UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 18-cv-5587**
v.	)	**Hon. John Z. Lee**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	)	**Magistrate Judge Young B. Kim**
Defendants.	)	

RECEIVER'S REPLY IN SUPPORT OF PROPOSED CLAIMS PROCESS

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The Court has broad powers and wide discretion to fashion an orderly, efficient, and fair claims process. It is appropriate and essential for the Court to match the process to the nature of the case before it. Here, there are approximately 1,000 claimants, over 2,400 claims submissions, and 116 properties, including dozens of underperforming properties that are very likely insufficient to satisfy all of the competing asserted secured claims against them. The genesis of this matter is a fraudulent scheme that took deliberate and varied steps to cloud those interests.

The Receiver's proposal provides for an efficient and fair claims process. It sets forth procedures for notice, discovery, and opportunities to be heard. And it confronts economic realities relative to administering the complex thicket of claims which can only be accomplished if the Receiver, as an officer of the Court, can be fairly and reasonably compensated for overseeing and implementing the claims process for the benefit of all claimants.

The vast majority of claimants recognize this, including a sea of approximately 957 investors, whose looming presence is inconspicuous in the docket but whose claims and alleged losses dwarf those of the objectors. Many of those investor lenders appear to have been victimized by the shapeshifting tactics of the Cohens when it came to their secured interests. Yet none of them nor any other claimants, apart from the institutional lenders, objected to the Receiver's proposed process. Put differently, 99% of the claimants have not objected to the Receiver's proposed process.

However, the Court must once again consider the objections of the one percent – a faction of institutional lender claimants. They typically have recorded interests,

cross-collateralized loans, and, until now, a long track record of proclaiming themselves ready to get to the merits of their claims. But despite the fact that they previously declared themselves ready and advocated for a short, truncated process to resolve priority disputes, now that the Receiver has proposed such a process, the objectors have brought a bevy of inconsistent, contradictory, and erroneous objections about notice, discovery, and due process. As explained below, their objections should be overruled and the Receiver's proposed process should be approved.

REPLY ARGUMENT

I. The Proposed Process Meets Due Process Requirements For Notice And Opportunity To Be Heard.

Taking all of these factors described above and many others into account, the Receiver proposed a process to provide due process and resolve all competing secured claims. He designed it around the institutional lenders' claims, the properties allegedly securing their liens, and the corresponding allegedly competing secured claims of investors, and was crafted after various discussions amongst the SEC, objectors and others, and with guidance of the Court.

The process provides, at the outset, notice of all competing claims along with the Receiver's framing report and the Receiver's initial disclosure to each allegedly secured claimant of all claims forms and supporting documentation for the property or properties against which the claimants submitted a claim (which, for the institutional investors, will be all documentation for the entire tranche). Following the Receiver's initial disclosure, all claimants should have all, or nearly all, relevant information in their possession which should substantially reduce the amount of

discovery needed. Nevertheless, the Receiver's process allows each claimant to conduct additional targeted discovery including document requests, interrogatories, and depositions, with reasonable limits. The Receiver also may conduct discovery – which he is entitled to undertake independent of the claims process – to determine, assert, and give notice to each of the claimants of any objections or other challenges he has to each of their claims. The process further allows each claimant to submit a pleading and supporting evidence in support of or in opposition to claims. It also provides for notice from the Receiver to each claimant of any issues raised regarding the validity, fairness, legality, or classification of the claims. And the process allows each claimant both a further subsequent opportunity to respond in writing to any issues raised by the Receiver or other participants and an evidentiary hearing as the Court allows at which participants could seek to address any issues and present further evidence. (Motion, ¶¶ 25-43)

In this way, the Receiver's process provides notice, an opportunity to be heard, fairness, and finality to all of the participants. Ultimately, the process should resolve all competing secured claims and all matters relating to them, including validity, fairness, legality, classification, and priority. It is a streamlined but fair summary proceeding, which the law not only allows but encourages for resolving claims in complex federal equity receiverships like this one.

This process clearly meets the requirements of due process under federal law. *See, e.g., Matthews v. Eldridge,* 424 U.S. 319, 332-35 (1976); *SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 669 (6th Cir. 2001) (due process satisfied

without full evidentiary hearing where claimants had opportunities to rebut the Receiver's position). Indeed, the objectors implicitly concede the propriety of summary proceedings, relying on decisions which generally affirmed their appropriateness. *See, e.g., SEC v. Elliott*, 953 F.2d 1560, 1568 (11th Cir. 1992); *SEC v. Torchia,* 922 F.3d 1307, 1316 (11th Cir. 2019). But, unlike here, where the process provides a meaningful opportunity for claimants to challenge the Receiver's and other participants' positions, the processes at issue in those cases were overturned because they did not provide a meaningful opportunity to challenge the Receiver's positions. *See, e.g., Elliott,* 953 F.2d at 1568 (district court failed to even rule on a particular claimants' motion for an evidentiary hearing and limited discovery before making an adverse factual finding on their claim in its final distribution plan).

The objectors' suggestion they are unaware of what is at issue is baseless. For over a year, the Receiver has sought to implement a summary process to receive, organize, review, investigate, categorize, classify, calculate, analyze, validate, determine priority, verify, confirm, and/or dispute all claims and supporting documentation as well as all objections relating to submitted claims. (*E.g.,* Docket No. 241, at 2, 4-6, 9 & Docket No. 241-1, at 12, 21, 36) The objectors are also well aware of the priority issues they themselves have advanced and which the Receiver, the SEC, and the Court have discussed on numerous occasions. They have conceded the Receiver's role in addressing additional broader issues associated with the claims, including determining the amount, validity, and priority of secured claims. (Response, Ex. B, at 20-21) They admit that the Receiver has an obligation to

determine whether someone's alleged secured claim is valid. (*Id.* at 21) The Receiver's process ensures that they will receive notice of the Receiver's position as to each claim and that each claimant will have the opportunity to respond to all issues raised either by the Receiver or other participants.

The objectors nevertheless suggest that the process should be delayed and reconfigured so that complaints can be filed upfront, before the Receiver has taken or evaluated discovery and determined what issues to raise in relation to the claims. Flipping and delaying the process in this way and adding another preliminary stage would create unnecessary delays and inefficiencies, and would not enhance due process. It also would transform the claims process from a process focused on the actual claims submitted by the claimants into a process premised on nascent and potential claims of the Receiver. Instead, through the Receiver's proposed process, the Receiver can review evidence obtained through the claims process and discovery to determine whether issues such as fraudulent conveyances are necessary to pursue. Equally if not more important, it will allow the Receiver to determine what issues and claims to *not* raise, thereby significantly limiting and streamlining the claims and issues that the Receiver determines should be pursued and included in his submission. In so doing, the Receiver's process is more time and cost efficient because the Receiver will not only be able to evaluate claim validity, but can also determine what if any affirmative claims or other issues should be asserted. To be clear, the idea that claimants will not be aware of any affirmative claims ignores that the Receiver will identify affirmative claims in the framing report if he is prepared to do

so, but if not then at a minimum he would expect to raise them in the Receiver's submission. Either way, claimants will have notice and an opportunity to respond – both through their objections to the Receiver's submission and, as the Court allows, in an evidentiary hearing *after* they have received the Receiver's submission that will set forth all of his objections to the submitted claims, if any.[1]

The objectors further challenge the idea that claims can act as complaints, arguing that they do not provide adequate notice. This is not an objection based on any case law; and it would delay matters and increase costs. It also ignores the fact that the Court approved the process for submission of claims a year ago. Moreover, in determining whether to deem the claims asserted by over 900 *pro se* claimants as complaints, the Court may "provide[] pro se parties wide latitude when construing their pleadings and papers." *See Elliott*, 953 at 1582 (citations omitted). And the Court may use common sense when interpreting the *pro se* papers to determine what relief the party desires. *Id.* Here, the claims were submitted under penalty of perjury, with a full statement of the nature, basis, and amount of the claims, with all supporting documentation provided, pursuant to an approved claims form and process designed for this receivership and issues raised herein. There is nothing improper in using the submitted claims as an initiating pleading for determining the validity, objections, and all interests raised by those claims, as vetted by the Receiver, and ultimately determined by the Court.

[1] A claimant who believes that additional discovery is necessary and appropriate under the circumstances, could request leave to take such discovery from the Court.

In short, the Receiver's proposed process meets the due process requirements of *Matthews* and *Elliott* by providing notice and an opportunity to be heard.

II. The Court Has The Authority to Limit the Scope Of Discovery And Structure A Fair Evidentiary Hearing.

The objectors next argue in conclusory fashion that the proposed process is contrary to the Federal Rules of Civil Procedure. (Response at 6) In fact, the proposed summary procedure arises directly out of the principles and guidance of the Federal Rules of Civil Procedure. "Rule 56 of the Federal Rules of Civil Procedure gives the district court summary jurisdiction over all the receivership proceedings and allows the district court to disregard the Federal Rules." *Elliott*, 953 F.2d at 1566. The Court also has discretion in determining the nature of the evidentiary hearing that the Receiver has proposed to ensure all claimants have a fair opportunity to be heard while balancing time and cost efficiencies. *See Elliott*, 953 F.2d at 1568 ("The structure of the hearing is left to the discretion of the district court so long as the [claimants] can present and argue their facts."); *SEC v. Hardy,* 803 F.2d 1034, 1037 (9th Cir. 1986) (court's "broad powers and wide discretion" stem from the need for orderly administration of the estate).

The objectors suggest that the discovery described in the motion is inadequate. (Response at 11-12) But this argument ignores that the Receiver will provide initial disclosure of all the documents submitted by each competing claimant. Further, the Rules expressly allow the Court to limit discovery. *See, e.g.,* Fed. R. Civ. P. 26(a) ("Scope in General. Unless otherwise limited by court order…."); Fed. R. Civ. P. 26(b)(2)(A) ("By order, the court may alter the limits in these rules…."); Fed. R. Civ.

P. 26(b)(2)(C) (in some circumstances, the court must limit the frequency or extent of discovery). The objectors also ignore that the process allows discovery under Rules 26, 30, 33, and 34, with reasonable limits as determined by the Court. (Motion at 17) The proposed process balances the opportunity to conduct discovery and be heard and the need for an expeditious and cost-effective process. Additionally, the Court, in its discretion, can adjust the scope of and limits on discovery as these tranches proceed.

Ignoring the discovery that is available, the objectors suggest they hope to take discovery of "loan servicer's express, implied, and apparent authority" relative to the loan payoff letters. (Response, at 5) Nothing prevents them from seeking such discovery through the proposed process. Such information may also be available from the investor lenders and their claim forms and supporting documentation. The Receiver also has proposed that discovery be allowed from other claimants and from title companies. (Motion at 17 (mistakenly identified as title insurance companies in the motion)) While there remain issues associated with EquityBuild's documents, the Receiver is not opposed to responding to discovery requests from claimants, but submits that it is far more efficient for the parties to review the voluminous documentation they will be provided at the outset by the Receiver and only where it is insufficient serve the Receiver with reasonably tailored discovery requests that are not cost or time prohibitive.

Other challenges raised by the objectors are similarly baseless. The objectors suggest the limitations are both too few and too many. For example, they argue that they will need to respond to numerous requests from claimants. It is more likely,

however, that objectors will gather one set of documents responsive to all claimants' requests, particularly as there is no evidence that the objectors had individual contact with the investors. Moreover, by arranging the tranches around the institutional lenders, the objectors are less likely to need to respond to discovery or seek discovery except for the one summary proceeding in which their claims are at issue. Put differently, the alleged burden of responding to such requests is a strawman.

Conversely, the objectors complain that a lender like BC57, LLC (Bloomfield Capital) does not have enough discovery tools to address 185 other claimants.[2] But each institutional lender will receive all documents produced by every claimant. The objectors also suggest that having multiple properties at issue will necessitate additional discovery. But this point ignores that the properties at issue are largely cross-collateralized, providing a demonstrable relatedness on the issue of priority but also a likelihood of substantial overlap with respect to each property at issue.

The objectors' response also suffers from other inconsistencies and contradictions. They previously proclaimed to be ready to immediately and expeditiously address priority, but now they seek to expand discovery and the length of the process. (*See, e.g.,* Docket No. 140, at 5 (arguing for lien priority determination without discovery on the basis of paperwork submitted).) The objectors previously

[2] In paragraph 49 of the February 28 motion, the Receiver reported that, in addition to the institutional lender's claim, 185 other claims had been filed against the properties in the proposed initial tranche (properties 74-78). Based on the extensive work reviewing claim forms and updating records conducted by the receiver and his professionals subsequent to that filing, the Receiver believes that the correct number of claims against these properties is 169, as follows: 3074 Cheltenham (47 claims); 7625 S East End (20 claims); 7635 S East End (30 claims); 7750 S Muskegon (41 claims); and 7201 S Constance (31 claims).

argued that the claims process should be shortened to 30-60 days but now they seek to elongate it. *Compare* Docket No. 280 at 6 (demanding a claims process of 60 days and complaining about delay and that the proposed process was too long), Docket No. 285 at 2 (seeking a hearing on lien priority within 30 days after a shortened claims bar date) *with* Response at 12-13 ("The Receiver proposes a mere 60 days for discovery. It will be an undue burden on all parties to gather, produce, and review relevant documents in such a limited time."). They even attempted to use the professed need for a lien priority hearing to stop all property sales, which the Courts have rejected. (*See, e.g.,* Docket No. 447 at 4-5; *see also* Docket No. 444, 4/23/2019 Tr. at 7-14 (finding that "it makes sense … to deal with … claims in an orderly fashion" through "an orderly claims process," and rejecting lenders' request for an immediate, first-lien priority determination).)

Although they previously argued that 30 days was sufficient, the objectors now complain that 60 days is too short for discovery, citing various issues including COVID-19. The Receiver notes that the motion was prepared and filed before the extent of the pandemic was understood, and recognizes the current environment will require everyone to adapt. The Receiver does not oppose modifying the proposed discovery period (particularly for the initial tranche), or issue other orders in regards to the process and schedule, which can include a status conference at the 45-60 day mark where discovery issues can be addressed including the possibility of allowing

additional discovery. As with all aspects of the process, the Court has the discretion to adjust any limitations to ensure that the process is fair and equitable.[3]

III. The Objectors Misstate The Role Of The Receiver And Seek To Improperly Limit His Role.

Another false premise developed by the objectors is the idea that the Receiver is advancing interests on behalf of one group of claimants and intervening in disputes in which he has no interest. (Response at 15-19) The objectors' position that the Receiver is precluded from making any legal or factual recommendations regarding competing claims is unsustainable and contrary to law. "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." *SEC v. Wealth Mgmt., LLC*, 628 F.3d 323, 332 (7th Cir. 2010). As the person responsible for administering the claims process, the Receiver will evaluate the validity, fairness, legality, and classification of each claim and report to the Court, on a property-by-property basis, all of the information bearing on the claims that the Receiver believes in his judgment and discretion to be reasonably necessary for the Court to resolve any disputes with respect to or between

[3] The objectors' citation to *SEC v. Torchia* is inapposite. In *Torchia*, the district court's complete denial of a claimant's request for discovery did not allow a meaningful opportunity to contest the Receiver's determinations and calculations. 922 F.3d at 1317-18. The court did not find that summary proceedings without discovery inevitably run afoul of due process, finding instead that "maybe things would have been different had the receiver … submitted evidence supporting how he arrived at the amount [included in his distribution plan]." *Id.* at 1318. The court thus declined to mandate discovery, but remanded with directions for the receiver to submit evidence, the methodology used, and legal bases to the district court, and for the district court to give investors an opportunity to challenge those positions. Then, the court noted, the district court will be in a better position to determine whether discovery is warranted. *Id.* at 1319. If anything, this result supports the Receiver' process here.

the submitted claims. (*E.g.,* Motion, ¶¶ 48, 51) That can and must include any important legal or factual items that may arise on priority or other issues.

Even the case relied upon by objectors indicates that the Receiver is obligated to advocate to the Court what he believes to be the best course of action to distribute the assets of the estate. (Response at 18 (citing *SEC v. Schooler*, 2015 WL 1510949, *3 (S.D. Cal. March 4, 2015))). In *Schooler*, the district court concluded that as an officer of the court a receiver *"has a duty to* protect, preserve, administer and *distribute appropriately the receivership assets and must advocate, to the court, courses of action that are consistent with those duties*." *Id.* (citing *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006) (receiver's role is to assist the district court in achieving a final, equitable distribution of assets)) (emphasis supplied). To remain unbiased between the parties in the litigation, a receiver "must not take positions or advocate for actions primarily for the benefit of one party *unless such positions or actions are consistent with the receiver's fiduciary duties*." *Id.* (emphasis supplied) Accordingly, in exercising his duty to advocate for the appropriate distribution of receivership assets the Receiver in this case may recommend a course of action which benefits one party over another. *See Elliott*, 953 F.3d at 1577 (a receiver may at times take adverse positions to certain claimants). From time to time, the Receiver also must zealously oppose efforts to tilt or skew the process by one or more participants, less it become unfair or inequitable for others. There is no reason to believe, however, that the positions taken by the Receiver to

ensure and implement a fair claims process will benefit investor lenders over institutional investors, or vice versa.

The Receiver is not advocating on behalf any claimants, as stated in the motion itself. (Motion, ¶¶ 37, 40) The fact that the Receiver is participating in discovery is not an advocacy effort, but directly related to the Receiver's responsibilities for the claim process and the fact that as part of that process, he is responsible for examining issues of claim and lien validity, fairness, legality, and classification, allowing for significant efficiencies in this process and benefit to the Court. Nor is the Receiver intervening in the priority dispute – that dispute is part of the claims process due to the nature of the fraud, as the Receiver has articulated from the inception of the Receivership. *See also Elliott*, 953 F.2d at 1577 (receiver's role in the claims process included opposing secured claims for the benefit of other secured claimants). And it is the Court that ultimately will determine which claimants have priority.

IV. The SEC Has The Right To Participate In All Aspects Of The Process Implemented By The Court.

The SEC brought this action to stop the Cohen's fraudulent actions and Ponzi scheme. As the plaintiff, the SEC has participated in every facet of this litigation, including the issues leading to this motion. The SEC has weighed in on virtually every matter of substance and it is appropriate for the Court to give significant weight to the position of the SEC on matters of substance in an SEC enforcement action. (*See, e.g.,* Docket No. 614 at 2 ("The Court's position with respect to these applications is influenced by, and with, that of the SEC.")). The SEC, as Plaintiff in this action and the party that sought the appointment of a receiver, has been involved

throughout the development of the process for resolving disputed claims. The Receiver believes it necessary and essential that the SEC have the right to participate in this process, and agrees with the arguments advanced by the SEC on this issue.

V. The Court's Establishment Of A Receiver's Lien Is Necessary And Appropriate.

A receiver's lien is critical in this action as the Receiver will not be able to do additional work in the claims process without such certainty in funding. The receiver's lien request covers the work by the Receiver and his counsel regarding the establishment and implementation of a process to address over 2,400 claims submissions for approximately 1,000 claimants, and the management and disposition of 116 properties, many of which did not or are not generating sufficient income to cover their expenses. The receiver's lien requested here would reimburse the Receiver and his counsel for their efforts in the process, and will be paid from the sales proceeds of each property. (Motion, ¶¶ 52-57).

Receiver's liens are appropriate in federal equity receiverships, even when placed ahead of other secured interests. *See Gaskill, v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994) (citations omitted) ("[the] district court's award of a receiver's compensation is … firmly within its discretion, … and the court may consider all of the factors involved in a particular receivership in determining an appropriate fee"); *Elliott*, 953 F. 2d at 1576 (district court has discretion over who will pay the costs of the receiver); *see also Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 842 (7th Cir. 2015) (citing *Gaskill*) ("[r]eceivers can displace even *prior* security interests in receivership property in some circumstances").

The objectors' response to these legal and general policy principles is conclusory and myopic. They argue that the Court has authority to allow a receiver's lien on the property in a receivership to cover receivership expenses only if "the receivership benefited the property and the mortgagee acquiesced in, or failed to object to, the receivership." (Response at 21 (citing *Gaskill*)). However, *Gaskill* does not say, as the objectors suggest, that this is the "only" circumstance in which a receiver's lien is allowed. *Gaskill* makes clear several points that describe the applicable law and put the language the objectors quote in context when it comes to a receiver's liens in federal equity receiverships. First, *Gaskill* affirms that "the district court has authority to impose a lien on the property in a receivership to satisfy the receivership expenses." *Gaskill*, 27 F.3d at 251. Second, *Gaskill* explains that "[r]eceivership is an equitable remedy, and the district court may, in its discretion, determine who shall be charged with the costs of the receivership." *Id.* (citations omitted). Third, *Gaskill* identifies the "general rule" that "the expenses and fees of a receivership are a charge upon the property administered." *Id.* (citing *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 375-76 (1908)). Fourth, *Gaskill* confirms that under federal common law a "[c]ourts in equity have allowed liens for receivership expenses to take priority over secured creditors interests in the property when the receiver's acts have benefited the property." *Id.* (citing *Elliott*, 953 F.2d at 1576-77). *Elliott*, which *Gaskill* cites with approval and follows, cuts through the issue, explaining that "there is an 'implied understanding that the court which appointed him and whose

officer he is will protect his right to be paid for his services, to be reimbursed for his proper costs and expenses.'" *Elliott*, 953 F.3d at 1576 (citations omitted).

The objectors' argument that the Receiver's "general assertion" of benefit is insufficient to surcharge a secured creditor's collateral, is unsupported. They ignore the benefit of work already performed and specific descriptions of benefit that the Receiver has made and which the process itself calls for. (Motion, ¶¶ 7-19, 32-35, 38, 40). While they rely upon *Elliott*, that case clearly supports the appropriateness of a receiver's lien in a case like this. Further, the objectors' reliance on *S. Cnty. Sand & Gravel Co. v. Bituminous Pavers Co.*, 108 R.I. 239 (1971) is unavailing.[4]

The objectors further argue that the Receiver would not confer a benefit even if he concludes that their claims are valid, fair, legal, and properly classified. (Response at 22) *Elliott* dispels this notion, too, finding that secured creditors receive a benefit that supports a receiver's lien in a case where part of the defendants' "fraud was convincing investors they were collateralized when they really were not" (like here) and using "the same securities as collateral for several different investors" (like here) and the Receiver spent significant time "cutting through this web to determine who really was entitled to the collateral" (like here) and opposing "many competing claims of secured status to the same property" (as will be inevitable here). *Elliott*, 973 F.2d at 1577. The court further explained that even where "the prevailing secured

[4] *Elliott* did not cite *South County* for the proposition that a receiver's implementation of a claims process is ineludibly antagonistic to a secured lender's interests. Nor does *South County* stand for the proposition that a receiver passing on the validity, fairness, and legality of claims, and ensuring that the process is fair for all participants should not be reasonably compensated for those efforts. (S*ee also* Motion, ¶ 52)

claimant had to fight the Receiver's opposition to his claim, he reaped benefits when the Receiver defeated competing claims. By combatting competing claims, the Receiver became his ally. We find that, with these type of activities, the Receiver conferred a benefit on the secured creditors and merits fees from their collateral." *Id.*

The objectors' argument that the Receiver would confer no benefit on the prevailing secured creditor by reporting "to the Court all of the information bearing on the claims the Receiver believes in his judgment and discretion to be reasonably necessary for the Court to resolve any disputes with respect to, including between, the submitted claims" (Response at 22) is also wrong for similar reasons. "Even though a receiver may not have increased, or prevented a decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation." *Elliott*, 973 F.2d at 1577 (citing with parenthetical *Donovan v. Robbins*, 588 F. Supp. 1268, 1273 (N.D. Ill. 1984) (the district court awarded the receiver a fee simply for determining how much money to release to a creditor)). Here, the Receiver has been, is, and will be providing such benefits to all claimants. (*See, e.g.,* Docket No. 710, at 3 ("the Court once again reaffirms both that there is a significant need for the Receivership Assets to be managed by a neutral party until an orderly claims process is concluded, and that the Receiver's efforts have benefitted and will continue to benefit the Receivership Estate")).

To fit their narrative in opposition to the receiver's lien, the objectors seek to recast the Receiver as their primary antagonist, an argument rejected in *Elliott*, where the appellants argued that the receiver was an adverse party and all of his

work was to deprive the appellants of their secured interest. *Elliott*, 953 F.2d at 1577. Just as in *Elliott*, "[t]his is not exactly true, for the Receiver is an officer of the court." *Id.* (citations omitted). As the court in *Elliott* noted, "[e]ven though the Receiver may at times take adverse positions to certain claimants, the Receiver acts under supervision of the court, *id.*; for the court must independently approve the Receiver's legal and factual findings." *Id.* (citations omitted).

Impliedly admitting the necessity and importance of having an administrator, the objectors suggest placing the burden of claims administration with Magistrate Judge Kim. Such a suggestion is neither proper nor practical. The Court has already noted the importance of the Receiver's role in implementing the claims process, now informed by institutional knowledge gained through the work performed over the past 22 months. If anything, in light of that knowledge and information, even if such a transition were feasible or practical, it would lead to greater delay and expense.

Leaving no argument unmade, the objectors traverse to the other side basically arguing that the Receiver is unnecessary because all claimants will take discovery, present evidence, and make their own arguments. That argument misconceives the role of the Receiver. The Receiver has a duty and responsibility to review all submitted claims, analyze them, vet them, and make an independent determination as to their validity, fairness, and legality, and then develop a fair and equitable distribution plan; in so doing, the Receiver levels the playing field for all involved. To that end, there may be some information that the Receiver has recovered or discovered that may not be in the claims submissions but which ought to be

considered by the Court in determining the validity, fairness, and legality of certain claims for the benefit and equity of all involved.

The objectors next argue that the Receiver's lien request is premature. It is not. First, the Receiver has already performed significant work to implement the claims process and the "time spent disentangling the [Cohens'] paper trail is relevant, as is … [t]ime spent in preparing his Proposed Plan with regard to these secured creditors…."[5] *See Elliott*, 953 F.2d at 1578. Second, it is essential for the Receiver and the retained professionals and vendors to have certainty that their substantial and essential work in implementing the claims process will be fairly compensated through a receiver's lien. This is particularly true as the general assets of the Estate appear increasingly unlikely to be sufficient to cover the costs of the Receivership. In such circumstances, liens have been approved to ensure that if a property leaves the Receiver's control that it will be subject to a lien that provides collateral for approved fees and expenses to be paid. *See Gaskill*, 973 F.2d at 251 (citations omitted).

Moreover, and contrary to the objectors' arguments, the need for a lien is neither speculative nor hypothetical. Some of the work has already been performed. The Court further can allow the receiver's lien premised on the understanding that the receiver will be providing a benefit by implementing the claims process and

[5] *See* Docket No. 703, at 2 (during the third and fourth quarter of 2019, the Receiver accepted over 2,000 claims submissions; conducted initial reviews of those claims; prepared and filed three status reports regarding those claims; prepared a preliminary report listing nearly a thousand claimants and their claim amounts; and preliminarily identified at least 116 properties potentially subject to secured and often competing claims, including claims associated with cross-collateralized loans; devoted substantial time and attention to analyzing the nature of the claims, considering the timing and prioritization of claims, and articulating the litany of issues to be presented to the Court).

performing the duties that the Court orders the Receiver to perform. Finally, the fee application process will be a means for the Court to review the time and expenses conferring that benefit to confirm that the amounts to be satisfied pursuant to the lien are reasonable and appropriate before anything is paid.

CONCLUSION

For the reasons set forth herein, and in the Receiver's opening motion and the SEC's reply brief, the Receiver respectfully requests that his motion for approval of a process to resolve disputed secured claims be granted.

Dated: June 22, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, I electronically filed the foregoing **Receiver's Reply In Support Of Proposed Claims Process** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. A copy of the foregoing was served upon counsel of record via the CM/ECF system.

I further certify that I caused true and correct copy of the foregoing to be served upon the following individuals or entities by electronic mail:

- Defendant Jerome Cohen (jerryc@reagan.com);
- All known EquityBuild investors; and
- All known individuals or entities that submitted a proof of claim in this action (sent to the e-mail address each claimant provided on the claim form).

I further certify that the **Receiver's Reply In Support Of Proposed Claims Process** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

/s/ Michael Rachlis

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