UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

RECEIVER'S RESPONSE TO MORTGAGEES' MOTIONS FOR RECONSIDERATION (DOCKET NOS. 814 & 818)

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The Mortgagees' Motion for Reconsideration (the "Motion") speaks loudly for everything it does not contain. It is not based on anything the Court failed to consider, nor on newly discovered evidence. It is not based on any argument that could not have been made before, nor on any new law that changed the legal landscape. It does not show that that the Court misunderstood or ignored the law, nor that it abused its discretion in structuring the claims review process as it has. Instead, the Motion is precisely what a motion for reconsideration *cannot* be. It is a rehash of prior arguments. It ignores the Court's statements that all claimants' interests in a fair and equitable process will be protected by notice and an opportunity to be heard through various pleadings, discovery, and evidentiary hearings. It does not articulate, address, or otherwise acknowledge the detailed process before the Court to resolve all issues associated with the claims of all claimants, including but not limited to the Certain Mortgagees. The Motion, which is filed by roughly 1% of the total claimants, merely repeats the same arguments that the Court has already rejected, adding further delay and additional cost. The Motion should be denied.

Contrary to the protestations now repeated in the Motion, the Court has made clear:

> [O]nce regular discovery is conducted, the receiver can then evaluate whether or not it is going to assert … [a claim of fraudulent conveyance or other sort of claim that would act to void or nullify a particular lien and, if so, then] provide the parties with a disclosure at that time; then that particular lienholder can decide whether or not they need additional discovery….
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> Basically, the disclosure will … identify[] the lien that the receiver will seek to nullify or void and the factual basis … for that legal claim. … [The receiver's disclosure will in essence answer the question], "Are you going to seek to nullify a lien with regard to the property at issue; and, if the answer is 'Yes,' set forth the factual basis for such a theory."

(9/23/2020 Tr. of Proceedings at 25-27)

With this, and the other pleadings, discovery, and potential evidentiary hearings, the Court has more than aptly addressed due process concerns in its discretion and consistent with the law.

I. The Certain Mortgagees Do Not Meet The Threshold Required For Motions For Reconsideration.

The Motion ignores the high standard and burden for a motion for reconsideration:

> The power to reconsider a prior decision is to be exercised only in the rarest of circumstances and only where there is a compelling reason—for example, a change in, or clarification of, law that makes clear that the earlier ruling was erroneous, *Solis v. Current Development Corp.*, 557 F.3d 772, 780 (7th Cir.2009); *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571–72 (7th Cir.2006), or where the court made a significant mistake. *United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008). **It is not a mechanism that allows a party to revisit strategic decisions that prove to be improvident, to make arguments that could and should have been made in prior briefing, to express mere disagreement with a decision of the court, or to reprise or "rehash" arguments that were rejected.** *Goplin v. WeConnect, Inc.*, 893 F.3d 488 (7th Cir. 2018); *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014). …
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> Not surprisingly … any motion for reconsideration, also serves a limited function. It must be based on a manifest error of law or fact or on newly discovered evidence. *Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505–06 (7th Cir. 2016)…. It is not an opportunity "to advance arguments or theories that could and should have been made before the district court rendered its judgment." *Miller v. Safeco Ins. Co. of America*, 683 F.3d 805, 813 (7th Cir. 2012). ….
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> Nonetheless, as this case unfortunately shows, motions for reconsideration continue to be routinely filed, prompting the Seventh Circuit to remind the Bar that "in a passage quoted by other courts literally hundreds of times... '[a] court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" *Cehovic-Dixneuf v. Wong*, 895 F.3d 927, 932 (7th Cir. 2018).

Terese F. v. Saul, 396 F. Supp. 3d 793, 794-95 (N.D. Ill. 2019) (emphasis supplied; citations omitted); *see also Paine v. Berglind*, 06 C 3173, 2012 WL 6727243, at *9 (N.D. Ill. Dec. 28, 2012) arguments raised for the first time in a reconsideration motion are waived) (citations omitted).

These statements and logic directly apply to the Motion. As in *Saul*, the Certain Mortgagees' pattern of filing repetitious motions, ongoing for over two years, treats the Court's decisions as mere drafts. They ignore that the arguments they advance here, which they have raised previously, about timing, sequence, and the nature of any objections or claims that may be asserted by the Receiver, were addressed by the Receiver and rejected by the Court. (*See, e.g.*, Dkt. No.

720, at 5-6) Instead, as with so many of their submissions, the Motion is argument by attrition, based solely on their disagreement with the Court's decisions and exercise of its considerable discretion to fashion a fair and equitable claims process for the benefit of all claimants.

Following the Receiver's proposal, the Court's claims process allows the Receiver to determine what issues and claims to raise after the initial discovery period – and what claims do not have sufficient support and therefore should not be asserted. (*See, e.g.*, Dkt. No. 720, at 5-6; *see also* 9/23/2020 Tr. at 25-27) This process is more time and cost efficient because it avoids discovery "with regard to properties and lienholders where the receiver really has no intentions of asserting such an issue." (9/23/2020 Tr. at 25) And it allows the claimants to request leave to take additional discovery regarding the *specific* issues the Receiver determines to pursue. 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. (*Id.* at 25-27; *see also, e.g.*, Dkt. No. 720, at 5-6) Because this Motion is simply another bite at the apple, it should be denied.

II. The Court's Process And Procedures For Summary Proceedings Is Within Its Discretion And Consistent With Applicable Law.

Ignoring applicable law and the details of the process the Court has fashioned, the Certain Mortgagees instead repeat prior arguments, to wit, that summary proceedings violate state and federal law. But the applicable law is clear and legion that summary proceedings in a federal equity receivership are proper and appropriate, when notice and opportunity to be heard are provided. This is precisely what the court held in *SEC v. Elliott*, 953 F.2d 1560 (11th Cir 1992), which arose from a Ponzi scheme, just like this case. *Elliott* involved claims of fraud. *Elliott* used and affirmed the propriety of summary proceedings, including to review and vet allegedly secured claims in real estate. And there is nothing in the Motion or any cases cited therein that shows that this Court made a significant error exercising its broad discretion to use summary proceedings.

As also noted in *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986) (citations omitted):

> We have repeatedly held, however, that the use of summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules, is within the jurisdictional authority of a district court. ... Such procedures "avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership." *Wencke II*, 783 F.2d at 837 n.9. Specifically, we have noted that "[r]eceivership courts have the general power to use summary procedure in allowing, disallowing, and subordinating claims of creditors." *Arizona Fuels*, 739 F.2d at 458. The procedures used by the district court in this case were a reasonable and practicable attempt to administer the receivership without depriving the creditors of fair notice and a reasonable opportunity to respond. …

In addition to ignoring applicable law (outside a single reference to *Elliot* in a footnote), the Motion ignores the procedural protections the Receiver included in the process and does not show how the process fails to avail them of their due process rights. Case law shows that the Court can avoid the formalities of the federal rules of civil procedure, in balancing equities of the situation, as long as notice and right to be heard are present. (*See* Receiver's Reply, Dkt. No. 720, at 7 (citing *Elliott*, 953 F.2d at 1566, 1568)) These objectors do not show that the Court overlooked or misunderstood anything.

III. No State Or Federal Authorities Establish That This Court's Process For Resolution of Claims Is Improper.

The Certain Mortgagees nevertheless pronounce that "IUFTA Requirements Are Not Satisfied by the 'Disclosure.'" Such an ontologically certain pronouncement suggests there are facts or law to support it. But there are none. To the contrary, the procedure the Court has described will provide adequate notice and an opportunity to be heard. The Court has undertaken deliberate and scrupulous efforts to create a fair process where all claimants will have an opportunity to receive notice of the claims and issues affecting their interests, participate in the process, and present their defenses, including through discovery, written submissions, and an evidentiary hearing if necessary. Nevertheless, the Certain Mortgagees make the anticipatory

assertion that the disclosure statements are inadequate because they will not have sufficient detail. But this argument is belied by the process the Court has said it will follow, expressly stating that the Receiver's disclosure will "set forth the factual basis for the claim." (9/23/2020 Tr. at 27)

Second, none of the cases advanced in the Motion finds that a disclosure statement as the Court describes here is improper either in summary proceedings generally or where a fraudulent transfer claim is brought as part of a summary proceeding specifically. Instead, these cases discuss the requirements for proof under IUFTA. Nothing advanced by the Court or Receiver suggests that the Receiver would not meet these statutory requirements if a claim is brought under IUFTA.

There is no question, under the law, that the Court can use summary proceedings to streamline the process, the submissions, and resolution. *See Elliott*, 953 F.2d at 1566 ("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."); *see also id.* 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."). The Receiver's proposed summary procedure arises out of the principles and guidance of the Federal Rules of Civil Procedure. (*See* Receiver's Reply, Dkt. No. 720, at 7) The Court 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."); *Hardy*, 803 F.2d at 1037 (court's "broad powers and wide discretion" stem from the need for orderly administration of the estate).

The Certain Mortgagees' citations to federal rules and cases neither add anything new (another reason to deny the Motion, as discussed *supra*) nor identify anything problematic with

the Court's decision. Indeed, the reference to Rule 9 (also raised during hearings on the claims process motion) and the string of cited cases are inapplicable as they neither involve summary proceedings, nor receiverships, and none suggest that this Court's procedures – that require a detailed disclosure, discovery, briefing, and hearing – do not satisfy due process concerns. For example, contrary to the misleading description of *B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005) that case does not involve a receiver, nor or a court exercising its wide discretion in a receivership to establish summary proceedings. Nor do any of the other cases cited.[1]

The Certain Mortgagees also claim that Fed. R. Civ. P. 8 stands in opposition to the Court's process decision. It does not. Neither *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) nor *Armada (Singapore) PTE Ltd. v. AMCOL Int'l Corp.*, No. 13 C 3455, 2013 WL 5781845 (N.D. Ill. Oct. 25, 2013) involved a receivership or summary proceedings. Neither addressed nor contravened the well-established line of cases approving summary proceedings in connection with claims processes. Beyond that, the suggestion that the factual basis for any such claim will not be adequately disclosed (along with other due process protections) is plainly inconsistent with the Court's directive. (*See, e.g.*, 9/23/2020 Tr. at 25-27)

[1]*PNC Equip. Fin., LLC v. Zilberbrand*, No. 12-CV-03074, 2014 WL 448384 (N.D. Ill. Feb. 4, 2014) involves a plaintiff's efforts to enforce certain guarantees and the defendants' efforts to claim fraudulent conveyances. *Desmond v. Taxi Affiliation Servs. LLC*, 344 F. Supp. 3d 915 (N.D. Ill. 2018) involved an independent action brought by a Chapter 7 trustee. *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502 (7th Cir. 2007) involved a claim by a frozen-out partner who brought RICO, conspiracy and fraud claims. *FirstMerit Bank N.A. v. Wolf Prof'l Ctr., Corp*., No. 13 C 2750, 2013 WL 4847491 (N.D. Ill. Sept. 10, 2013) is a mortgage foreclosure dispute which also had counterclaims including issues of fraud. *Hildene Opportunities Master Fund, Ltd. v. Holata Micco, LLC*, No. 18 CV 1758, 2019 WL 1125798 (N.D. Ill. Mar. 12, 2019) involved a shareholder dilution dispute. *Spector v. Mondelēz Int'l, Inc.,* No. 15 C 4298, 2017 WL 4283711 (N.D. Ill. Sept. 27, 2017) is a false advertising type of case. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436 (7th Cir. 2011) does not suggest that using a disclosure to set forth facts consistent with the directives of the Court is improper as part of a summary proceeding, nor is it a receivership case; instead, the plaintiff made efforts to suggest that the Illinois Consumer Fraud Act did not involve a heightened standard, which the court rejected.

The Certain Mortgagees also make a toothless argument that the summary proceedings here run contrary to Rule 11. (Motion at 8) Once again, there is nothing in the cases that supports this proposition. *Jiminez v. Madison Area Technical College*, 321 F.3d 652 (7th Cir. 2003) involves an employment discrimination case where the plaintiff apparently relied on falsified documents. *Am. State Bank v. Pace*, 124 F.R.D. 641 (D. Neb. 1987) is cited for the unremarkable proposition that the Court needs a mechanism to deter frivolous papers which lack factual or legal support. The Court has the ability to ensure that every pleading, written motion, and other paper is submitted by counsel for all parties and participants in good faith and not for an unreasonable or vexatious purpose. *See, e.g.*, Fed. R. Civ. P. 11; *see also* 28 U.S.C. § 1927.

Finally, there is nothing in Rule 12 or in the 1961 patent decision cited by the Certain Mortgagees (Motion at 9) that suggests that summary proceedings and the procedures set by the Court are improper. Were that the case, summary proceedings would never be allowed for any purpose – but the law is plainly opposite. In any event, the objectors will have the detailed disclosure, discovery, and position paper available to provide the Court with their views regarding the issues, as well as further discovery and an evidentiary proceeding, as needed.

CONCLUSION

For the reasons set forth herein, and for all the reasons previously submitted in writing and during oral argument, the Certain Mortgagees' Motion for Reconsideration should be denied.

Dated: October 26, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I electronically filed the foregoing **Receiver's Response to Mortgagees' Motions for Reconsideration (Docket Nos. 814 & 818)** 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 **Response**, 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 **Response** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

/s/ Michael Rachlis

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