

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Plaintiff,

v.

EQUITYBUILD, INC., EQUITYBUILD  
FINANCE, LLC, JEROME H. COHEN, and  
SHAUN D. COHEN

Defendants.

Case No. 1:18-cv-5587

Hon. John Z. Lee

Magistrate Judge Young B. Kim

**MOTION OF CERTAIN LENDERS FOR LEAVE TO  
PERMIT BANKRUPTCY CASES FOR RECEIVERSHIP ENTITIES**

The following lenders (collectively, “Lenders”) respectfully submit this Motion of Certain Lenders for Leave to Permit Bankruptcy Cases for Receivership Entities (“Motion”). The following Lenders (1) Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; (2) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; (3) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; (4) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; (5) Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; (6) Federal

National Mortgage Association (“Fannie Mae”); (7) Federal Home Loan Mortgage Corporation (“Freddie Mac”); (8) UBS AG; and (9) BMO Harris Bank N.A. respectfully state as follows:

### **INTRODUCTION**

1. On August 15, 2018, the U.S. Securities and Exchange Commission filed a securities fraud complaint against EquityBuild, Inc., Equitybuild Finance, LLC, Jerome Cohen, and Shaun Cohen (collectively, “Receivership Defendants”). On August 17, 2018, the Court appointed Kevin B. Duff as the equity receiver (“Receiver”) over the estates of the Receivership Defendants (“Receivership Estate”).

2. The Receivership Estate is insolvent and is unable to currently pay all of the indebtedness to all creditors in the case, including Lenders and unsecured creditors along with equity holders. This case also contains a multitude of parties, each of whom is seeking resolution of their respective claims, adjudications of priority and lien rights, as well as determinations regarding the distribution of assets and the sale of respective properties. Indeed, this Court has noted the ample filings required to address these contested issues. [Dkt. 535, September 24, 2019 Minute Order requiring consolidated briefing; Dkt. 468 Receiver’s August 1, 2019 First Status Report on Claims, p. 4, noting 1,892 claims received].

3. Bankruptcy provides a streamlined, efficient, and economical mechanism for addressing each of these issues. Indeed, bankruptcy courts are confronted with these very issues on a daily basis and are well-equipped as a specialized forum to address competing claims, claims procedures, and timely resolution of such issues – particularly in instances where there are simply not enough funds to “go around.” Indeed, the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division is one of the nation’s top bankruptcy venues, handling a wide array of complex, highly contested commercial real estate and related financing cases.

4. Furthermore, as noted below, this Court's order appointing the Receiver expressly provides that bankruptcy relief may be sought by the Receiver. (Receiver Order, ¶¶ 51-52).

5. To be clear, the Lenders are not requesting that the Court divest its own jurisdiction over the SEC's complaint or the SEC's request that ill-gotten gains be disgorged by the defendants in this case. Nor are the Lenders requesting that the Receiver relinquish his role. The Lenders are, instead, requesting that the borrowers involved in this case be placed in bankruptcy to address the liquidation of assets, the distribution of those concomitant proceeds, as well as the adjudication of competing claims, which the Bankruptcy Court has specialized expertise in so doing.

### **ARGUMENT**

#### **I. THE RECEIVER ORDER APPROVED BY THIS COURT SPECIFICALLY CONTEMPLATES THAT BANKRUPTCY MAY BE FILED.**

6. The current Receiver Order expressly provides that the Receiver may act as a debtor-in-possession in bankruptcy for the Receivership Defendants.

The Receiver may seek authorization of this Court to file voluntary petitions for relief under Title 11 of the United States Code (the "Bankruptcy Code") for the Receivership Defendants, or any of them. If a Receivership Defendant is placed in bankruptcy proceedings, the Receiver may become, and may be empowered to operate the Receivership Estates as, a debtor-in-possession. In such a situations, the Receiver shall have all of the powers and duties as provided a debtor-in-possession under the Bankruptcy Code to the exclusion of any other person or entity. Pursuant to Paragraph 4 above, the Receiver is vested with management authority for all entity Receivership Defendants and may therefore file and manage a Chapter 11 petition.

Receiver Order, ¶51. Paragraph 52 of the Receiver Order further provides, "The provisions of Section VII above bar any person or entity, other than the Receiver, from placing any of the Receivership Defendants in bankruptcy proceedings." *Id.* at Para. 52. As such, (a) either the Receiver may either exercise this right or (b) the Court may modify the Receiver Order to (i) direct the administration of its docket and the distribution of assets through the relief requested herein or

(ii) to allow the filing of involuntary petitions. Such relief is well-contemplated by the scope of the ex-parte Receiver Order entered by this Court and within this Court's discretion.

**II. THE RELIEF REQUESTED PROVIDES A CODIFIED, WELL-DEVELOPED FRAMEWORK FOR THE TIMELY AND COST-EFFECTIVE ADJUDICATION OF CLAIMS AND THE RESOLUTION OF COMPETING INTERESTS.**

7. Bankruptcy is appropriate here as an entity may avail itself of the benefits of the Bankruptcy Code pursuant to 11 U.S.C. § 109.

8. The Bankruptcy Code provides well-defined and codified procedures to address the very issues that have been the source of contention in this case for well over a year.

9. By way of example, the Bankruptcy Code provides for specific guidelines and requirements for the sale of assets, which would eliminate much of the issues currently pending before this Court regarding the sale of assets and the pending Rule 72 Objections. 11 U.S.C. § 363.

10. The Bankruptcy Code also sets forth detailed guidelines regarding the adjudication of both secured and unsecured claims. See 11 U.S.C §§ 501 et seq. The federal Bankruptcy Rules also supplement the Bankruptcy Code to provide additional guidance. Fed. R. Bankr. Proc. 3007.

11. Moreover, the Bankruptcy Code, Federal Bankruptcy Rules, and Local Bankruptcy Rules also provide for guidance regarding fee applications and compensation of professionals, which is also a contested issue pending before this Court. 11 U.S.C. §§ 330, 331; Fed. R. Bankr. Proc. 2016; Local R. Bankr. Proc.5082-1. The Bankruptcy Code and Rules also set forth timelines for the timely submission of compensation applications to ensure that estate resources are being managed appropriately and efficiently. 11 U.S.C. § 331.

12. Additionally, the Bankruptcy Code provides for the litigation of competing claims through various adversary proceedings which are managed as separate litigation matters from the general bankruptcy matter and are advanced concurrently with the general bankruptcy case. See Fed. R. Bankr. Proc. 7001-7087. In fact, adversary proceedings are utilized “**to determine the**

**validity, priority, or extent of a lien or other interest in property . . . .”** *Id.* at 7001((2) (emphasis added). The Bankruptcy Court for the Northern District of Illinois manages thousands of these adversary proceedings every year.

13. The Bankruptcy Code also provides for an automatic stay which will equally protect estate assets. 11 U.S.C. § 362; see also *In re Fulton*, 926 F.3d 916, 927 (7th Cir. 2019) (noting that the “broad application” of the Bankruptcy Code’s automatic stay).

14. Moreover, among the hallmarks of bankruptcy is transparency and predictability of the process, assets, and related matters. In this case, the Magistrate Judge has expressed his concern regarding communication with creditors and the transparency regarding the receivership process:

But I will raise one issue because this isn't the first time I actually heard this, and we also heard from one of the investors who came to the evidentiary hearing. There's this lack of information, lack of communication. I'm not sure exactly what's going on, but if the law firm has a website, you can have a portion dedicated to this particular claims process, upload all the orders, you know. So I don't know, but I'm just mentioning it. You know, I'm not doing it in an accusatory fashion because I don't have all the information because but banks are saying the same thing and the private investor who came to the hearing said the same thing. So even if it's there, it's not doing its job. So we need to find another way of communicating.

(July 17, 2019 Hearing Trans., pp. 18-19).

15. Indeed - unlike in the present case - the Office of the United States Trustee (which is an arm of the Department of Justice and has oversight for all pending bankruptcy cases to ensure that such cases are administered appropriately) supplements the oversight by the Bankruptcy Court to ensure transparency in connection with the administration of cases:

The United States Trustee Program is a component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq. We are a national program with broad administrative, regulatory, and litigation/enforcement authorities **whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and**

**the public.** The USTP consists of an Executive Office in Washington, DC, and 21 regions with 92 field office locations nationwide.

See <https://www.justice.gov/ust> (emphasis added).

16. This is an additional resource that is currently unavailable to this Court as part of the pending receivership. Indeed, the office of the United States Trustee has standing to be heard on all matters involving a bankruptcy case and is highly regarded within the Northern District of Illinois. 11 U.S.C. § 307 (“The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title . . .”). Indeed, the U.S. Trustee is able to object to and file its own motions to ensure compliance with bankruptcy guidelines, including such matters as compensation applications, sale motions, and other issues. The U.S. Trustee is a neutral, third party who aids with such transparency and administration.

17. The Office of the United States Trustee in the Northern District of Illinois is administered by Patrick Layng, the U.S. Trustee, a highly regarded former Assistant U.S. Attorney for the Northern District of Illinois, who is conversant not only in bankruptcy but matters involving fraud. Layng’s office closely monitors and appears routinely in bankruptcy cases. Such oversight would be a welcome addition to this matter and would provide an additional resource that is currently unavailable to this Court and the Magistrate.

18. As an adjunct of the District Court, the Bankruptcy Court also has the authority to issue final orders on core matters, which will expedite the resolution of certain contested matters. 28 U.S.C. § 157(b)(1); see also Wellness Int’l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1940, 191 L. Ed. 2d 911 (2015) (“Congress gave bankruptcy courts the power to “hear and determine” core proceedings and to “enter appropriate orders and judgments,” subject to appellate review by the district court. § 157(b)(1)”). This reduces administration related to the inability of the Magistrate to issue certain final orders and promotes judicial economy.

19. Finally, the Bankruptcy Code provides for a well-developed framework for the distribution of estate assets to competing claimants, whether the bankruptcy case is pending in Chapter 7 or Chapter 11. See 11 U.S.C. §§ 507, 726, 1121-1129.

20. The current case has been, in large part, bogged down by the inefficiencies and uncertainties regarding the common law process for federally appointed receivers, which remains subject to much litigation across the United States – often with divergent results. SEC v. Madison Real Estate Grp., LLC, 647 F. Supp. 1271, 1284-85 (D. Utah 2009) (holding that receiver must abandon properties to lenders where receiver fails to make monthly principal and interest payments and there is no equity in the underlying real estate).<sup>1</sup>

21. Because such procedures are well-established by the Bankruptcy Code and related federal and local rules, this Court is not required to spend its limited time litigating disputes relating to the appropriateness and legality of such procedures and related administrative matters.

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<sup>1</sup> As noted in the *Madison* real estate Ponzi scheme decision, a Receiver may not retain commercial real estate property in a receivership if: (1) the property's value does not exceed the value of the secured indebtedness and (2) the Receiver fails to satisfy the obligations of the mortgage on an ongoing basis and while the property is in receivership:

Because there is sufficient equity in the property, the court concludes that the advantages of keeping the property in the Receivership exceed the disadvantages to Midland. **This conclusion, however, is contingent upon the Receiver restoring status quo to Midland and maintaining it. The Receiver has not serviced the loan or paid property taxes on Westgate Villas property since the Receivership assumed control of the property.** As discussed in Section I, to justify retaining property in a receivership, one must preserve the status quo of the lender.<sup>80</sup> **Accordingly, the Westgate Villas property may be retained by the Receivership as long as it brings current the regular, monthly principal and interest payments that have not been paid.<sup>81</sup> It must also continue to pay timely the regular, monthly principal and interest payments, as well as the property taxes, as long as the property is held by the Receivership. If the Receiver is unable to meet these terms, the Receiver must relinquish the property and allow it to proceed to foreclosure.**

Madison Real Estate Grp., LLC, 647 F. Supp. 2d at 1284–85 (emphasis added).

22. Indeed, all parties in interest would benefit from the bankruptcy process, which should streamline the process, reduce administrative costs, and ultimately reduce expenses charged by estate professionals which ultimately reduces the funds available to victims of the defendants' fraud – whether they be secured lenders, investors, unsecured creditors, employees, or other third parties.

### CONCLUSION

For the reasons set forth herein, the Lenders request that the Court grant the relief requested herein.

Dated: October 1, 2019

Respectfully submitted,

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*Trust, National Association, as Trustee for  
the Registered Holders of Wells Fargo  
Commercial Mortgage Trust 2014-LC16,  
Commercial Mortgage Pass-Through  
Certificates, Series 2014-LC16; and Fannie  
Mae*

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Magistrate Judge Young B. Kim

**NOTICE OF MOTION**

PLEASE TAKE notice that on **October 8, 2019 at 9:00 a.m.**, we shall appear before the Honorable Judge John Z. Lee, or any judge sitting in his stead, in **Courtroom 2125** (subject to change) of the United States District Court for the Northern District of Illinois, 219 S. Dearborn Street, Chicago, Illinois 60604, and shall then and there present the ***Motion of Certain Lenders for Leave to Permit Bankruptcy Cases for Receivership Entities.***

Dated: October 1, 2019

Respectfully submitted,

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Trust, National Association, as Trustee for  
the Registered Holders of Wells Fargo  
Commercial Mortgage Trust 2014-LC16,  
Commercial Mortgage Pass-Through  
Certificates, Series 2014-LC16; and Fannie  
Mae*

**CERTIFICATE OF SERVICE**

I, Jill L. Nicholson, hereby certify that on October 1, 2019, I caused the *Notice of Motion* and *Motion of Certain Lenders for Leave to Permit Bankruptcy Cases for Receivership Entities* to be electronically filed using the Court's CM/ECF system on all counsel of record.

/s/ Jill L. Nicholson  
Jill L. Nicholson