at 9) Cohen’s latest filing provided nothing as well. (Docket No. 512) Cohen’s behavior towards the Court shows a complete disregard for the Court’s time and the Receiver’s time. Judge Kim was well within his discretion to impose sanctions on Cohen for his repeated failures to comply with Court Orders.

For the reasons stated herein and in the Judge Kim's Report and Recommendation, this Court should adopt the Report and Recommendation and identify and include the single-family home located at 1050 8th Avenue North in Naples, Florida and a joint checking account ending in 3641 as Receivership Assets as that term is defined in the receivership order. Further, the Receiver respectfully requests this Court enter an order that allows the Receiver to take immediate possession of the Naples Property as a Receivership Asset and that authorizes him to change door locks to the Naples Property.

Dated: September 12, 2019

Kevin B. Duff, Receiver

By: /s/ Nicole Mirjanich

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2019 I provided service of the foregoing Receiver's Response To The Defendants' Objection To The Honorable Judge Kim's Minute Entry Docket No. 491, via ECF filing to all counsel of record, and via electronic mail to the following individuals and entities:

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