

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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U.S. SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
	Plaintiff,)	Civil Action No. 18-CV-5587
)	
	v.)	Hon. John Z. Lee
)	
EQUITYBUILD, INC., et al.)	
)	
	Defendants.)	
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SEC’S RESPONSE TO BC57’s MOTION FOR LEAVE FOR EXPERT WITNESS

Three days before discovery closed, BC57 moved to allow an unspecified opinion from a real estate attorney. (ECF 1076).¹ Under the current claims process schedule, the investor claimants will not have the opportunity to depose or cross-examine BC57’s expert. Moreover, the limited disclosure BC57 attached to its Motion does not satisfy the requirements of Rule 26(a)(2), further limiting the investors’ ability to probe the attorney’s opinions, bases for his opinions, facts he considered, and prior statements. For these reasons, and those discussed below, the investors and other claims process participants should be given the opportunity to depose any expert proffered by BC57 prior to submitting their position papers:

1. Discovery for Group 1 of the claims process has been ongoing since July 9, 2021. (ECF 1006, p. 2). Discovery closes on November 4, *id.*, and the last scheduled deposition will occur on November 3. The parties’ position papers are due December 9, with responsive

¹ BC57 filed its Motion on the afternoon of November 1 without noticing the Motion for presentment. (ECF 1076). The following morning, the Court issued a minute order granting the Motion. (ECF 1078). The SEC, which would have opposed BC57’s motion, files this response to preserve its rights and ensure the Court and claims process participants are fully apprised in advance of the next hearing in this case, which is scheduled for November 17. *Id.*

statements due January 13, 2022. *Id.* There is no provision for expert discovery. *Id.*

2. The expert BC57 seeks to utilize is a real estate attorney from a national law firm. (ECF 1076, pp. 71-72). While BC57 has not disclosed the opinions its expert will render, BC57's Motion suggests the expert will opine that BC57's mortgage should have priority over the investors' earlier mortgages. (*Id.*, p. 4).

3. Beyond identifying the attorney's credentials, the "disclosures" BC57 has provided do not satisfy the requirements of Rule 26(a)(2). To that end, BC57 merely attaches the curriculum vitae of its proposed expert. (ECF 1076, p. 71). Among the requirements of Rule 26(a)(2) that the CV does *not* include are: (a) "a complete statement of all opinions the witness will express and the basis and reasons for them"; (b) the facts or data considered by the expert; (c) the expert's previous trial and deposition testimony; or (d) the expert's compensation.

4. Given BC57's limited disclosure, the investors and other claims process participants will be required to submit their position papers on December 9 without knowing the opinions BC57's expert will offer, the basis for those opinions, the facts relied on by the expert, or any prior inconsistent statements.

5. Moreover, because the period for depositions closes on November 4, the claims process participants will not be able to test the expert's opinions before submitting their opening position papers or responding to BC57's submission. Indeed, there currently is no mechanism for the investors to obtain the testimony of or otherwise confront BC57's proposed expert. This raises serious due process concerns. *See, e.g., Cooper v. Salazar*, 196 F.3d 809, 815 (7th Cir. 1999) ("confrontation and cross-examination are important procedural safeguards, especially where factual determinations are made.") (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.")).

6. While the Order establishing the claims process does provide a mechanism to seek leave for rebuttal expert reports, (ECF 941, p. 5), it is unlikely that most investors will be able to retain a rebuttal expert to prepare a report in the required timeframe. Specifically, under the current schedule, investors would have between December 9 (when BC57 will file its expert report) and January 13 (when responsive submissions are due), a period including the winter holidays. (See ECF 1006, p. 2).

7. Given the investors' limited participation in the discovery process to date and the economic impediments to retaining an expert, the SEC believes that most investors will be not marshal the resources necessary to rebut BC57's proposed expert. On the other hand, various investors have availed themselves of the opportunity to attend the video depositions made available to all claims process participants.

8. While the Order establishing the claims process allows a party to seek leave to include an expert witness (ECF 941, p. 5), the Court had cautioned that expert witnesses would likely be unnecessary. (See, Jan. 29, 2021 Hearing Tr. at 40:25-41:10). Specifically, the Court advised that it would be a "non-starter" to include the sort of expert BC57 seeks to proffer:

given the fact that I have a hard time contemplating what sort of experts you would have other than ones that would basically provide legal opinion, I'm not going to envision any expert discovery at this time ... *But, again, an expert that says, well, you know, I'm a real estate lawyer and I believe that the priority should be this, this, this, and this -- which I've seen -- you know, those types of experts are non-starters...I don't want to see those reports...but at this point, I don't foresee the need for any expert discovery...*

(*Id.* (emphasis added)).

9. Given the Court's admonishment, allowing a deposition of BC57's attorney-expert, in advance of the parties' position papers, will provide claims participants the opportunity to probe whether the expert is providing a legal opinion of the sort the Court advised would be impermissible. It will also allow claimants to address the issue in their position papers.

WHEREFORE, the SEC respectfully requests that the claims process participants should be given the opportunity to depose any expert proffered by BC57 prior to submitting their position papers.

Dated: November 2, 2021

Respectfully submitted,

/s/ Benjamin Hanauer

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CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing Opposition, via ECF filing, to all counsel of record and Defendant Shaun Cohen on November 2, 2021.

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