

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

**MORTGAGEES' RESPONSE TO RECEIVER'S TWELFTH INTERIM
APPLICATION AND MOTION FOR COURT APPROVAL OF PAYMENT OF FEES
AND EXPENSES OF RECEIVER AND RECEIVER'S RETAINED PROFESSIONALS**

The Mortgagees identified on Exhibit A object to the Receiver's Twelfth Interim Fee Application and Motion for Court Approval of Payment of Fees and Expenses of Receiver and Receiver's Retained Professionals (the "12th Fee Application"). The Mortgagees previously filed objections to the Receiver's prior interim fee applications (the "Prior Objections"). (*See* Doc. 442, 511, 581, 595, 617, 648, 777, 907, 960, and 1000.) The Court has recently rejected the Mortgagees' objections to the Receiver's ninth, tenth and eleventh interim fee applications for the reasons set forth in an order entered on August 17, 2021. (*See* Doc. 1031.) The Mortgagees also filed objections to the Receiver's request for a super priority lien (*see* Doc. 961), which the Court addressed in another order entered on August 17, 2021 Approving First-Priority Receiver's Lien for Certain Categories of Expenses (the "August 17 Order"). (Doc. 1030.) The Mortgagees seek to preserve their objections to the Receiver's prior fee applications and request for a priority lien by reference herein. With respect to the 12th Fee Application, the Mortgagees specifically object to the Receiver's request in his 12th Fee Application for a blanket super

priority lien for administrative expenses on properties encumbered by their mortgages (the “Estate Properties”) on the grounds that the Receiver has failed to show in his 12th Fee Application that all of the tasks performed during the second quarter of 2021 for which he seeks a super priority lien were incurred in (i) the preservation, management, and liquidation of certain real estate belonging to the Receivership Estate, or (ii) the implementation and management of an orderly summary claim-priority adjudication process. The Mortgagees further object to the Receiver’s claim in the 12th Fee Application that the Court has approved the Receiver’s allocations of its fees and expenses. Finally, the Mortgagees request that the Court subject any fees it may approve to a 20% holdback.

1. The Receiver Has Failed to Show That His Fees and Expenses Fall Within the Categories of Tasks That The Court Found Supports Payment on a Priority Basis.

The Court, over the Mortgagees’ objections, granted the Receiver a super priority lien for fees and expenses incurred in connection with (1) the preservation, management, and liquidation of certain real estate belonging to the Receivership Estate; and (2) the implementation and management of an orderly summary claim-priority adjudication process. (Doc. 1030, p. 11.) The Receiver has failed to show in the 12th Fee Application, however, that all of the fees and expenses were incurred in connection with either of those categories.

For example, the Receiver describes some of his activities as addressing open litigation, notifying his appointment to individuals or entities who may possess books and records, factual investigations, devoting efforts in professional malpractice litigation, engaging in settlement on a life insurance policy, and addressing tax issues in connection with the winding down of business operations. (*See* Doc. 1026, pp. 7-9.) None of these efforts, on their face, were incurred in connection with the two categories of expenses covered by the August 17 Order.

Likewise, the billing records, attached as Exhibit F to the 12th Fee Application, include many entries which do not show, on their face, that they were incurred in connection with the two categories this Court determined could support a super priority lien. Examples of such entries are found on the Receiver's invoices for 4/5/21 through 4/30/21 (p. 36), 5/19/21 through 5/28/21 (pp. 51-52), and 6/2/21 through 6/29/21 (pp. 65-66) for Asset Analysis & Recovery; for 4/12/21 (p. 48), and 5/7/21 through 5/13/21 (p. 62) for tax issues. Likewise, entries on Receiver's counsel's invoices for 4/1/21 through 4/30/21 (pp. 76-77), 5/5/21 through 5/28/21 (pp. 120-22), and 6/9/21 through 6/29/21 (pp. 158-60) for Asset Analysis & Recovery, 6/30/21 for Asset Disposition, 4/2/21 through 4/29/21 (p. 103) for Case Administration, 4/5/21 (p. 169) through 4/30/21 (pp. 114-16) for Status Reports, 4/7/21 through 4/28/21 (p. 116) and 6/1/21 through 6/17/21 (p. 188) for taxes, and 5/10/21 through 5/20/21 (p. 120) for accounting/auditing do not appear, on their face to have been incurred in connection with either of those categories. Further, some of the entries in block billing are for properties that are not part of the claims resolution process. (See *e.g.* 1102 Bingham, Houston, p. 111.) Moreover, some entries do not provide sufficient information to determine if they may meet the criteria for either of the two categories.

Consequently, the Mortgagees request that the Court deny the Receiver's request that the fees and expenses identified in the 12th Fee Application be paid on a priority basis from the proceeds of the sales of the Estate properties. The Mortgagees recognize that the Court may refer the resolution of this issue to the Magistrate Judge, consistent with the August 17 Order. (*See* Doc. 1030, pp. 2, 16-17.)

2. The Receiver Has Failed to Show a Proper Allocation of the Fees and Expenses.

The Receiver also requests that they be paid in accordance with the allegedly Court-approved allocation. (Doc. 1026, p. 15.) The Court in the August 2021 Order stated that it did not

approve the Receiver's allocations. (Doc. 1030, p. 16.) Although the Mortgagees understand that certain fees, if properly supported and all requirements are met, may be chargeable against specific properties, here the Receiver proposes to allocate non-property specific fees across the board, without any accounting of the benefit received by each property that he proposes to surcharge. Indeed, the Court noted in the August 17 Order that an across-the-board allocation may be inappropriate. (Doc. 1030, p. 16, n.8.) Moreover, the Receiver admitted in his 7th Fee Application that he cannot show such benefits with respect to particular properties. (Doc. 755, p. 21.)

Consequently, the Mortgagees request that the Court deny the Receiver's request that the fees and expenses identified in the 12th Fee Application be paid on a priority basis from the proceeds of the sales of the Estate properties. The Mortgagees recognize that the Court may refer the resolution of this issue to the Magistrate Judge, consistent with the August 17 Order. (*See* Doc. 1030, p. 16-17.)

3. The 12th Fee Application Should be Subject to a 20% Holdback.

Consistent with the Court's order approving the Receiver's ninth, tenth and eleventh fee petitions (Doc. 1031, pp. 13-14), if the Court approves the fees requested in the 12th Fee Application, the Mortgagees request that any approved fees be subject to a 20% holdback. Further, consistent with the Court's August 17th Order (Doc. 1039, pp. 14-16), if the Receiver seeks to pay its approved fees from the proceeds of the sales of the properties, the Mortgagees request an additional 20% holdback. In further support of this request, the Mortgagees incorporate by reference their requests for a 20% holdback contained in the Mortgagees' objections to the Receiver's ninth, tenth and eleventh fee applications (Docs. 907, pp.10-12, 960, pp. 12-4, and 1000, pp. 11-13).

CONCLUSION

For the reasons set forth above, the Mortgagees request that the Court deny the Receiver's request in the 12th Fee Application that all of his fees and expenses be paid on a priority basis from the proceeds of the sales of the properties.

Respectfully submitted,

<p><u>/s/ Michael Gilman</u></p> <p>Edward S. Weil (eweil@dykema.com) Michael A. Gilman (mgilman@dykema.com) Todd Gale (tgale@dykema.com) Benjamin W. Chertok (bchertok@dykema.com) Kevin Connor (kconnor@dykema.com) Dykema Gossett PLLC 10 S. Wacker Drive Suite 2300 Chicago, Illinois 60606 (312) 627-5675 <i>Federal Home Loan Mortgage Corporation 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; Wilmington Trust, National Association, as Trustee for the Registered Holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; Federal National Mortgage Association; U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp.,</i></p>	<p><u>s/ Jill L. Nicholson</u></p> <p>Jill L. Nicholson (jnicholson@foley.com) Andrew T. McClain (amcclain@foley.com) Foley & Lardner LLP 321 N. Clark St., Ste. 3000 Chicago, IL 60654 Ph: (312) 832-4500 Fax: (312) 644-7528 <i>Counsel for Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; 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; 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; 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; 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; Federal National Mortgage Association; and Sabal TLI, LLC</i></p>
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<p><i>Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; 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; 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 Sabal TLI LLC; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2; BC57, LLC; UBS AG; 1111 Crest Dr., LLC, Pakravan Living Trust, Hamid Ismail, Farsaa, Inc.; Thorofare Asset Based Lending REIT Fund IV LLC</i></p>	
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EXHIBIT A

Freddie Mac; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; 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; 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; 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; 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; Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1; Federal National Mortgage Association ("Fannie Mae"); BMO Harris Bank N.A.; Midland Loan Services, a Division of PNC Bank, National Association; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Colony American Finance 2015-1; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; BC57, LLC; UBS AG; Thorofare Asset Based Lending REIT Fund IV, LLC; and Liberty EBCP, LLC.; 1111 Crest Dr., LLC, Pakravan Living Trust, Hamid Esmail, and Farsaa, Inc.