Arnold & Porter

Michael A.F. Johnson
Partner
+1 202.942.5783
Michael.Johnson@arnoldporter.com

February 21, 2023

VIA ECF

Office of the Clerk of the Court
United States Court of Appeals for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

Re: *Securities and Exchange Commission v. Equitybuild, Inc.*, No. 22-3073: Submission of Supplemental Authority

Dear Clerk of Court:

FHFA respectfully submits, under FRAP 28(j) and FRAP 2,[1] items from recent district court proceedings relevant to the pending motion to dismiss this appeal. Each became available only after briefing concluded February 3, 2023.

The first is the transcript of a February 8 argument on a motion to approve distributions of proceeds from sales of certain properties. During that hearing, counsel for Kevin B. Duff, in his capacity as receiver of Equitybuild Inc., et al. ("Duff") stated that:

- Several of Duff's proposed allocations of fees and costs to specific properties included errors;
- Duff will correct the errors, which requires *recalculating all allocations*; and;
- Because "there's both time and cost expense associated with [doing so]," Duff "*wanted to be sure that we had [identified] everything that needed to get corrected done before we go ahead and rerun [the calculations]*."

See Exhibit A, Hearing Tr. at 95:25-96-20 (emphasis added). These statements are relevant to FHFA's argument that "[g]etting these first allocations right is … vitally important, as any error would propagate through the entire series," with "extensive calculations [then needing] to be erased and done over," Dkt 15 at 19, as well as to risks and harms that FHFA highlighted in the briefing. *See id*. at 15 at 15-20; Dkt. 20 at 5-6.

Second, on February 13, Duff moved to distribute proceeds from the sales of certain properties, and the district court promptly approved. *See SEC v. Equitybuild, Inc.*, No. 1:18-cv-5587, Dkts. 1382, 1383. Those distributions will exhaust all funds corresponding to those

[1] FHFA recognizes the items are not legal authority and may not fit perfectly within FRAP 28(j). Nor are they submitted on the merits, so a motion to supplement the record under Rule 27 may not fit either. FRAP 2 nevertheless allows the Court to consider them, as good cause exists: They are relevant to the pending motion and became available only after briefing closed.

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properties, and therefore assume that all allocations up to now have been done properly. If FHFA prevails in its appeal, the payments will have been computed incorrectly, with no holdback available to rectify the error.

Respectfully submitted,

/s/ Michael A.F. Johnson

Michael A.F. Johnson

cc: All Counsel of Record (via ECF)

Arnold&Porter

CERTIFICATE OF COMPLIANCE AND SERVICE

Counsel for FHFA certifies that this letter complies with the type-volume limitations of Fed. R. App. P. 28(j), because the body of the letter contains no more than 350 words. Specifically, the body of the letter contains 350 words, as counted by the word-count feature of Microsoft Word.

On this 21st day of February, 2023, I filed the foregoing document electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF system, which will provide electronic service on all counsel of record.

/s/ Michael A.F. Johnson

Michael A.F. Johnson

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiffs, vs. EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, AND SHAUN D. COHEN, Defendants.	) Docket No. 18 C 5587) Chicago, Illinois) February 8, 2023) 2:00 o'clock p.m.

VOLUME ONE
TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE YOUNG B. KIM, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	U.S. SECURITIES & EXCHANGE COMMISSION BY: MR. BENJAMIN J. HANAUER 175 W. Jackson Blvd., Suite 900 Chicago, Illinois 60604
For the Receiver:	RACHLIS, DUFF, PEEL & KAPLAN, LLC BY: MR. MICHAEL RACHLIS MS. JODI ROSEN WINE 542 South Dearborn, Suite 900 Chicago, Illinois 60605
For Freddie Mac, BC57, UBS, Thorofare, and 1111 Crest Dr., LLC:	DYKEMA GOSSETT BY: MR. BRETT J. NATARELLI MR. TODD A. GALE 321 North Clark Street, 26th Floor Chicago, Illinois 60654
For Citibank, U.S. Bank, Wilmington Trust, Sabal, and Fannie Mae:	FOLEY & LARDNER BY: MR. ANDREW T. McCLAIN 321 North Clark Street, Suite 2800 Chicago, Illinois 60654
For Liberty EBCP, LLC:	DICKINSON WRIGHT, PLLC BY: MR. RONALD A. DAMASHEK 55 West Monroe Street, Suite 1200 Chicago, Illinois 60603

APPEARANCES (Cont'd):

For Midland Loan Svcs.:	AKERMAN, LLP BY: MR. THOMAS B. FULLERTON 71 South Wacker Drive, 46th Floor Chicago, Illinois 60606
For BMO Harris and Midland Loan Svcs.:	STINSON BY: MR. BRADLEY S. ANDERSON 1201 Walnut Street, Suite 2900 Kansas City, Missouri 64106
For Federal Housing Finance Agency:	ARNOLD & PORTER, LLP BY: MR. MICHAEL A. JOHNSON 555 Twelfth Street, NW Washington, D.C. 20004
	ARNOLD & PORTER, LLP BY: MR. DANIEL E. RAYMOND 70 West Madison Street, Suite 4200 Chicago, Illinois 60602
Also Present:	MR. KEVIN B. DUFF, Receiver
Court Reporter:	MR. JOSEPH RICKHOFF Official Court Reporter 219 S. Dearborn St., Suite 1728 Chicago, Illinois 60604 (312) 435-5562

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

(Proceedings had in open court:)

THE CLERK: Calling case 18 CV 5587, United States Securities and Exchange Commission vs. Equitybuild, Inc., et al.

THE COURT: So, in terms of getting your names on the record, let me just go ahead and prompt you before you say your name.

It looks likes we have somebody from the SEC.

MR. HANAUER: Good afternoon, your Honor, Ben Hanauer for the SEC.

THE COURT: And for the receiver?

MR. RACHLIS: Good afternoon, your Honor, Michael Rachlis on behalf of the receiver.

MS. WINE: Good afternoon, Jodi Wine also on behalf of the receiver.

MR. DUFF: Good afternoon, your Honor, Kevin Duff, the receiver.

THE COURT: On the lenders' side, like I did the last time we were on the phone, I will name the institutional lender and let's find out if anyone is here on behalf of that institutional lender.

Freddie Mac?

(No response.)

THE COURT: Citibank?

MR. NATARELLI: Your Honor, Brett Natarelli for

Freddie Mac.

THE COURT: I'm sorry?

MR. NATARELLI: Brett Natarelli for Freddie Mac.

THE COURT: Citibank?

MR. McCLAIN: Andrew McClain, M-c-C-l-a-i-n.

THE COURT: U.S. Bank?

MR. McCLAIN: Andrew McClain.

THE COURT: I take it you're representing both securities?

MR. McCLAIN: Yes, your Honor.

THE COURT: Wilmington Trust?

MR. McCLAIN: Andrew McClain.

THE COURT: Fannie Mae?

MR. McCLAIN: Andrew McClain.

THE COURT: BMO Harris?

MR. ANDERSON: Yes, your Honor, Brad Anderson.

THE COURT: Midland?

MR. ANDERSON: Yes, your Honor, Brad Anderson.

MR. FULLERTON: Good afternoon, your Honor, Tom Fullerton, as well.

THE COURT: Tom --

MR. FULLERTON: Fullerton, F-u-l-l-e-r-t-o-n.

THE COURT: BC57?

MR. NATARELLI: Brett Natarelli.

THE COURT: Can you spell your last name for the

court reporter, Mr. Natarelli.

MR. NATARELLI: Yes. It's N-a-t-a-r-e-l-l-i. N, as in Nancy.

THE COURT: UBS?

(No response.)

THE COURT: No one for UBS?

MR. NATARELLI: Brett Natarelli for UBS, your Honor.

THE COURT: Did you have to think about that?

(Laughter.)

THE COURT: All right. Thorofare?

MR. NATARELLI: Brett Natarelli for Thorofare.

THE COURT: Liberty?

MR. DAMASHEK: Ron Damashek, D-a-m-a-s-h-e-k, for Liberty.

THE COURT: 1111 Crest Drive, LLC?

MR. NATARELLI: Brett Natarelli for that entity.

THE COURT: Sabal?

MR. McCLAIN: Andrew McClain.

THE COURT: Okay. All of the lenders are represented here in court today.

As I indicated during our last status hearing by phone, the purpose of today's hearing is for me to get a better understanding of the objections and also, in some circumstances, to have the objectors walk me through your objections.

In terms of organization, I think what I'll do is follow the lender's response and its organization. In the response, the lenders pointed out 11 objections.

Yes?

MR. JOHNSON: Your Honor, if I may, I'm Michael Johnson. I'm with Arnold & Porter. I represent the Federal Housing Finance Agency.

May I approach just --

THE COURT: Yes.

MR. JOHNSON: Thank you.

Before the Court and all my friends get into that agenda, I just wanted to note for the record that -- first of all, I was pro hac'd in, and my colleague, our Illinois counsel, Daniel Raymond is in the room.

I wanted to note for the record that FHFA maintains its objections to any allocations to the property at 1131-41 East 79th and the property at 7024-32 South Paxton. Those were detailed in our March 4th submission to your Honor and, then, our objection to your Honor's ruling that we tendered to the district court on July 6th of last year. That's all on appeal to the Seventh Circuit.

I just wanted the record to be clear that we maintain and reiterate those objections.

THE COURT: Okay. Thank you.

MR. JOHNSON: Thank you, your Honor.

THE COURT: In terms of the objections, I'm going to jump around and maybe start with ones that are perhaps easier to deal with. For example, when I say "lenders' objection," I'm referring to Document No. 1210. And within the response, there are sub-headings. And these are numbered, so I'll use the same numbering system that the lenders used.

So, for example, No. 4. And this is titled, "Rent Restoration."

So, if I understand the argument correctly, at some point the receiver was using rent money from Property A to pay for repairs, as an example, that were needed for Property B; and, the lenders then came in and said, hey, wait a second, you shouldn't be using our money -- or at least that's the logic -- to fix somebody else's property.

The court agreed and said, receiver, you need to keep everything separate and segregate the funds, and not to use rent money unless it's for that particular property.

Do I have that right?

MR. DAMASHEK: Correct.

THE COURT: Your name?

MR. DAMASHEK: Ron Damashek.

THE COURT: What else are you arguing under rent restoration other than what I just described?

MR. NATARELLI: Your Honor, I think there's an additional piece --

THE COURT: Your name?

MR. NATARELLI: Brent Natarelli.

There's an additional piece, which is that the receiver in other -- in some cases, the receiver used rents from one property to pay another. And the court ordered them not to do that anymore. So, part of the expense was fixing --

THE COURT: I just said that.

MR. NATARELLI: Yes.

THE COURT: What else?

MR. NATARELLI: The additional piece is there were times where the receiver used the receiver's operating account, as they should have, to fund different properties and then needed to go back and reallocate to make that a specific charge by property.

And I don't think any of us contest the expenses attributable to the property being charged to the property. What we're objecting to is the fees associated with figuring out what goes with what having a priming lien.

THE COURT: Meaning once Judge Lee said, yes, you should segregate everything, the receiver then had to go back and fix everything, essentially, right?

MR. NATARELLI: That's correct.

THE COURT: And it took some time to do so, and the receiver is charging the receiver estate for those fees?

MR. NATARELLI: I think in some cases, yes, and in

other cases, no. They were charging specific properties that were thought to be unencumbered and, then, later it was discovered they were, in fact, encumbered.

THE COURT: So, in other words, the lenders think that the receiver should eat those fees?

MR. NATARELLI: No, your Honor. We're arguing that the fees should be drawn from the operating account, which now has additional funds that were not present several months ago.

There's been a recovery from Whitley Penn for several million dollars, that will go to the operating account. There's over a million dollars on hand in the operating account that is available. There's also an additional source of recovery for unsecured creditors in a recent Wells Fargo class action settlement. And there are a number of additional actions that are pending against either Equitybuild, professionals, outside counsel, all of which --

THE COURT: You're taking up way too much time.

Operating account, is that in your response? I didn't see it.

MR. NATARELLI: Your Honor, we didn't address the settlements and potential settlements in the response because those were not present at that time. Those didn't --

THE COURT: No, no, no.

MR. NATARELLI: -- exist yet.

THE COURT: The idea that -- you're not saying that

the receiver should not eat the fees; the receiver should be charging the operating account. And my question is: Is that in the response? Because I didn't see it. I just want to be clear on this.

MR. NATARELLI: No, it's not in the response, your Honor. And I think that's because at the time of the response, it was assumed that the operating account did not have sufficient funds to possibly fund any of the fees, whereas that has since changed.

THE COURT: Let me then turn to the receiver and ask some questions.

Number one, when the receiver was appointed, were you directed by the court to segregate all rent funds?

MR. RACHLIS: No, your Honor.

THE COURT: When you took over as the receiver, was there any indication that the Cohens were not, in fact, commingling funds in order to maintain their properties?

MR. RACHLIS: The evidence that we had was that they were commingling funds.

THE COURT: And tell me about this operating account that Mr. Natarelli just raised for the first time in court.

MR. RACHLIS: So, what he is referring to is -- the receiver had -- all along had an operating account, from which to pay for expenses associated with various properties or various issues that were ongoing. So, that was the account

that was being used, and opened when the receivership began when the receiver was appointed. That's where funds from the Cohens were collected and placed, into there. That's where rent receipts were placed into the receivership account. So, that account had been present.

What Mr. Natarelli is referring to at this point in time are different funds that have been obtained through third-party settlements, that go to the operating account because they're not affiliated with a specific property. They're strictly related to this third-party action for -- and that can be used for a variety of things.

I will say, your Honor, this issue has come up just a few weeks ago before Judge Shah in response to --

THE COURT: I was going to get to that.

MR. RACHLIS: Oh, I'm sorry.

THE COURT: No, no, go on. It's fine.

MR. RACHLIS: Judge, so we had -- the 17th fee application was before Judge Shah, and -- as well as allocation sheets presented to him. And the objection that was raised at that point in time included the one that you've just heard -- which is new; that's a new thing; this was not part of the prior presentation -- where it was articulated by these lenders that those dollars from these new funds should be used for purposes of paying off the 17th fee application, which the court had granted.

The court rejected that and understood that the allocations still are proper, as they are from what was presented to your Honor here, because they go property by property. Benefits were received by the property. And there is both logic and law that supports the fact that those properties should be paying for what those benefits were.

So, the court rejected the idea that this separate account should now be used and that the properties should not pay for the benefits and for the allocated amounts that were provided to Judge -- before Judge Shah in that 17th application.

THE COURT: So, let me come back to you, Mr. Natarelli.

Not only is the argument not raised in the response; there appears that perhaps the law of the case should apply in terms of lenders arguing that point.

What are your thoughts?

MR. NATARELLI: Yes, two points. With respect to it was not raised in the response, it was in the sense that there is a universe of fees that are not being allocated to any specific property. They are being charged to the --

THE COURT: Let's --

MR. NATARELLI: -- receiver's operating account.

THE COURT: Let's focus on --

MR. NATARELLI: That's undisputed.

THE COURT: Let's focus on this, this particular -- the fees that are associated with rent restoration.

MR. DAMASHEK: Judge, Ron Damashek. Can I jump in here?

THE COURT: No, no. Mr. Natarelli, it's his turn. Go ahead.

MR. NATARELLI: Well, Judge, the point is the idea that there would be funds to pay the receiver coming out of the operating fund, that's not a new idea. That's been going on since the beginning of the receivership. That's always --

THE COURT: And Judge Shah has said, no, that's not happening?

MR. NATARELLI: No. Judge Shah permitted that, and the receiver agreed with it, as to a certain set of fees. And, then, there was another set of fees where it was disputed, whether it should go in that bucket or it should go to a specific property --

THE COURT: So, coming back to the rent restoration fees, what is the current status?

MR. NATARELLI: With respect to the 17th fee petition, to the extent there were restoration fees -- and I'm not sure there were any; or, if there were, they were not significant -- those would, per Judge Shah's order, be allocated to specific properties associated with the 17th fee petition.

That petition is not before your Honor today. What's before your Honor are the first, I believe, eleven petitions, which cover a different period of time --

THE COURT: Okay.

MR. NATARELLI: -- where the restoration was more at issue.

THE COURT: That's fine.

MR. NATARELLI: Yes.

THE COURT: Let's go back, then, to the initial question. I asked the question are the lenders asking the receiver to eat those fees, and you said, no, they should come out of the operating funds. But that argument was never raised. So, what was the argument that's in the response, then?

MR. NATARELLI: Well, no, I believe that argument is raised in the sense that what's before --

THE COURT: Where is it?

MR. NATARELLI: What's before your Honor is allocation --

THE COURT: No, no.

MR. NATARELLI: -- by property.

THE COURT: Where is the response argument that it should come out of the operating fund -- operating account?

MR. NATARELLI: I believe that's the entire response, your Honor. There was no argument --

THE COURT: The entire response. You're talking about at 1210? 1210 has the operating account argument?

MR. NATARELLI: Well, the issue in 1210 is whether the receiver should be entitled to a priming lien. Whether the receiver should --

THE COURT: Well, that has been resolved, right? They do have a priming lien.

MR. NATARELLI: They have a priming lien as to two categories of expenses, which are designated in Docket 1030. I actually have a handout I can use which --

THE COURT: You're not --

MR. NATARELLI: -- illustrates those two --

THE COURT: -- making sense to me.

This isn't a very difficult issue. We're talking about fees that the receiver expended in terms of restoring -- in other words, fixing -- the rent money, right?

MR. NATARELLI: Correct.

THE COURT: And you're saying, well, wait a second, those fees shouldn't come out of the properties, or at least the properties that we are dealing with here. But why?

MR. NATARELLI: Because they're expenses that the receiver would have to endure anyway, regardless of whether there were any secured creditors to deal with or not. It has to do with just the mere existence of the receivership, which is traditionally billed toward the operating account. And --

THE COURT: That doesn't answer the question as to why these fees should not be taken out of each building.

MR. NATARELLI: Well --

THE COURT: Maybe Mr. Damashek has a better argument.

MR. DAMASHEK: Thank you, Judge.

The issue here is that the receiver initially improperly used money from one account to pay another account. He --

THE COURT: When you say "one account to pay another account," what do you mean?

MR. DAMASHEK: One property's account. So, if one property had a positive cash flow and another property had a negative cash flow, the receiver took from the positive cash flow to the negative cash flow.

THE COURT: And why is that improper?

MR. DAMASHEK: The court has ruled that's improper. The --

THE COURT: Wait. I just asked Mr. -- I'm sorry.

MR. RACHLIS: Rachlis.

THE COURT: -- Rachlis whether the receiver was told not to do that and they did it anyway. And he said, no, that was never the case.

So, how was it improper?

MR. DAMASHEK: There is a court order -- the institutional lenders filed a motion seeking to stop that

practice, basically saying, we have a security interest in Property A receipts; you can't use them for B.

The court order that -- granted that motion. And the order --

THE COURT: Ah. So, the court order after it happened, right?

MR. DAMASHEK: Correct.

THE COURT: So, there was nothing improper about what Mr. Rachlis did before the motion was filed.

MR. DAMASHEK: Judge, respectfully, the receiver never should have done it in the --

THE COURT: Why?

MR. DAMASHEK: -- first place.

THE COURT: Why? Why is that improper? Why should the receiver not have done so?

In other words, if I am Cohen and I own a hundred properties, I can do whatever I want with the rent money. If Property A is positive cash flow and I have Property B that has some doors that I need to fix, what's so wrong with me taking that money and fixing Property B?

MR. DAMASHEK: I'm happy to answer the question. Respectfully, it's already been answered by the district court by saying it was an improper behavior.

The receiver is different than Mr. Cohen. The receiver -- whatever Mr. Cohen was doing clearly was improper.

But the receiver, as a receiver, has got to treat each property separately because each of us, as institutional lenders, have security interests in that collateral and we have assignments of rents. You can't just take our security to do that. But the court has already ruled on that.

And, if I may, the issue here --

THE COURT: But let me stop you just for a second.

MR. DAMASHEK: Go ahead.

THE COURT: But you don't have any rights to the operating account? You don't have any security interest in the operating account?

MR. DAMASHEK: I have a security interest in the rents from Property A, let's say. That security interest follows those proceeds of rents. If those proceeds go into the operating account, my position would be my lien would track them. But I think that we're focusing on the wrong issue, respectfully.

The issue here, in my view, is when the receiver has taken an action which the court has then granted our motion saying you should restore those funds and then the receiver restores those funds, we, as secured lenders, should not be charged for the receiver improperly using our funds in the first place and then contesting our -- there was a contested motion. There's a lot of time in here on the contested motion, which the receiver lost. The receiver should not be

able to allocate his loss against us to our account; and, then, when he has to set things right, he shouldn't be able to surcharge our collateral.

Now, there is a second prong of this because in the reply memorandum, the receiver said, well, we were doing two things. One is we were restoring funds that were -- that the court ordered us to restore, but we also had advanced some of our own funds and we were seeking reimbursement of those funds. And the problem with that is there really was no distinction in the motion that the receiver set forth.

And it's actually a compound -- there are a lot of compound entry where the receiver, for instance, says, I have a motion to restore funds and reimburse funds, and my charge for that is one hour. I don't think he should get the restoration. And if he combines it with reimbursing the funds, then I don't know whether it was .3 hours on restoration, .7 hours on reimbursement, or vice versa.

So, the big argument is, receiver, when you took the wrong step, you filed -- improperly used our funds. When the court ordered -- when you fought us and you lost and when the court ordered you to restore, then you don't have a right to get -- surcharge us for that. And if you have an entry which says, I am restoring and reimbursing, it's a compound entry and there's no way for this Court to know the percentage.

THE COURT: Well, then complete your argument for me.

MR. DAMASHEK: Yes.

THE COURT: Because the operating account didn't come into play at all until a few weeks ago. So, complete the argument for me. Are you saying that the receiver should eat the fees?

MR. DAMASHEK: If I may, the point of our motion was you can't surcharge our properties for the fees. And personally, on behalf of my institutional lender, I would say the receiver should be eating the fees related to restoration.

THE COURT: Well, that's not going to happen.

MR. DAMASHEK: But --

THE COURT: The receiver will get paid for the work performed in terms of restoring. The point is the court never ordered the receiver to do certain things. The motion was filed and, to the benefit of the institutional lenders and all others who may have a secured interest in each building, the receiver then had to do the work to segregate all the funds, which benefits all secured interestholders because now you've got what you wanted.

And I am not going to sit here and say the receiver is not going to get paid for the work performed. That's going to be something that you need to accept, that the receiver will get paid.

The purpose of the allocation motion simply is, where is the money coming from? And the operating account was never

discussed in the motion or the response from the lenders.

So, in terms of the rent restoration, I think the lenders are taking this approach that if the receiver's work did not add monetary value to the credit or the institutional lenders' interest, it somehow did not benefit.

But I am not going to work from scratch. Judge Lee has already ordered that the receiver's work has benefitted all. Because in a case like this, you need a neutral individual to sort out the impossible task of trying to sell and, then, to try to distribute those funds equitably. And there's never been any ruling by Judge Lee that the receiver's work -- there has to be a specific nexus between the work performed and a specific credit interestholder.

Did I say something that's incorrect? You're shaking your head.

MR. DAMASHEK: I'm shaking my head because what you're doing is basically saying -- this receiver on Day One should have been allocating fees by property. And if he had done that, there would be zero fees incurred by this estate --

THE COURT: Could have, would have, should have. Right?

The point is, I am not going to say to the receiver, you're not getting paid for the fees incurred restoring the rent.

MR. DAMASHEK: So, then --

THE COURT: So, I think what you should do is go ahead and file the objection -- I'm sure you will -- and deal with it that way.

So, the objection as to the rent restoration is overruled.

Let's move on to credit bidding. So, if I understand this argument -- actually, I don't understand the argument.

Who wants to take that one for the lenders?

MR. McCLAIN: Your Honor, Andrew McClain, M-c-C-l-a-i-n.

I can take that one up. And this one dovetails nicely with what we just discussed about security interest for the institutional lenders.

The institutional lenders here, as well as the parties here, all had security interest in each one of these properties. And that security interest was --

THE COURT: I'm sorry. I can just kind of shorten this. I was involved with the credit bidding. So, let's just fast forward.

MR. McCLAIN: And, so, our position here on the credit bidding is that pursuant to the Elliott case, the receiver took adverse action against the institutional lenders. And the Elliott case stands for the proposition that we should not be surcharged for fees that are associated with taking adverse action against our security interest.

And the Elliott case also states that in awarding fees, the court should consider the results of the receiver's work. And here, the result is the receiver lost in his challenge in opposition to our request for a credit bid. The court ultimately ordered a credit bid --

THE COURT: Let me stop you so that others don't have to argue this point.

The receiver doesn't win or lose in this case. You've got to understand that. The receiver is an officer of the court helping the court deal with this mess, untangling the Christmas lights after Christmas is over. The receiver doesn't win or lose.

But go on.

MR. McCLAIN: Your Honor, perhaps win or lose isn't the correct terminology.

THE COURT: It's not. Go ahead.

MR. McCLAIN: But the case law states if the receiver's taking adverse action against a secured party's interest, then the secured party should not bear the cost of those fees. And our point on credit bidding here, your Honor, is that the receiver was taking adverse action to our security interest; and, so, those fees should not be allocated and surcharged to our properties.

THE COURT: And do you think that the receiver was taking a favorable position or protective position of other

creditors?

MR. McCLAIN: I think that the receiver was opposing the secured parties' interest. And that doesn't benefit anybody because --

THE COURT: Really? Doesn't benefit anyone? You can --

MR. McCLAIN: Well --

THE COURT: -- say that?

MR. McCLAIN: -- it doesn't benefit the secured parties who have a secured --

THE COURT: So, not --

MR. McCLAIN: -- interest in those properties.

THE COURT: So, not the entire receiver estate?

MR. McCLAIN: Yes, your Honor.

THE COURT: So, only looking at you, yourselves, they are against you?

MR. McCLAIN: Well, there --

THE COURT: So, is that the standard, then?

MR. McCLAIN: The standard is -- and it's from the Elliott case -- that secured investors are not liable for the receiver's time spent on activities adverse to them for the benefits -- excuse me, for the activities that benefit the unsecured creditors, which is exactly what happened here.

THE COURT: But the holding is only as good as the factual circumstances present in the case, right?

And tell me the facts of the Elliot case.

MR. McCLAIN: Well, the facts of the Elliott case, there it was a similar case, your Honor, of a Ponzi --

THE COURT: How similar?

MR. McCLAIN: Well, it was a Ponzi scheme involving --

THE COURT: Did it have 116 properties?

MR. McCLAIN: Your Honor, it had --

THE COURT: The answer is no.

MR. McCLAIN: It had 2,000 claims filed, your Honor. So --

THE COURT: I didn't ask about the claimants.

But go on with your facts.

MR. McCLAIN: Yes, your Honor.

The case did not involve commercial real estate. But the rule from the case applies equally to our case, in that it's an SEC receivership involving a Ponzi scheme where a federal equity receiver was appointed and the court was trying to determine how receiver fees should be allocated and charged against creditors of the estate. And, so, on those principles, the case is extremely analogous to our current case.

THE COURT: I do understand that Judge Lee relied on the Elliott case for certain holdings. But I don't see that case being very similar to this case at all. And here's why:

In this case, we have 108 separate properties with many different creditors, secured interests -- I'm sorry, those with secured interest.

And in the Elliott case, you essentially have someone running a Ponzi scheme accepting money for investments. So, there, as I understand the case, the receiver simply had to liquidate all assets and, then, deal with how to go ahead and distribute the money, depending on which investment vehicles each claimant entered into. That's the way I see that particular case.

This case is much more complicated. And I am not going to challenge Judge Lee's ruling on this case that the receiver was necessary to untangle this mess and the receiver's work benefitted everyone. I am not deviating from that ruling.

Now, coming back to the credit bidding, let me ask you, so what you're saying is, again, the receiver should eat the fees?

MR. McCLAIN: No, your Honor. What we're saying is the fees should not be surcharged to our collateral. So, what we have in --

THE COURT: Then it should be charged to, who? The fees should be charged to, who?

MR. McCLAIN: To the general operating account of the estate. And, your Honor --

THE COURT: So, is that in the response?

MR. McCLAIN: Well, I believe --

THE COURT: Let's look at Document 1210.

MR. McCLAIN: I believe the concept is in the response, your Honor, because --

THE COURT: Concept.

MR. McCLAIN: -- the --

THE COURT: See --

MR. McCLAIN: Our objection --

THE COURT: -- I'm not that smart.

MR. McCLAIN: Our --

THE COURT: You need to spell it out for me. I mean, I'm sure that you learned that.

So, credit bidding is on Page 15 to Page 16. It spans two paragraphs. You're asking the Court to say to the receiver, you need to eat the fees. That's what you're saying. Why not just admit to it like Mr. Damashek has?

MR. McCLAIN: Your Honor, that is not what we're saying. We're not saying the receiver --

THE COURT: Okay.

MR. McCLAIN: -- should ever be --

THE COURT: Where is the operating account argument on Page 15 and Page 16?

MR. McCLAIN: The term "operating account" is not mentioned in this paragraph, your Honor. But on Page 16, we

state it is inappropriate for the receiver to allocate the credit bid implementation time to all the receivership properties.

And the point there is that we have numerous buckets here, your Honor. We have all of the sale proceeds for all 100-plus properties that have been sold. Each one of those are an individual bucket. And, then, we have the receiver's general operating account bucket. From Day One, the receiver had been paying his fees out of the general operating account bucket. And back in -- from the outset of this case, we mentioned that this proper -- that the estate is insolvent and the receiver is eventually going to run out of money because all of the individual 100 buckets for the property are subject to security interests.

Now the estate at some point did run out of money, which is when the court granted the priming lien as to specific tasks only. But the posture of the case has changed significantly, in that the operating account now has over $2 million in it to satisfy the receiver's fees that should be properly allocated to that bucket.

THE COURT: But aren't you forgetting Judge Lee's ruling? I think it's Document 1107. Judge Lee adopted the receiver's allocation methodology to allocate the fees and certain expenses to each property. In fact, he adopted the methodology of allocating fees and expenses not otherwise

specifically allocated to any property as a percentage of their gross sales price.

So, why are you arguing this to me now?

MR. McCLAIN: Well, your Honor, we did argue it then, but we're arguing it now because --

THE COURT: I know you lost it, right?

MR. McCLAIN: -- because the fees are actually --

THE COURT: Did you lose that argument?

MR. McCLAIN: I'm sorry, your Honor?

THE COURT: Did you lose that argument before Judge Lee?

MR. McCLAIN: The court granted the receiver's request as to specific allocations. He did not grant a blanket approval of the receiver's fees. And, in fact, in Judge Lee's ruling in Docket 1030, Judge states that, this order is not a declaration that each and every entry on the receiver's submitted schedules actually falls within the two categories of billings described above.

And, then, Judge Lee also went on to state that Magistrate Judge Kim, yourself --

THE COURT: Yes.

MR. McCLAIN: -- may will determine --

THE COURT: We'll get to --

MR. McCLAIN: -- a particular --

THE COURT: Correct. But that's classification.

It's not dealing with talking about general operating account versus each property.

MR. McCLAIN: That's exactly what it's dealing with, your Honor, because if it's not properly allocated to one of the approved --

THE COURT: No, no.

MR. McCLAIN: -- classifications --

THE COURT: If it's not related to a particular expense or fee, it is not to be allocated to the properties.

MR. McCLAIN: And --

THE COURT: Am I wrong on that account?

MR. McCLAIN: You are correct that if it doesn't fall within one of the two approved categories, that it should not be subject to the priming lien that the court granted.

Now there are all of these issues that we've pointed out in our response that the allocations are not proper for the various topics and issues that we pointed out in the response brief.

THE COURT: Okay. Then let's go back to credit bidding.

Who was able to successfully submit a credit bid?

MR. McCLAIN: No one, your Honor, because --

THE COURT: Why is that?

MR. McCLAIN: The process for credit bidding chilled all credit bidding because the issue with the credit

bidding --

THE COURT: I'm sorry, can I stop you for a second.

Are you saying that the financial institutions submitted a higher bid for a particular building than the winning bid?

MR. McCLAIN: I'm sorry, I'm not following, your Honor.

There were no successful credit bids actually submitted for any of these properties.

THE COURT: Any bids submitted?

MR. McCLAIN: There were bids submitted but ultimately withdrawn, your Honor. And that's because the way that the credit bid procedure was set up is the risk was so great to the institutional lenders that they could effectively make a loan twice, that the institutional lenders decided not to credit bid because the risk was so great. So, in essence --

THE COURT: Well, how come you didn't know about that before you fought this tooth and nail that you should be allowed to submit a credit bid?

MR. McCLAIN: We did fight it tooth and nail. And we --

THE COURT: Because --

MR. McCLAIN: -- requested that the credit --

THE COURT: Did you know about the risks or no?

MR. McCLAIN: No, because the procedure for credit bidding was instituted after the Court granted our motion to be entitled to credit bid.

THE COURT: And did the lenders come in and say, hey, wait a second, this process is not going to work?

MR. McCLAIN: Yes, we did, your Honor.

THE COURT: What happened?

MR. McCLAIN: We were overruled.

THE COURT: By?

I'm surprised I didn't handle that part.

MR. McCLAIN: I don't recall if it was you or Judge Lee. I apologize, your Honor.

But we were overruled that we raised this very issue that -- there were two fundamental issues. One, we had to post a letter of credit to credit bid; and, two, there was no prior determination of the amount of our secured lien.

So, just conceptually, if we were to credit bid, let's just say, a million dollars on a property because we have a secured lien of $1.5 million, we bid a million dollars based on the assumption that our secured lien is worth 1.5. We're good. We're not going to overbid.

Now, the claims process hasn't taken place when we submitted our credit bid. Many years later when the claims process eventually does take place, if there's a determination that we, the secured lender that submitted a million-dollar

credit bid, is not, in fact, either secured or is not the senior secured lender, meaning there's another lender in front of us who has a security interest, we have to then pay that lender in front of us whatever their amount of their lien is. And if we're determined to be completely unsecured, then that means we have to pay the full million dollars. So, we've, in essence, loaned $2.5 million on this property.

And we raised that issue --

THE COURT: Why is that not fair?

I remember this now.

Why is that not fair? If you're not entitled to the assets, why shouldn't you have to pay?

MR. McCLAIN: Because that's not --

THE COURT: You submitted the bid to buy the property.

MR. McCLAIN: But that's not how credit bidding works. Credit bidding works -- you're determined what your secured lien is before you submit your credit bid.

THE COURT: But you weren't --

MR. McCLAIN: So, you know --

THE COURT: You weren't, I don't know, confident that you had a better lien?

MR. McCLAIN: That's a large risk, your Honor. A million-dollar risk.

THE COURT: That is a large risk because no one knows

who is actually entitled to the money, right? We haven't had --

MR. McCLAIN: In this process --

THE COURT: Correct. We haven't had --

MR. McCLAIN: -- that is correct. That is correct. But fundamentally --

THE COURT: Let me stop you.

But the problem here is that you act as if you own the properties. You act and you take these positions as if you are entitled to the funds, and therefore any time the receiver does anything, it's contrary to your position; and any time the receiver does anything, it's spending money not to your benefit.

I don't think it's unreasonable for me to actually take that position. I mean, the lenders already have won this case in your minds. That's the way you have been behaving throughout this entire case. And that's the problem, in my opinion.

But coming back to the credit bidding, how is it not related to the sales of the properties?

MR. McCLAIN: Well, your Honor, I think the issue on that point is two prongs. First, it goes back to the language and the ruling in Elliott that the receiver's taking an adverse position against a secured lender.

And the second prong is I don't think that preparing

a credit bid process -- which we were statutorily entitled to -- is part of the process that the court approved to be allocated to these properties. I think that might be an issue that would have been reserved for the claims process to determine if it was one of the properly allocated funds.

So, I think it would be premature now to allocate it to the properties if the Court is actually going to approve it.

THE COURT: The objections regarding credit bidding are overruled.

MR. McCLAIN: Thank you, your Honor.

THE COURT: I think the reason -- again, I go back to these competing arguments. They are generated because of the institutional lenders' attitude, perception that they already own these properties and they are simply just caught up in this process, unfairly and unreasonably perhaps. I don't know. But from the receiver's point of view, they -- or, I should say, he -- does what he thinks is best to preserve the assets of the estate.

When you are litigating a case, you pay -- I should say the client pays for all the fees generated, whether you lose an argument or win an argument, because everything is done for the benefit of the client. I don't think that's any different for the receiver. The receiver doesn't win or lose in this case. The receiver is simply trying to help the court

untangle the mess. And the receiver makes certain decisions he believes are for the benefit of the estate. The receiver does not fight in favor of a specific claimant or institutional lender.

So, for those reasons, I believe that the credit bidding -- which the institutional lenders fought for, got. And the receiver had to expend fees, time and energy setting it up in order to follow the orders of the court. And they should be paid from the property allocated -- I'm sorry, the fees allocated to the properties.

MR. McCLAIN: Your Honor --

THE COURT: So, your objections are overruled.

MR. McCLAIN: Your Honor --

THE COURT: You may make a record if you wish.

MR. McCLAIN: May I just respond to one --

THE COURT: You may make a record if you wish.

MR. McCLAIN: The concept that the institutional lenders are operating as if we own the property, I respectfully disagree with that. We are operating within the confines of secured transaction laws. And as a party that has a security interest in the property, we're entitled to certain rights under the laws. And that has been the principle that we've been enforcing and operating under throughout this entire case.

It started with the rent restoration issue. We

asserted our security interest. And, again, here now, we're operating on the basis that we have a security interest in these proceeds and in the collateral. And there's certain rights and benefits we have as secured parties, and that's the principle that we're operating under.

THE COURT: Thank you.

So, then let's go to Objection No. 7, title examination. So, you know, it's something that I'm personally familiar with, having purchased properties in the past. Everything comes out of the sales proceeds. No one has to write a check to anyone else. When you go to the closing, they do all the paperwork. All the columns are lined up, and payment is made and you walk away with one check for you or you pay money to another person. So, I get that.

But the receiver's argument, if I'm understanding this correctly -- help me out if I got this wrong -- this was such a complicated matter. The receiver had to ensure there wasn't going to be any blowback, there wasn't going to be any subsequent litigation from not having done the examination more carefully.

Why is that so wrong?

Mr. Damashek --

MR. DAMASHEK: If you're asking --

THE COURT: -- why is that so wrong?

Answer the question first and I'll let you say

whatever you want to say.

MR. DAMASHEK: Thank you, Judge. I am prepared to respond to that.

THE COURT: Why is that so wrong?

MR. DAMASHEK: The reason why you pay the title insurance premium at closing is that the title insurance company accepts responsibility for giving you clear title and insuring that. And, so, that there is no reason for the receiver to be essentially doing the title insurance company's job.

Now, in this case, the receiver's attorney was also a title insurance agent and received a share of the title insurance premium, which was credited against the receiver's fees. Absolutely appropriate.

The objection is that you go to a title insurance company, you pay the title insurance premium, and that is the expense that the property should get charged with. And to say that the receiver needs to spend additional time to backstop the title company or do something else, to me doesn't make sense as a --

THE COURT: Oh, really?

MR. DAMASHEK: -- as a transactional attorney.

THE COURT: What would have happened if your title insurance companies and the lenders actually did some due diligence with respect to the Cohens? Do you think they would

be here? I mean, come on. You don't think that a little bit of digging is not warranted under these circumstances?

MR. DAMASHEK: Judge, I think the two circumstances you described are totally dissimilar. I represent somebody -- another creditor -- who made a purchase-money mortgage loan, gave the Cohens the money to buy the property. They got a title insurance policy that insured their mortgage. Nothing wrong there. They gave value; a property came into this estate. So, I don't think we can look at all the -- what the lenders did.

What we're doing here is looking at whether you can surcharge a secured creditor's property, whether it's my -- me being the secured creditor, whether it's some individual investors being a secured creditor, with something other than the title insurance premium.

THE COURT: So, there's a more fundamental question, though. Judge Lee approved these fees, no?

MR. DAMASHEK: Judge --

THE COURT: Why didn't you argue that these were extraneous fees, unnecessary fees?

MR. DAMASHEK: The --

THE COURT: Did you argue that?

MR. DAMASHEK: I did not argue that, but that's the --

THE COURT: Why not? I mean, you're arguing it now,

aren't you?

MR. DAMASHEK: What I'm arguing today is whether you can surcharge a secured creditor's collateral with this. And I think that's the whole reason why we're here. When --

THE COURT: Who else can they charge? Don't say operating account.

MR. DAMASHEK: Well --

THE COURT: Who else can you charge?

MR. DAMASHEK: I have to say the operating account, Judge. And the reason I have to say the operating account, this motion deals with -- the only question in this motion is, can you surcharge my collateral?

You are correct that Judge Lee approved fee petitions. And, then, the question referred to this Court is whether you can surcharge my collateral for them. If you can't surcharge my collateral, then the fees have been approved and they should be paid out of another source, just not out of my collateral. And the only other source is the operating account.

THE COURT: But if the work is done for the property, Mr. Rachlis, the title examination is done for the property being sold.

MR. RACHLIS: Yes, it is.

THE COURT: So, why should it be charged to somebody else? I don't understand.

MR. DAMASHEK: Because my collateral is also being surcharged with the title insurance premium, and that is the appropriate charge because that is what a buyer of the property wants. The buyer wants a title insurance product. And that title insurance product, he pays an insurance premium. That comes off the sales price; reduces my collateral value. But I don't think I should be charged in excess of that.

THE COURT: I understand the argument. I disagree. I think the receiver's making a valid point under the circumstances of this case. Further examination was warranted in order to make sure that the sales go through properly, and that no one else is going to be subsequently in trouble for something that was perhaps not addressed. The objection is overruled.

So, let me go to claim adjudication, Group 1 properties.

Who is in charge of BC57?

MR. NATARELLI: Brett Natarelli, your Honor.

THE COURT: Okay.

Help me out here. You don't want to be charged with fees related to actual adjudication? Is that what you're saying?

MR. NATARELLI: Your Honor, there's water under the bridge on this one in the sense that the Court has previously

held that we would evaluate the extent to which the properties were benefitted by the adjudication process at the end. And, so, we were using this category for that. So, there's no dispute that that category should exist, and the dispute is just about what falls into it.

The receiver argues we should decide that now, but I think the logic of earlier days still prevails. Whether the properties are benefitted by the litigation involving Group 1 is still to be determined.

Your Honor may recall in one of the settlement discussions we had -- and I'm not going to go into the details of it. But there were, I think, seven properties at issue. And on two of them, we said, let's see how Group 1 shakes out, but on the other five we had a full answer. And that's because Group 1 is not going to answer all the questions. So, whether Group 1 litigation benefits all of the properties is something we don't know yet and can be --

THE COURT: Maybe my question was bad. Let me try to reframe the question.

I don't know which institutional lender or lenders -- I've got to think that it's BC57 because Group 1 properties were referred to in the response. Essentially, the lender or lenders say that the receiver should not allocate fees related to discovery, filing a framing report, making recommendations to the Court.

These fees have been generated already, Mr. Rachlis?

MR. RACHLIS: There have been fees that have been -- yes, they have been. And approved by the court, as well, yes.

THE COURT: So, as I understand the response, the lender or lenders are saying, hey, those fees should not be allocated to these properties.

MR. RACHLIS: They're not --

THE COURT: Hold on. I'm asking Mr. Natarelli.

MR. RACHLIS: I'm sorry.

MR. NATARELLI: Yes, our position is those fees should not be allocated to the properties at this time. They are adjudication related. They may fall into Category 2 of the order, Docket 1030, establishing the priming lien categories. But whether they do or not cannot be known at this time.

THE COURT: Essentially, what you're saying is that these fees are not related to the second category approved by Judge Lee: Implementation and management of an orderly summary claim priority adjudication process. Essentially setting up the process -- you can get paid -- but not the actual adjudication work.

Am I understanding that correctly?

MR. NATARELLI: They fit the category, your Honor, but whether they should be charged to the properties now or evaluated later was reserved by Docket 1030. That was part of

the evaluation process. Because the categories are guides. So, it's not that just because it falls into the category, it's automatically able to be surcharged. It's that those are categories likely to involve a benefit to the properties. And in some cases, that's obvious now that there's a benefit or it's obvious there's not a benefit. This is a case where it's not clear yet if the properties will benefit from that process.

THE COURT: So, these fees do fall within the second category. What you're saying is that Judge Lee exempted them from the second category.

MR. NATARELLI: Well, I think --

THE COURT: Or at least they should not be paid now?

MR. NATARELLI: He exempted the concept that there might be fees that can't be paid now because the benefit can't yet be evaluated. We're saying this fits that concept.

THE COURT: Let me take a look at 1030.

Mr. Rachlis?

MR. RACHLIS: Yes.

THE COURT: So, if I'm understanding Mr. Natarelli's argument correctly, claim adjudication fees fall within the second category already approved by Judge Lee, but Judge Lee said don't -- you can't get paid for those fees just yet.

MR. RACHLIS: I don't think that the interpretation that's being advanced is the correct interpretation. And I

actually feel very comfortable saying that because Judge Shah just, in Docket No. 1366, rejected pretty much that exact argu- -- or something akin to that argument, where the court notes on Page 2, in dealing again with this allocation questions and the question -- on Group 1 fees associated that were being allocated, the court says, quote: The Court previously rejected as too narrow the objection that the requested fees do not relate to property-related activities and continues to overrule that objection.

He goes on to basically -- and as part of the approval of the 17th fee application and the allocations, there was Group 1 work allocated within that and the court correctly allowed that allocation to occur. I only note that. I know the 17th application is unique from the applications before your Honor, which is -- we have 1 through 16 in front of you.

But the point is, is that Group 1 activities -- including the framing report, the discovery, the work associated with making sure all claimants were participating when they submitted their discovery, the other questions and issues, and going ahead and making recommendations on the claims -- are absolutely part of the claims process. And it would be totally inconsistent to have on the one hand that work be approved, which Judge Lee has done, to somehow say, well, that's now carved out because there's a question about

the benefit.

The only issue, I think, that may --

THE COURT: Let me just stop you for a second because in order for me to understand what you're saying, I guess I need to go back to Mr. Natarelli because I'm confused now.

So, tell me, when you say "discovery," what do you mean by that? What kind of work is discovery work?

MR. NATARELLI: Taking discovery from claimants who are competing over the priority of their claims.

What Mr. Rachlis said is contradicted by the order of Docket 1030. It's a very quick read. It's Footnote 7. It's Page 14: The receiver will also be participating in the claim priority adjudications by taking discovery, filing a framing report, and making recommendations to the Court, which may assist the to-be-determined first-priority secured creditor defeating claims. But the receiver rightfully acknowledges that whether such activities conferred a benefit on the victorious creditor cannot be determined until the conclusion --

THE COURT: See --

MR. NATARELLI: -- of the claims process.

That's all we're saying, is what's --

THE COURT: The reason --

MR. NATARELLI: -- written right there.

THE COURT: -- we have this confusion is because

you're on two different pages. When you talk about discovery, the definition of discovery becomes important. The way you described discovery just now, it's work performed by the receiver to collect information from the claimants, no?

MR. NATARELLI: Well, no. I think in this case there are at least two distinct categories. There's just gathering the claims, getting the claim forms, contacting the claimants, and in most cases there is no further discovery with the claimants. In some cases where there's a litigation over a priority dispute, there's an additional discovery process that's beyond just the claim form --

THE COURT: But who --

MR. NATARELLI: -- actually asking them questions about what their investment is and where it comes from and how it's backed up.

THE COURT: So, when you say "discovery" in your response, what do you mean specifically? Give me an example of work performed.

MR. NATARELLI: In most cases there has not been discovery. But it's the Group 1 claimants, including BC57. There was discovery. So, as to those properties, there were additional things done besides just listing the claims. That's what we meant.

THE COURT: I know, but you're saying fees already incurred, billed and allocated connected to discovery should

not be allocated, right? So, this is work already performed.

So, what discovery are you talking about?

MR. NATARELLI: The work is performed. The fees are approved. All we are saying, Judge, is what it says in Footnote 7, that until the process is over, until the conclusion of the process, we can't determine whether or not that work benefits the properties or not.

THE COURT: Unless it's just simply related to the claims process, which is Category 2 approved by Judge Lee, no?

MR. NATARELLI: Well, Judge Lee recognizes it's within Category 2. He's just saying we can't, until the conclusion of the process, determine whether that's properly allocated or not.

THE COURT: Arguably, you can say that about any fee generated, no? Especially the institutional lenders. I mean, that's what we've been arguing all day long, right? I mean, not all day long, but for the past hour, right?

MR. NATARELLI: I think you could make arguments, Judge. But this one has already been stated by the court.

THE COURT: Again, the reason for this hearing was for me to better understand your argument. You say in your response, hey, fees associated with discovery, filing a framing report, making recommendations should be rejected.

MR. NATARELLI: They should be reserved for ruling until the conclusion of the process --

THE COURT: Okay.

MR. NATARELLI: -- in accordance with the Court's --

THE COURT: I understand.

MR. NATARELLI: -- statement in Footnote 7.

THE COURT: I understand. But what do you mean by discovery? What do you mean by framing report?

MR. NATARELLI: Your Honor, I'm new to the case, but I do have some understanding --

THE COURT: Maybe Mr. Rachlis can help me out here.

What do they mean when they say "discovery"?

MR. RACHLIS: Certainly.

Our understanding of where they're coming from, whether it be the framing report and discovery, all related to claims administration. It was not discovery --

THE COURT: Well, explain. What do you mean by --

MR. RACHLIS: Sure.

Framing report, which was filed -- and I'm sorry, I don't have the docket number for that, but we can get that for you when we're on break.

So, the framing report sets forth basically who the claimants are, sets forth basically the outline of the disputes, and basically triggered the process to start Group 1. That's what the framing report did, essentially. The properties --

THE COURT: So, you're saying that these are

preliminary steps that the receiver took in order to tee up Group 1 properties' adjudication process?

MR. RACHLIS: That's absolutely correct.

THE COURT: So, what do you think the lenders mean when they say "discovery"?

MR. RACHLIS: Discovery? I think that they are confusing the work that was done to get information about claims with the avoidance -- there's the issue about the receiver's ability to bring an avoidance action, which would basically challenge the validity of the secured interest of a -- of somebody who is claiming a secured interest. So, it could be institutional lenders here who --

THE COURT: I'm sorry, I'm still not getting --

MR. RACHLIS: I apologize.

THE COURT: So, just help me out. Step by step, discovery. Somebody files a claim?

MR. RACHLIS: Yes.

THE COURT: Online?

MR. RACHLIS: Yes.

THE COURT: Here are my supporting documents.

MR. RACHLIS: Yeah.

THE COURT: Then you do, what?

MR. RACHLIS: There were two elements to discovery in the case regarding the claims process. There was actually written discovery that was submitted that had been worked out

in advance that went to all claimants that were exchanged between these claimants. And, then, it was the receiver's responsibility to gather that information and make sure everyone received it, had it in hand.

Then following written discovery, which was this kind of form that was approved by Judge Lee, there was oral discovery taken of certain claimants where --

THE COURT: For what reason?

MR. RACHLIS: Well, it could -- well, in part, there was -- the institutional lenders were looking to challenge some of the claimants' ability to make their claims, whether they had received payments, you know, or had been fully -- whether they had fully received payments, whether their own secured interest claims were valid, and things of that nature. So, you had that going on. And there were questions that could be asked by the receiver or anyone else, including the SEC or whatnot, in order to gather information about the claim.

THE COURT: So, you're making these inquiries --

MR. RACHLIS: Yes.

THE COURT: -- on behalf of those who are challenging the claims?

MR. RACHLIS: These aren't really inquiries as much as questions that could be asked about the claims that were submitted, as well as their discovery responses, to better

understand what their claims are and to see whether -- and to check their validity, to check the numbers that they are given, and things of that nature.

So, the role of the receiver there -- there was participation by receiver and receiver's counsel, but that was really part of the claims administration process.

Now, there was a separate and ongoing review associated with avoidance claims. In other words, a separate claim that could be brought by the receiver, which I think is the discovery that they -- and the activities that --

THE COURT: What's the purpose of that discovery, then?

MR. RACHLIS: That would be to determine whether or not a certain claim by an institutional lender or somebody could -- should be challenged as being valid and then being subordinated to either an unsecured level --

THE COURT: Who would make that decision?

MR. RACHLIS: The court. The court would make that decision.

THE COURT: But then what are you providing to the court?

MR. RACHLIS: Recommendation on the avoidance issue, which actually did occur in Group 1 separately. We filed a separate document. And that time associated with the avoidance issue was not -- is not included in any of the

allocations that's here. That's what I think the critical point. We excluded informa- -- work that was being done on activity outside of claims administration -- traditional claims administration.

THE COURT: Okay. Let me stop you.

Mr. Natarelli, do you want to respond to that? Anything incorrect that Mr. Rachlis said about what he thinks you mean by discovery, what he thinks you mean by framing report?

MR. NATARELLI: That's what we mean. And that's what I think the court meant, as well. And what the court was getting at is that if the receiver's work helped figure out who the victorious secured creditor should be, that secured creditor is going to obtain the money; and, in that case, the receiver benefitted the property, the victorious creditor, and a surcharge would be appropriate.

THE COURT: But --

MR. NATARELLI: But if the receiver's work didn't do that, if the receiver's work was a frolic and detour, if it didn't help the court get to who the right creditor secured should be, then it's not subject to a surcharge. And it's not that the receiver eats it; it's that the estate bears the expense. The unsecured creditors bear the expense.

THE COURT: How can that work not benefit the process itself?

You have to first find the claimants in order to have a claims adjudication process. In other words, we need to find out who the participants are. And in the process of identifying the claims or claimants, the receiver sees something funny about a sub-group of these claimants and the receiver says to the court, hey, by the way, you should pay attention to these claimants because we think their claims are bogus.

How is that not preliminary steps to the actual adjudication process?

MR. NATARELLI: Under that set of facts, I think the receiver would have a good argument that that benefitted the property because it defeated unsecured claims and it helped the Court identify who the right secured party is.

THE COURT: But I guess the point that Mr. Rachlis is making is that these steps were taken for the purpose of getting the adjudication process ready, no?

MR. NATARELLI: They may have been, but the court has not ordered a priming lien as to all of the steps that were necessary to get to an adjudication process. It's ordered a priming lien only as to the adjudication process itself, and has said that we can't determine who -- whether the properties were benefitted or not until the conclusion of the claims process.

THE COURT: No, I hear what you're saying. But how

could these preliminary steps not help the ultimate adjudication process? I don't see how it can't.

MR. NATARELLI: Well, so, for example, the secured creditors, generally speaking, are here. They're present. They were present from Day One. They didn't need to be notified. They didn't need to be found or searched for. If the receiver's activities are in the nature of searching for and finding unsecured claims that have not been asserted and supporting those claims and arguing against the secured lenders in that process, that would not benefit the secured --

THE COURT: Yeah, but --

MR. NATARELLI: -- creditor, whoever it is.

THE COURT: Yeah, but the thing is the Court needs to make sure that the process is fair, right? In other words, the Court simply can't say, well, no one really stepped up, so I'm just going to go ahead and give all the money to those financial institutions which have been actually participating actively ever since the filing of this case; I'm not going to care about those claimants who never bothered to come to court or never bothered to do anything.

That wouldn't be fair to others, right? I mean, it's up to the receiver to figure out, okay, who may have an interest in these properties and who may be able to file claims.

In other words, in order for the court to actually

sign off -- yes, I agree, the process is fair; we've done what we could and the institutional lenders are right; they are entitled to the funds -- only then can the court actually enter an order distributing those funds. I mean, that's the orderly way of doing things, right?

MR. NATARELLI: That's right. The receiver's activities doing that are proper. The receiver's fees for doing those activities have been approved by the court. The only question that's before the Court today is whether the receiver's entitled --

THE COURT: Yeah.

MR. NATARELLI: -- to a priming and surcharging lien for that activity, as opposed to drawing from the estate itself.

THE COURT: Yeah, the thing is these steps have been approved. Judge Lee says if they fall within the implementation and management of an orderly summary claim-priority adjudication process, then they need to be paid now rather than later.

Mr. Damashek?

MR. DAMASHEK: If I may, Judge, could I suggest that it might be beneficial for us to take a short break at this time?

THE COURT: Well, I want to finish up this particular objection.

MR. DAMASHEK: The only --

THE COURT: Go ahead.

MR. DAMASHEK: -- reason I'm suggesting it is I know Mr. Natarelli is new to this, but the Group 1 claimants --

THE COURT: Mr. Natarelli is a very capable person. I've talked with him many times about this case.

MR. DAMASHEK: The reason I'm saying --

THE COURT: Do you have something to say?

MR. DAMASHEK: Yes, sir.

THE COURT: Say it.

MR. DAMASHEK: Yes, sir.

I think the distinction is between the initial intake of claims and the adjudication of the Group 1 claims process. The receiver established a claims process, and that's one step. Then Group 1 was the first claim to be adjudicated in that claim process. And during the course of that adjudication, in which I was not involved because I'm not in Group 1, there would have been discovery, as we've talked about. There would have been briefing. There would have been various claims asserted.

But the receiver, I believe, did make a recommendation to the court in that process. And I believe that recommendation was that priority should be given to the unsecured creditors. And if the court does not agree with that and, instead, grants priority to the institutional

lenders, then the receiver essentially has made the wrong recommendation or made one that certainly did not benefit the secured creditor.

Now, I'm assuming these facts --

THE COURT: Let me stop you because we're short on time.

Mr. Rachlis --

MR. RACHLIS: Yes.

THE COURT: -- about the recommendation, can you comment on that?

MR. RACHLIS: Yes. There were two recommendations made. And the whole point of having a receiver is to review claims and to go ahead and then make recommendation to the court as to the validity and amount of claims.

And we did that. We did exactly that at the end of the Group 1 process. We made a recommendation on the amount that should be -- the court should consider -- the amount claimed by a claimant, the amount that we believe was appropriate, and whether it was secured or unsecured. So, there's a pleading and filing associated with that.

Separately from that -- and, again, going to a separate process, which is not part of these allocated fees -- there was -- the court asked us whether or not, within a time frame, whether there was going to -- whether we were claiming there should be an avoidance action or an avoidance process

brought against one of the claimants. And we did that separately.

THE COURT: Well, I really want to just hear your response to Mr. Damashek's argument, hey, wait a second, you recommended to the court that we should lose. Why should we be stuck with the bill if we win this case?

MR. RACHLIS: But he said a couple of things. He said that we made a recommendation that unsecured creditors should be -- should get the -- should be favored, right, as first prior- -- first-secured priority. But that's not true. We made a recommendation that there were other parties that claimed secured interest. And we valued -- we took what their amounts were, and I believe we also included group -- BC57 in that --

THE COURT: I'm sorry, I can't hear you.

MR. RACHLIS: I'm sorry.

Every claimant who submitted a claim, we made a recommendation as to the amount that they would be -- the proper amount, if the court rules one way or another on who's first secured, should be awarded. That was the -- that is the recommendation that was made.

We made a separate filing that one of the claimants, BC57, has -- there should be -- their claim is -- they -- they knew -- they were on notice of certain issues associated with the loan being improper, and therefore there was -- the Court

could avoid or subordinate their claimed secured status to an unsecured status. That's a separate recommendation.

So, what was expressed to your Honor was incomplete and inaccurate. There was one filing that says this is the amount that is being sought by every secured -- every alleged secured claimant; this is the amount we believe is appropriate after the investigation that was being done, the work that we had done. And that's for every single one of the Group 1 claimants. That is the recommendation that we made to the court as to the claims that were there.

A separate filing was made saying that the -- that BC57's claim to a security should be avoided. We are not seeking recovery at this point or allocations associated with that filing. So, what's been stated is not really accurate because it's not part of this claim, it's not part of the allocation, and it excludes a recommendation that was being made because there were two of them.

THE COURT: So, what you're saying is you're actually agreeing with Mr. Damashek that you shouldn't be paid for a recommendation made to the court now; you should wait to see how the adjudication process --

MR. RACHLIS: Not at all. We're saying that as to all the work that was done associated with non-avoidance work, that is absolutely proper. And Judge Shah agrees with that.

It's, again, 1366. Specifically on Group 1, he says

the following: The Group 1 issues for which the receiver seeks payments in this application are compensable as claims administration. The Court's forthcoming ruling on the priority dispute in Group 1 bucket is no -- is not reason to delay payment --

THE COURT: But what kind of work --

MR. RACHLIS: -- for the past --

THE COURT: -- did you perform? What work is he referring to?

MR. RACHLIS: In the last quarter, perhaps Ms. Wine can advise the Court specifically.

MS. WINE: Yes, your Honor.

THE COURT: Ms. Wine?

MS. WINE: In the 17th fee application, the work related to Group 1 had to do with some late-submitted claims and a couple claimants came to the receiver with claims that hadn't been submitted by the deadline. There was some briefing on that.

THE COURT: Any recommendations made?

MR. RACHLIS: Yes.

MS. WINE: The recommenda- --

THE COURT: Against the interest of BC57?

MR. RACHLIS: No. They were basically made that -- as to one claim -- one claimant, I believe it was Martinez, it was a late claim that was filed. The court allowed that claim

to come in. We reviewed the claim and we made -- we noted how much the claim was alleged to be made for by the -- by Mr. Martinez or Martinez family, how much we believed was appropriate to consider for that claim, and whether or not it was secured or unsecured or -- you know, at least by recommendation of the -- from the receiver.

So, that was the -- it was basically a supplement. It amended our prior filing.

THE COURT: So, that particular application didn't have any work performed in terms of making recommendations to the court?

MR. RACHLIS: It made a recommendation -- it advised the court of how much we thought the claim, you know --

THE COURT: Well --

MR. RACHLIS: I mean, so it did have some recommendations.

THE COURT: We're talking about recommendation that a certain institutional lender should not have priority over other claimants.

MR. RACHLIS: No. The prior- -- we made a separate filing that had that.

THE COURT: So, what you're saying is that separate filing dealing with that particular issue is not part of this particular motion for allocation?

MR. RACHLIS: Exactly, your Honor. Yes.

THE COURT: So, which line are you looking at that you think that should not be paid now, Mr. Natarelli or Mr. Damashek?

MR. NATARELLI: I never raised anything about avoidance. We were talking about specifically about Group 1 litigation fees that have to do with adjudication of the claims.

And the fact that the litigation occurred -- let's say hypothetically that the lenders lose. In that case, another secured creditor would win. And in that case, the receiver would have benefitted that secured creditor, in which case the receiver should be paid for that work and should get a priming lien because it benefitted the secured creditor who was victorious.

But if the Court agrees with us that we were the primary secured lender and all the receiver did was try to defeat that argument and lost, then the receiver did not benefit --

THE COURT: Yeah, see --

MR. NATARELLI: -- us as the secured creditor.

THE COURT: -- I think again --

MR. NATARELLI: And we don't know yet how that's going to turn out.

THE COURT: I think perception or perspective is the reason for this issue. From the receiver's point of view, the

objective is to implement a system so that the court can adjudicate. It doesn't matter to the receiver who is the ultimate winner and who is the loser, right?

So, when you say "benefit," you're talking about personal benefit to the institution.

MR. NATARELLI: No, your Honor. I'm talking about benefit to the category of whoever the victorious secured creditor is. And --

THE COURT: Exactly.

MR. NATARELLI: -- as to Group 1, that may not be us.

THE COURT: Exactly.

But you're saying the benefit can only be conferred to the winning litigant.

MR. NATARELLI: No, I'm saying --

THE COURT: And that is not the objective of the administration process.

MR. NATARELLI: No, I'm saying --

THE COURT: At least not from the receiver's point of view.

MR. NATARELLI: I'm saying the receiver's only entitled to a priming lien to the extent his work got us to the victorious creditor and --

THE COURT: Now I understand what you're saying.

The objection noted as No. 9 is overruled because the work is to benefit this process, not to benefit any particular

individual.

And I did also review the footnote. But under the circumstances of this case, what the parties have argued today, the objective isn't for the receiver to pick a winner. It's simply to implement a system, collect information necessary, do what the receiver needs to do so that the court can, in fact, follow that particular system.

It's 3:20. We'll take a break until 3:30.

Thank you.

(Brief recess.)

THE COURT: We're back on the record.

So, we were just talking about Objection No. 9, claim adjudication. I think there's a related objection. I think that's No. 3, claims administration.

If I am understanding the argument correctly here, lenders object that general claims administration should not be paid at this time.

MR. NATARELLI: Should not be allocated, your Honor, as a surcharge to the properties.

THE COURT: Let me ask this question of the receiver: Was there ever any kind of direction from the court as to this operating account?

MR. RACHLIS: I don't believe there was direction about it. You know, part of -- some of the materials -- I'm talking about this restoration issue. We certainly were

providing accounting best we could, and the court asked us to do so. And we would provide that. I don't recall how often, but there were accounting reports that were being distributed and things of that nature. And, of course, your Honor knows that there are status reports and things of that nature that discuss the operating account.

But there was no directive given that I can recall. And I'm sorry if I may not understand --

THE COURT: No, no. Let's use an example. And I just picked out some line numbers.

Exhibit C, this is an Excel spreadsheet. This is an exhibit to lenders' response, which, again, is Document No. 1210. I was provided with an Excel spreadsheet of the exhibit so that I'm not working with PDF. So, the Excel spreadsheet has the line numbers on the left-hand side.

So, if I go to Line No. 60, here the receiver says in August -- I'm sorry, on August 28, 2018, work performed related to claims administration and objections.

Am I reading that correctly?

MR. RACHLIS: Yes.

MR. NATARELLI: Yes.

THE COURT: So, then it goes on to say: Reviewed documentation received to date for debt service details.

So, that's Line 60. So, let me -- let's use this example. I don't know who wants to address the Court. Tell

me what is wrong with this and why this particular line number should not be allocated to whichever account this is allocated to.

MR. DAMASHEK: Judge, Ron Damashek. And if I may briefly, to the extent I misspoke earlier and said unsecured creditors with respect to Group 1, I did mean the individual investors versus the institutional lenders. And to the extent I said unsecured creditors, I just misspoke.

THE COURT: Thank you.

Line 60.

MR. DAMASHEK: Yes. Line 60, there really are two different components to the objection. The first component to the objection is that as part of the overall receivership process, the receiver is going to take in claims from all creditors out there. There may be some secured, maybe unsecured, et cetera. And my understanding of Judge Lee's ruling was focused on the lien priority adjudication process. So, to the extent that the receiver is just intaking claims like any receiver should, that is not something that gets surcharged to anybody's collateral.

The part that gets surcharged is the claims process, claims adjudication process, as distinct from the gathering of information. That's Part One.

The second part here is if you look at this entry, it says, for debt service details. There was no debt service

paid in this case. No funds were paid to any secured creditor, whether institutional or individual investors --

THE COURT: I'm sorry, can you just tell me about that? Can you rephrase that again?

MR. DAMASHEK: Okay.

THE COURT: The debt service.

MR. DAMASHEK: Right. So --

THE COURT: You said something that there was no something.

MR. DAMASHEK: Correct.

So, the concept of debt service is if I have a loan on my property and it's got a -- secured by a mortgage, I'm supposed to get paid a thousand dollars a month as the mortgageholder. That's debt service.

In this case, there was no debt service ever paid. There was never a process whereby the receiver collected money and paid the institutional lenders or the individual lenders as mortgageholders. So, that's got nothing to do with the claims resolution process. Maybe it's understanding what's out there. But it's not claims dispute resolution, which is what should be permitted under the court's order.

THE COURT: Okay.

Mr. Rachlis, can we hear your side regarding Line No. 60?

MR. RACHLIS: Yes.

THE COURT: Can you --

MR. RACHLIS: I'm sorry, I'll speak into the microphone. I'm sorry. I was just looking back at the date.

So, in August of 2018, the receivership was just being established and there were various filings that were being made by claimants already, right, including most of them from the start were from the same parties who are here today. And that information that was being provided would be necessary to understand from the get-go and review, which would be a normal part of handling claims. The fact that those -- there was -- some of that information provided included information about debt service, as well as other information that was being looked at, would, of course, not be an unnatural part of what the receiver would be doing as handling a claim because if there was money to pay off debt service or things of that nature, one would want to know what the obligations were.

But as a more global and general matter, what was going on at that time and as part of that type of entry involved looking at a submission by a claimant as to what their claim would be -- as to what some of the features of what their claims are, which would include amounts owed or debt service or things of that nature.

So, that is -- when we look back here at that entry at that time, that is certainly, I would say: One, not

unusual; two, standard type of analysis that you would look at for purposes of understanding a claim. And that was submitted early on. Not the full claim itself, but information about a claimant associated with their claim.

THE COURT: So, you're not saying that you were engaged in debt service; you were simply trying to get a handle on whether there was any kind of debt service?

MR. RACHLIS: That is absolutely correct, your Honor.

THE COURT: Let's go to a different line number. 2130.

So, if I am reading this right, we're talking about claims administration objections, entry date March 18, 2020, review claimant forms.

So, this goes to, Mr. Damashek, your objection that collection of data is not part of the adjudication process?

MR. DAMASHEK: Correct.

THE COURT: Okay.

So, here's where I come down on this. I read Judge Lee's decision on allocating fees and giving the receiver a priming lien. I don't read it that narrowly. I think he wanted to -- at least from my reading of the order -- wanted to compensate the receiver for the bulk of the work already performed; that is, maintaining and selling and liquidating the properties, and also all the work that has been done in terms of collecting data, identifying claimants, and getting

the process implemented.

You can't devise a plan without knowing who the participants are. You can't devise a plan without knowing what is really going on. So, it's not something that the receiver can say one day, you know, I don't really know who the claimants are, I don't really know what -- whether their claims are for one property or multiple properties or whether we have a single claim for one property or multiple claimants; I'm just going to go ahead and devise this plan and see how it goes.

I don't think that's the way this played out. I think there was an orderly way of the receiver collecting the data, figuring out who the claimants are, what do we do with these claimants, and what is the best process in terms of moving forward.

So, for those reasons, Objection No. 3 is overruled.

So, I think there is another objection that's very -- that's related to this, which is Objection No. 10, general fee allocation. Again, I think, if I'm not mistaken, this objection also relates to fees related to collecting claims-related data.

Am I mistaken?

MR. NATARELLI: Most of the objections in this --

THE COURT: Your name for the record?

MR. NATARELLI: Yes, Brett Natarelli.

Most of the items in this category of objection relate to claims administration. However, in concept, the objection is different. And the fees are different. And they're allocated differently.

So, as to general fee allocations, what the receiver is saying is that every property's collateral needs to be surcharged in a pro rata amount. So, not tied to how much time was spent on that particular property.

In concept, all that should go in that bucket are activities that benefitted only the secured creditors, whoever they are, at the expense of the unsecured creditors, and did so on an equal pro rata basis as to all of the properties. That's the only thing that logically fits that category.

And that category nonetheless contains claims administration work, both as to specific claimants, as to claimants generally. It includes items that the receiver would do anyway. As the receiver put it, that's what a receiver does, we collect claims, we design the claim form.

Those are all things that would still happen in a world where there were no secured creditors. If we didn't exist and it was all unsecured creditors, the receiver would have to take in claim forms --

THE COURT: I apologize.

MR. NATARELLI: -- analyze them --

THE COURT: I lost you there.

Why would your argument about whether these fees should be allocated at all to these properties depend on whether there are secured creditors and unsecured creditors?

MR. NATARELLI: Because in order to surcharge the properties, the fees need to be -- have conferred a benefit on the secured creditors. And, so, to the extent what the receiver did benefits the estate as a whole, then the estate should pay for it. This is a surcharge on the secured creditors who have collateral, and that's inappropriate where the activities are benefitting all the parties in the estate generally.

THE COURT: It's like if money is coming into a building, you want everything to be separate. If money has to go out, you want everything to be all equal, in general. I mean, that's the way I understand this. Somehow all these fees should be coming out of another bucket altogether if there is no positive value monetarily to the secured creditors. That's what I'm hearing.

Am I mistaken?

MR. NATARELLI: Your Honor, the law is that the secured creditors only are charged a surcharge on their collateral to the extent the properties were benefitted. That's what the various orders in the case say --

THE COURT: Well, yeah. So, here is the -- yeah, we're just going over the same ground again. Judge Lee has

already ruled on this issue; has he not?

MR. NATARELLI: He has not ruled on this issue.

THE COURT: I think he has. He says that the receiver's work has benefitted all; has he not? Let me try to find the quote.

MR. NATARELLI: Well, your Honor, if the receiver's work benefitted the estate, that's all we're arguing, is that the estate should be charged for it. So, if that's what you're referring to, we don't dispute that the statement that the receiver's work has benefitted the estate is correct. We're just saying that fees that fall into that bucket need to be charged to the estate as a whole.

THE COURT: Well, no, because all the money has to be separated, right? So, it's fair to actually charge the properties a pro rata share.

And if I'm not mistaken, the court has already approved the practice of using the sales price as a proxy for the time the receiver may have spent on certain tasks. I don't know if I'm just making this up or whether I'm reading this right.

Mr. Rachlis?

MR. RACHLIS: You're reading it correctly, your Honor. That is what Judge Lee has held several times, both in terms of the benefit and approving the methodology that you've just described.

THE COURT: I'm trying to find --

MR. RACHLIS: The district court -- Judge Lee's approval of the methodology -- your Honor, the approval of the methodology is at Docket 824, Page 5.

THE COURT: So, here, it says again -- yes, Document No. 824 -- non-specific property expenses and fees to be allocated as a percentage of their gross sales price. Why would he say that if it's coming from a general bucket? Why would there be need for a pro rata share or calculating the percentage by sales price?

MR. NATARELLI: The necessity of the bucket is for activities that benefitted the properties at the expense of the unsecured creditors in a way that's equal across all the properties. Things that fit that category appropriately fall on the general fee allocations. We're just saying that the spreadsheet listing general fee allocations doesn't do that.

To take the same example from --

THE COURT: Oh, I found it. Here.

MR. NATARELLI: Yeah.

THE COURT: So, the court actually says: The Court rejects the notion that the receiver has to make -- I'm sorry, the Court has to make an individualized determination that the fees assessed pursuant to the receiver's lien benefitted the precise property.

And he goes on to say that, the claims process, this

particular process as a whole, is beneficial to all involved, secured creditors, as well as unsecured creditors, because this process was necessary to untangle the morass of competing claims. Secured creditors may have certain statutory rights, but I think the system we have in place is necessary because of the scheme ran by the Cohens because of the situation that we are all in. This isn't a situation where you have one property, one lender and the lender trying to collect money from that particular property.

Now, going back to this particular benefit to a secured creditor, again, we're making the same argument -- you're making the same argument, I'm making the same ruling. The court finds that the benefit is conferred on the estate. And I don't see why Judge Lee would have said non-specific property expenses and fees to be allocated as a percentage of their gross sales price, for example, if the money is coming from a general operating fund.

Why would that be? Can you answer that? Why would you need to figure out the percentage based on the gross sales price if these data collection fees should be coming out of a general fund somewhere?

Shouldn't he have just said, oh, yeah, I approve your fees, you can take it out of the general accounting -- general operating fund? But he didn't do that, right?

MR. NATARELLI: Well, because it would be appropriate

to surcharge the properties, and surcharge them equally, to the extent the receiver's work is adverse to the unsecured creditors and as to the secured creditors' benefit.

And this is a distinct argument from the others because we're not talking about any individual secured creditor here. We're talking about the concept of unsecured creditors and secured in different categories. And to the extent the receiver is benefitting both, it's not appropriate to charge the properties for that work.

THE COURT: Mr. Rachlis, I'll give you the last word and move on.

MR. RACHLIS: Thank you, your Honor.

What's lost in that argument is that this process that was in place was to deal with a disputed claims process. These were -- that is what was in front of Judge Lee. Those are the issues that were being discussed throughout the time period because of the nature -- as your Honor just described, the nature of the fraud, the nature of the scheme, which involved these competing interests. Those are the ones that needed to get addressed and have been addressed through the process that was being developed.

So, I think that your Honor's correct in the way you've looked at this.

THE COURT: Objection No. 10 is overruled.

Again, there is this fundamental difference between

the way the court is looking at it and the way the institutional lenders are looking at it. The institutional lenders are necessarily requiring a specific nexus between anything that the receiver does and positive value to the secured creditors' interest. I don't see that to be the element that is necessary based on the prior rulings of the court.

I think there's another category that's very related. So, Objection No. 6, it says "not divisible." Let's take a look at some examples to get a better understanding. Exhibit C, let's go to Line No. 402. Actually, we're in the 2,000s, so let's go to 2117.

So, if I'm reading this correctly, Line No. 2117 is an entry dated March 3rd, 2020, and it's under the category of Claims Administration and Objections. And the task performed is described as: Preparation of summary of utility refund checks received and analysis of accounts in which to deposit funds.

What does that mean, Mr. Rachlis?

MR. RACHLIS: I believe at the time we had received certain checks that were related to this claimant. And, so, there was an effort to make sure that they were deposited in the right -- in the right place.

THE COURT: Ms. Wine, do you have anything to add?

MS. WINE: No, your Honor.

THE COURT: Okay. So, let's come back to the institutional lenders.

So, Objection 6 is not divisible. What do you mean?

MR. DAMASHEK: Ron Damashek for the institutional lenders.

I don't know that the wording there is exactly what I'd use, but let me explain how it applies to this concept.

This utility refund check was allocated against 103 properties, and it was not allocated to a particular property for a utility refund to that property. I don't know if there are ten utility refunds or a hundred utility refunds, but you can't simply take a utility refund that applies to, let's say, ten properties and allocate it across 103 properties, because that would be surcharging my collateral with one of the other -- a utility refund that benefitted or was associated with somebody else's collateral.

THE COURT: Unless -- okay. So, the receiver looking at this utility refund check, why should it be divided among -- by the way, how much are we talking about here? .4? .4 hours?

MR. RACHLIS: It's a dollar fifty-one.

THE COURT: Total?

MR. RACHLIS: For this -- on Exhibit C, total that's been allocated to this lender.

THE COURT: Okay.

So, how much is that total you think?

MS. WINE: It would be that times 103.

THE COURT: 1.51?

MR. RACHLIS: Dollar fifty-one times 103.

THE COURT: So, we're talking 160? Something like that?

MR. RACHLIS: Yes. $155.53.

THE COURT: All right.

So, if you get a refund check, why couldn't you figure out which property it goes to?

MR. RACHLIS: The check may not have identified it, so you'd have to take a look. The check may be just to Equitybuild, Inc., or some other type of entity. So, you do have to go back through and make sure -- you have to -- there's an effort that needs to be done as to making sure it gets to the right place.

THE COURT: Do you even know how much it was?

MR. RACHLIS: Not as we're sitting here, your Honor.

THE COURT: I mean, ballpark it. Are we talking like a hundred dollars or $10 million?

MR. RACHLIS: It's not $10 million, your Honor --

THE COURT: Okay.

MR. RACHLIS: -- as much as --

THE COURT: Well, let me get a better understanding. Are we talking a thousand dollars? We're talking about a

utility refund check.

MR. RACHLIS: It's not -- it's going to be less than five figures for certain. Likely -- so, it could be three- to four-figure type of sum. That's what we're talking about.

THE COURT: Okay.

MR. RACHLIS: Likely.

THE COURT: So, that falls under the category of non-specific property expenses and fees to be allocated as a percentage of sales -- gross sales price? Is that how we're getting the 0.0038835?

MR. RACHLIS: Yes, your Honor.

THE COURT: What about that, Mr. Damashek? If you can't figure out which property this refund check belongs to, how can you bill a particular property? Why not just go ahead and divide it among everyone?

MR. DAMASHEK: Judge, this is pure speculation that they --

THE COURT: Should I consider speculation?

MR. DAMASHEK: No.

THE COURT: Okay.

MR. DAMASHEK: I think --

THE COURT: Then let's move on to something --

MR. DAMASHEK: I think we --

THE COURT: -- that's more real.

MR. DAMASHEK: Well, I think we need evidence. And

we don't know -- this one is a small dollar amount, .4. There are others which are 2.2 or other amounts. For each of those, you can't just say every secured creditor gets charged for anything related to a utility refund. And if that -- respectfully, if that's what the Court's saying, then there is no allocation process associated with being a secured creditor or not; you just divide everything up.

But the burden on the receiver, A, is to figure out which property the utility charge goes to, and then charge that property for it.

THE COURT: Well, sure.

MR. DAMASHEK: We can --

THE COURT: I mean, correct. You know, us lawyers, we have the ability to think, make decisions, make judgments, and I take it that the receiver, as a court officer, has to make a decision or did make decisions based on the amount of the refund check and how many hours he's going to spend trying to figure out where this check belongs to and actually go ahead and allocate that particular refund check to a particular property. By then, we may be talking about more fees compared to the actual refund check.

So, for that reason, the court has already recognized that this is not an ideal situation. And the court has already ruled that, look, the receiver is -- this is the reason why we needed this particular process in place, and

this is the reason why the receiver's work is benefitting all.

You look like you want to say something.

MR. DAMASHEK: No.

THE COURT: Okay.

Let's take one more example and see if it's any different. Let's go to 1288. No, I'm sorry. 2117, let's go to something closer. 2696.

So, 2696 -- Line No. 2696 -- Exhibit C, this is an entry dated October 22, 2020, and the task description says: Record remaining unresolved title exceptions associated with properties in tenth sales tranche. And there's an address: 4317 South Michigan, 4533 South Calumet, 4750 South Indiana, 6217 South Dorchester, 7024 South Paxton, and 7701 South Essex. Begin researching same and preparing action plan for discussion with title underwriter.

So, tell me what's going on here, Mr. Rachlis.

MR. RACHLIS: At the time, there were -- this is in October of 2020, I believe.

THE COURT: Yes.

MR. RACHLIS: So, as referenced, there was the tenth sales tranche was -- those were, I believe, the last remaining properties or very close to that number of properties left before they were all basically disposed. And as part of getting prepared for addressing that sales tranche, there was work being done in order to look at titleholders for all of

those properties, liens, and things of that nature.

So, what you have in there is a time entry, as well. And that was only -- and the allocation there was to six different properties. And the six different properties are listed in the entry and are associated with the tenth sales tranche and divided out the total amount listed. So, what's been allocated here is $149.50.

THE COURT: So, this line number I got from the response itself under Objection No. 6. It doesn't appear to me that this is an across-the-board allocation.

MR. RACHLIS: It's not, your Honor.

THE COURT: Mr. Damashek?

MR. DAMASHEK: That's correct. It's allocated to, I believe, six specific properties or whatever the number of properties it is here.

But the reason it's not divisible equally is -- relates to the nature of the title exceptions. For instance, let's say you had just two properties and one of the properties has seven title exceptions and the other property has one title exception. Do you divide the total time working on title exceptions 50/50, even though the one exception maybe could be resolved in ten minutes but the other might take two hours? And that's why they're just grouping all title exceptions, regardless of severity, in one entry and saying, okay, each of them bear the same percentage. And that's why

it's not equally divisible and shouldn't be allocated according to that formula.

THE COURT: And you don't know from looking at this whether there were differing degrees of exceptions?

MR. DAMASHEK: There is no way to tell because there was no evidence submitted by receiver to the Court, and it's the receiver's burden of proof.

THE COURT: Yeah, but the Court is not asking for mathematical precision, right? Just reasonable allocation.

MR. DAMASHEK: So, going back to my example with two properties, one that takes 15 minutes and one that takes two hours, my question would be, is that reasonable? I would say no. Do you need mathematical precision? No. But you do need a sound basis for the determination, and we don't have that here.

THE COURT: Mr. Rachlis?

MR. RACHLIS: Yeah, no, we respectfully will disagree with that. The whole process -- it's been outlined in the papers. There's been an effort -- each timekeeper went back, looked at these -- at the time entries, went back to make a determination as to what was going on based on the entry, what they were doing at the time. It was then reviewed by the receiver and then submitted. So, it was a very painstaking process that was gone through. So, the idea somehow that this has been just sort of like done willy-nilly is not true.

And the standard, of course, is has there been -- maybe I'm paraphrasing it, but has there been a reasonable, solid effort to do -- to perform the allocation and present it to the Court? I think unquestionably, given the number of hours that have been spent by everyone at this table and everyone working on this, I think that's clearly been the case.

And your Honor set forth the other guiding principle: Is mathematical precision the standard that is to be met? The answer is no; but here, would say that the entry that's there is actually very precise, and it actually provides a good amount of information. Based on everything that had -- you know, underlied the presentation of this allocation to your Honor, feel comfortable that that is a fair representation and an adequate representation of hours and of the allocation that's there.

THE COURT: Let me ask this question: When you're actually filing a petition for fee approval, I take it then the task description is the same?

MR. RACHLIS: I believe the answer is yes. That just came from the fee -- that came from the fee application --

THE COURT: So, it's 149.50 times six? That's what the fee application would have said.

MR. RACHLIS: 2.3 hours -- it would have said 2.3 hours. The other breakdown of the allocation itself wasn't

part of the fee petition, but the actual time entry and the amount of it was there.

MS. WINE: And the billing rate.

MR. RACHLIS: And the billing rate.

So, basically, Column H, Column I, and then Column N --

THE COURT: Okay.

MR. RACHLIS: -- would be all before Judge -- would have been all before Judge Lee.

THE COURT: Okay.

So, again, going back to the objection and -- I'm just not seeing anything wrong here that's unreasonable or somehow unfair to anyone. Judge Lee has already looked at this particular billing. He said, yeah, that looks good. And the receiver then went back and decided fairly divide the time by six and allocated one-sixth of the fee to six different properties. I don't see that the receiver has to do much more than that. So, for purposes of this case, Objection No. 6 is overruled.

MR. DAMASHEK: Judge, may I ask you to look at one other entry?

THE COURT: Okay. Where?

MR. DAMASHEK: Along the same lines.

THE COURT: Okay.

MR. DAMASHEK: If we could turn to -- it's still in

Exhibit C.

THE COURT: Yes.

MR. DAMASHEK: And it is 2355.

THE COURT: 2355.

All right. 2355 is -- it's categorized as asset disposition. Entry date is June 6th, 2020. 2355. Task description is: Begin preparation of spreadsheet listing all properties, associated litigation matters, judgment amounts, judgment dates, and payment status. Task hours 3.2, and it looks like it's divided among 79 properties.

Am I reading the line correctly, Mr. Damashek?

MR. DAMASHEK: Yes.

THE COURT: Okay.

MR. DAMASHEK: So, my -- the same issue arises here because not all 79 properties had litigation matters, judgment amounts, judgment liens, and payment status. Now, that's an assumption by me because we haven't seen evidence from the receiver saying that all of those properties had that.

But what you have is an entry dealing with properties that have judgment liens being assessed against 79 properties. And if all 79 of those properties did not have judgment liens, it is improper to allocate those funds -- that charge against all those properties.

THE COURT: Let me ask this question of Mr. Rachlis.

When he says under task description and after the

description it has a parentheses and an amount -- a number, 3.2, what does that mean?

MR. RACHLIS: 3.2 hours.

THE COURT: Total hours spent?

MR. RACHLIS: On those tasks, yes.

THE COURT: And that's divided among 79 properties. So, each property -- each of the 79 properties is charged $15.80?

MR. RACHLIS: That's correct, your Honor.

THE COURT: See, I mean, if you're going to pick an example, you should have picked a better example because when you're actually preparing a spreadsheet like an Excel spreadsheet, we're talking seconds in entering the data. And if a property has more litigation matters and more judgment dates and more payment status data, I'll give you -- I'll agree with you that a certain line number will take three seconds rather than five seconds.

I'm not going to require the receiver to track those seconds and allocate the fees associated with those seconds for those particular properties. I don't see anything wrong with this particular line entry. I don't see anything wrong with dividing 3.2 hours among 79 properties. Presumably, 79 properties were, in fact, on this particular spreadsheet.

Let's move on. Let's go to ambiguous entries. This is Objection No. 8. And let's go to Exhibit C, 2205. Again,

I'm getting these line numbers from the response. 2205, Exhibit C.

This is billing category Business Operations. Entry date is April 21, 2020. And, then, there's the task description of "call," and the total time spent on the call is tenth of a minute. And this tenth of a minute is spread among 103 properties? Am I reading this correctly?

MR. RACHLIS: I'm sorry, I'm just getting it called up.

(Brief pause.)

MR. RACHLIS: You are reading correctly, your Honor, that that .1 call was spread out -- was divided, then, among the properties. So, you're correct about that.

THE COURT: But what call? I mean, that's probably what the lenders are questioning.

MR. RACHLIS: Yeah, we're going back. Let us take one second here to take a look at another spreadsheet.

(Brief pause.)

MR. DUFF: Your Honor, if I may? Kevin Duff.

THE COURT: Yes.

MR. DUFF: Your Honor, that particular entry only reads as "call" because of the way that the tasks were divided when we created the spreadsheets. To be able to understand what that call related to, you would need to look at the entire entry description. So, there's related entries. I

don't have the line items for your Honor right now, but they would be the entries right on either side of that.

And what it would show is that this call was between Ellen Duff, a lawyer at the office, and myself; and, it related to reimbursable amounts by properties. And, so, the fact that that call for a tenth of an hour, this was obviously -- there were other things going on in connection with that work. Part of that work included a call with me, which was six minutes long, and related to a general discussion of the reimbursable amounts by properties.

THE COURT: So, this particular entry is for which property? What am I looking at here?

Anyone from the lenders' side?

Exhibit C.

MR. DAMASHEK: It was divided between 103 properties, Judge. I don't think it's worth our spending the time on this particular entry, other than to say you're exactly right. We looked at an entry here that said "call." There's no way and there was no proof submitted to the Court as to what that call did. Mr. Duff is explaining to you that it relates to a larger entry in an invoice, which wasn't attached, and -- but we are only talking about .1 here, and it was divided against 103 properties.

MS. WINE: Your Honor, if I may?

THE COURT: Ms. Wine.

MS. WINE: The reply brief that was submitted to the Court had an exhibit that was a chart that addressed many of these objections.

THE COURT: I'm trying to find it. So, hold on a second. Let me see --

MS. WINE: Particular one was Row 65.

MR. RACHLIS: That was Exhibit 1 to our reply brief, your Honor.

THE COURT: Hold on.

MS. WINE: It's Docket 1230, Exhibit 1.

MR. RACHLIS: Page 13 of Exhibit 1.

THE COURT: So, when you filed the motion, you filed PDF attachments. And I'm trying to find the Excel spreadsheet.

MS. WINE: It's Page 52 of 157.

MR. RACHLIS: Yes, on Docket 130.

(Brief pause.)

THE COURT: Okay. Docket entry --

MR. RACHLIS: So, it's Docket 1230.

THE COURT: 1230.

MR. RACHLIS: Page --

THE COURT: Give me one second.

MR. RACHLIS: Page 52.

THE COURT: 1230.

Oh, that exhibit.

MR. RACHLIS: Yes. Which does specifically address that line and page reference number 2205.

THE COURT: Row number?

MR. RACHLIS: Row No. 65. So, if you go to Page 52, it's the one that's No. 65 towards the bottom.

THE COURT: Okay. Thank you.

Let's look at one more, 2192. 2192.

Again, this is a line number I got from the response, 2192. The objection here is that the entry is ambiguous, lacking in details. 2192 is classified as asset disposition, entry date April 20, 2020. Task performed: Review due diligence documents received from property manager from various properties.

Now, remember, the lenders object to the reference to, quote-unquote, various properties, and yet it's divided over -- divided between -- among 36 properties.

How do you get there?

MR. DUFF: Your Honor, Kevin Duff. I'd be happy to address that.

After we submitted the fee applications and those were approved by the court, when we were going through the process of making sure that the allocations were correct, we spent hundreds if not over a thousand hours to go back through every task entry to make sure that the allocation was correct.

Initially, especially in some of the early days of

the receivership, we did not include an allocation. But we made a concerted and earnest effort to make sure that the allocations were proper. So, in this instance, we looked at this particular task. We had the bill keeper first check to make sure that they had the allocation correct, and then either Ms. Wine or I or both of us double-checked that to make sure that the allocation actually related to the properties to which it was allocated.

THE COURT: I'm sorry, but that doesn't answer the question. You have this entry for various properties, and yet you divide the charge among 36 properties. What's the rationale there? Why not 103 properties?

MR. DUFF: I believe --

THE COURT: How are you getting to the 36? That's my question.

MR. DUFF: I believe in that instance, your Honor, it related to properties that were under management by one of the two property managers, and that allocation corresponded to those properties that were under management by that property manager.

THE COURT: Okay.

Any comments from the institutional lenders?

MR. DAMASHEK: Yes, Judge. In the receiver --

THE COURT: Mr. Damashek, go ahead.

MR. DAMASHEK: Sorry, Judge. Ron Damashek.

In the receiver's response to our motion, they prepared a chart -- and, actually, I believe it would have been the reply to our objection -- they prepared a chart in which they said the receiver agrees this allocation is incorrect. Further investing --

THE COURT: Hold on a second.

MR. DAMASHEK: I'm sorry, this is --

THE COURT: Which page number?

MR. DAMASHEK: Document 1230, Page 46 of 157, first line.

THE COURT: 46.

And row number?

MR. DAMASHEK: The first one, Judge.

THE COURT: Oh, sorry.

MR. DAMASHEK: 31.

MR. RACHLIS: Yep.

THE COURT: Okay?

MR. RACHLIS: Yep.

THE COURT: Mr. Damashek is correct.

MR. RACHLIS: Is correct -- yes, he's correct.

THE COURT: So, when you say the task will be reallocated to the following properties -- one, two, three, four, five, six, seven -- am I reading that correctly?

MR. RACHLIS: Yes.

THE COURT: So, how is this going to take place?

Walk me through how you will do this.

MR. RACHLIS: So, your Honor, what we had identified on this exact exhibit, this row entry and a few others, as well, we would -- after the -- we figured -- what we were going -- planning on doing was after we understood if there were any other issues or items that needed to be addressed or corrected, we are going to go ahead and rerun all of these spreadsheets for your Honor, which will then take into account basically deleting, essentially, the entry that you see; reentering the allocation, I mean, to what you -- what is here; and, then, providing your Honor with corrected or amended versions of each of these reports, which does take both time -- that is -- I think we had indicated in our pleadings that we have a vendor that we are using in order to help make this doable and feasible. So, we'll work with that vendor.

So, there's both time and cost expense associated with rerunning these. So, we wanted to be sure that we had everything that needed to get corrected done before we go ahead and rerun them.

THE COURT: Mr. Damashek, did you find any other entries where the receiver agrees with the objection?

MR. DAMASHEK: Yes. There were several, Judge. But one comment with respect to this, again, the receiver is telling us now that's what he's finding. I don't know -- and

we have representative examples here, and I'll get to them. But remember, we only have maybe a hundred out of thousands of examples here. So, how many other places might there be errors like this? And I don't know how we deal with that in the context of the receiver acknowledging certain things are wrong.

If we look on Page 41 of 1 -- of Document 1230 --

THE COURT: Give me one second.

(Brief pause.)

THE COURT: Okay.

MR. DAMASHEK: Line -- Row 9. That relates to property in Naples, Florida, in which the receiver agrees that was improperly charged to the secured properties.

MS. WINE: If I can interject for one moment, your Honor?

THE COURT: Ms. Wine.

MS. WINE: You had asked when we had a call last week whether there were certain errors that we had identified. And there are such errors, and they're on different rows of this sheet that we're all looking at. I can tell you the lines right now and put it in the record. It's Row 9, 11, 12, 13, 15, 19, 20, 21, 22, 23, 26, and 31.

THE COURT: So, how many is that total? What's the total?

MS. WINE: 12.

THE COURT: But am I correct, then, that we have total line numbers 72 in the exhibit, right?

MS. WINE: That's correct.

THE COURT: And we have 12 errors?

MR. RACHLIS: Yes.

THE COURT: Don't you think that's a sizable percentage?

What's the percentage if we were to divide 12 by 72?

MR. NATARELLI: That's about 16, Judge.

THE COURT: 16 percent?

MR. RACHLIS: Your Honor, it's about 16 percent, that number. But we would probably disagree with the denominator that you're using there. The denominator is more -- there are probably 30,000 or 50,000 entries that are included in all of this. So, you are seeing, I'd say, a very minor figure of items that need to be corrected.

MR. McCLAIN: Your Honor, if I may? Andrew --

THE COURT: Hold on a second.

So, 72 lines are lines identified by the institutional lenders in the response, right?

MR. RACHLIS: They are -- they were examples. And, so, we went through each example that they gave in order to create Exhibit 1 that's attached to 1230.

THE COURT: Okay.

I'm sorry. Go ahead. Your name?

MR. McCLAIN: Andrew McClain, your Honor. Thank you.

I want to stick with the point that you just pointed out, your Honor, of there's 72 examples in the exhibit and at least 12 of them have admittedly been allocated to the wrong property. One of the institutional lenders' basis for an objection is improper allocation among properties. And in our response brief, we identified 13 examples where we believe there were improper allocations, and those are on Exhibit D to the response brief. And of those 13 examples that we identified, your Honor, the receiver admitted that seven of those entries were improperly allocated to the property in Exhibit D.

So, that percentage is actually 50 -- over 50 percent, your Honor. And within that same objection, we identified 11 examples from Exhibit C. And the receiver conceded that four of those 11 examples were improperly allocated. And, so, that percentage of error is approximately a third.

And, so, your Honor pointed out exactly one of our concerns, is that there seems to be, at least on the examples that we identified -- and I recognize there's 20,000-plus pages of time entries, but on the examples we identified -- there seems to be a high percentage of error rate. And that is concerning when we're talking very large numbers here. I recognize in isolation some of these entries are only a few

cents. But they add up to significant dollar amounts.

THE COURT: My gut reaction is the same as yours, that the percentage appears to be high. But I have to remember that we're not dealing with a statistically sound sample.

In other words, I can't draw an inference that all of the fees charged and allocated there's a 16 percent error rate because I really don't know. Because I'm sure, given how good the attorneys are, you're pointing out the obvious examples where you can support your objection. So, among a rich set of alleged errors, we have 16 percent where the receiver agrees that there was an error.

Let me ask this question: What is the purpose of the 20 percent holdback, and how is that going to be -- how is that going to actually come into play?

Actually, you know what? Hold that thought. Let's go ahead and take a break until -- actually, why don't we go ahead and finish that point, and then we'll just pick it up on Friday.

Oh, yes, the holdback. How is that actually going to come into play? Who wants to address that?

MR. McCLAIN: Your Honor, so the holdback of the fees, as I understand it -- not to put the SEC's attorney on the spot, but perhaps he can opine a little better. But my understanding is that it's intended to ensure that there's

excess reserves at the end of the estate to pay remaining funds or to pay remaining expenses and potentially be distributed to other creditors of the estate.

THE COURT: What is your interpretation?

I'm asking the receiver.

MR. DUFF: Yes, your Honor. Kevin Duff.

Your Honor, I believe that when Judge Lee ordered the hold-back, it was in part to ensure that, as your Honor -- as this Court went through this process, if there was a need for any corrections, there would be a cushion there in order to cover that.

So, the 20 percent here that had been ordered for properties and then an additional 20 percent with respect to fees specifically allocated to properties would be more than enough to cover here.

And I think the point has been noted, but it's worth emphasizing. We're talking about a sample of a very small number of items that we have agreed ought to be corrected in relation to, I believe, nearly 22,000 separate tasks.

THE COURT: I'm not understanding how the holdback -- so, let me start from scratch.

How much are you asking to be paid now through this motion of allocation, the first motion to allocate?

MR. DUFF: Are you asking a matter of percentage, your Honor, or amount?

THE COURT: No, no, the actual amount.

MR. RACHLIS: Actual amount.

(Brief pause.)

THE COURT: It's probably listed on one of the exhibits.

MR. RACHLIS: Yes. That's what we're --

THE COURT: Exhibit 1.

MR. RACHLIS: So, you're right, your Honor. It's Exhibit 2, yes. We're looking at the bottom of Docket No. 1107-8 filed. And at the bottom, we have a total of --

Is it this total here? Yeah?

So, it would be total fees are three million nine hundred and forty-three dollars and twenty-nine -- I'm sorry, $3,943,029.54.

THE COURT: Okay. So --

MR. RACHLIS: Your Honor, just one thing. As you know, this was done in December of 2021. We've had some resolution of claims with your Honor's help, and those have been approved by the court. So, that number is less right now as a result of certain --

THE COURT: It's okay. I just want to use a real figure to figure out how this holdback works.

So, the first motion for allocation is seeking approximately $3.9 million. And if I were to grant the motion for allocation, I grant the motion in the amount of 80 percent

of 3.9 million?

MR. RACHLIS: That would be correct, your Honor, although there are -- there are other hold-backs that Judge Lee had included for certain of the fee application awards that were given.

THE COURT: So --

MR. RACHLIS: But, generally speaking, it would be -- 80 percent is a right figure to be thinking about.

THE COURT: So, what is 20 percent of 3.9 million? Just give me a ballpark number.

MR. RACHLIS: If we round it up to four, it's 800,000 -- it's approximately $800,000.

THE COURT: So, where does the $800,000 go?

MR. RACHLIS: The $800,000 would be -- would remain in each of the property accounts.

THE COURT: And at what point -- I mean, I imagine that at some point the receiver will say, hey, wait a second, where's my $800,000?

When will that take place, and who is going to decide whether anything has to be reverted to the property owners?

MR. RACHLIS: I would believe, your Honor, that unless there's some interim motion or other thing that would be submitted, it would be at the time of the final distribution plan that would be given to Judge Shah when we're getting close to, basically, distributing everything else

from, basically, making final distributions from the estate.

THE COURT: But someone would have to actually go through line by line to figure out where there was an error and notify the court, oh, and by the way, we made an error as to X amount.

MR. RACHLIS: It could be that, your Honor, or it could be also related to future fee petitions or something to that effect. I mean, it could be utilized as a cushion in some sense, I think, going forward, as well, to have the holdback.

But, yes, in some sense, your Honor's correct. I guess -- I'm thinking about it. It could be used in a variety of ways as a cushion. But, certainly, your Honor, yes, that's true.

And Ms. Wine reminded me the holdback just began with the ninth fee application. So, the first eight did not have any.

THE COURT: So, it wouldn't be 20 percent of 3.9. It would be much less.

MR. RACHLIS: It would be less, but for round -- yes, that's correct, your Honor.

MR. NATARELLI: Your Honor, Brett Natarelli.

The reason for that is because the first eight fee petitions were paid out of the operating account. That was historically what preceded.

MR. RACHLIS: To be accurate, the first eight weren't paid. The first three were paid. The remainder were not.

THE COURT: Okay.

So, in terms of Objection 8, the objection is overruled. Having gone through the details, there's sufficient information for me to approve that the receiver has followed the court's directions and doing its best to allocate the work performed to the properties necessary. Although we have identified a potential that there is a percentage error, I can't decide what that percentage is. But even with this unscientific sample of entries, we have a 16 percent error rate, which is, again, not very scientific, but it is, in fact, lower than 20 percent. So, for that reason, I am not going to hold the error over the receiver and sustain the objection. That's my ruling.

So, that leaves us with Objection 1 and Objection 2. We will pick up those two objections on Friday. But if you want to start earlier, since it's Friday, I'm more than happy to accommodate. Otherwise, my preference is to start at 1:00 p.m.

Any thoughts on that particular issue?

MR. RACHLIS: From the receiver's perspective, we can start whenever your Honor would like to start.

THE COURT: I can start as early as 11:00 a.m.

MR. RACHLIS: 11:00 a.m. works for the receiver.

THE COURT: Only if there's an agreement.

MR. NATARELLI: 11:00 it is, your Honor.

THE COURT: Okay. I'll see you at 11:00 a.m. Friday morning.

MR. HANAUER: Your Honor, one very quick housekeeping matter. Ben Hanauer for --

THE COURT: Yes. Have a seat.

MR. HANAUER: -- the SEC.

THE COURT: Have a seat.

MR. HANAUER: The Court spent a significant amount of time addressing Objection 6, but I don't believe a formal ruling was ever made on the record for it. I think the Court intimated how it viewed it, but, again, I didn't hear --

THE COURT: I overruled the objection.

MR. HANAUER: Oh, thank you. I just didn't hear that for the record.

THE COURT: Okay.

MR. HANAUER: Apologies, your Honor.

THE COURT: What other housekeeping matters?

MR. RACHLIS: That was it.

THE COURT: Okay.

Thank you. See you Friday.

(Adjournment taken at 4:32 o'clock p.m., until 11:00 o'clock a.m., the following Friday, February 10, 2023.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph Rickhoff February 15, 2023
Official Court Reporter

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. Manish S. Shah Magistrate Judge Young B. Kim

JOINT MOTION TO APPROVE DISTRIBUTIONS OF PROCEEDS FROM THE SALES OF PROPERTIES LOCATED AT 3723 W 68TH PLACE, 61 E 92ND STREET AND 7953 S WOODLAWN AVENUE

Kevin B. Duff, as the receiver for the Estate of Defendants EquityBuild, Inc., EquityBuild Finance, LLC, their affiliates, and the affiliate entities of Defendants Jerome Cohen and Shaun Cohen ("Receiver"), and Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Colony American Finance 2015-1 ("Midland"), respectfully file this joint motion for approval of an agreed plan for the distribution of the proceeds from the sales of 3723 W 68th Place (Property 33), 61 E 92nd Street (Property 35), and 7953 S Woodlawn Avenue (Property 40) (hereinafter the "Subject Properties"). In support of this motion, movants state as follows:

1. With the Court's approval, on May 26, 2021, the Receiver sold a portfolio of properties that included the Subject Properties free and clear of all mortgages and encumbrances. (Dkt. 979) Prior to the sale, the Court found that the Receiver gave fair, adequate, and sufficient notice to all interested parties, including all mortgagees affected by the Receiver's 13th Motion to Confirm the Sale of these and other properties. *Id*. at 2. The net proceeds of sale for each of the

three Subject Properties were deposited into a separate interest-bearing account held by the Receiver pursuant to court order. See Exhibit A. Additional deposits have been made into these property accounts, as reported in the Receiver's quarterly status reports (Dkt. 1017, 1077, 1164, 1243, 1280, 1328) and summarized in Exhibit A, along with the balance as of the date of filing in each of the accounts.

2. In 2019, the Receiver initiated a claims process whereby he: (a) researched mortgagees of record and EquityBuild records to identify potential claimants; (b) served all known potential claimants by email and/or regular mail with notice of the bar date, procedures for submitting proofs of claim, and a link to a third-party portal to submit claims; (c) sent multiple follow-up emails reminding potential claimants of the bar date (and the extended bar date); and (d) established a webpage (http://rdaplaw.net/receivership-for-equitybuild) for claimants and other interested parties which prominently displayed the claims bar date and provided copies of the claims notice, instructions, proof of claim forms, a link to the claims portal, and copies of certain court filings related to the claims process. Investors were notified that the failure to submit a claim verification form by the bar date would be a basis for denial of that claim. (Dkt. 241, 302, 349, 468, 548, 638, 693, 720) The Court's orders with respect to the claims process were also served upon claimants and potential claimants and posted on the Receiver's website. (Dkt. 349, 574, 940, 941)

3. In February 2021, following briefing and hearings, the Court entered two orders establishing a process for the resolution of disputed claims. (Dkt. 940, 941)

4. In February 2021, the Receiver moved to approve the payment of certain previously approved fees and costs pursuant to the Receiver's lien on the properties of the Estate that had been granted by the Court (Dkt. 947, 981) The Court granted the Receiver's motion (Dkt. 1030),

and referred subsequent proceedings on the Receiver's specific fee allocations to Magistrate Judge Kim, which are ongoing. (Dkt. 1107, 1113, 1230, 1312, 1321, 1323) Claimants and potential claimants have received notice of the motion practice relating to the receiver's lien, and the Receiver's fee applications, the foregoing motions, and the Court's orders have been posted to the Receiver's website.

5. Subsequently, settlement discussions occurred before Magistrate Judge Kim among and between the Receiver and each of the claimants asserting an interest in the Subject Properties, namely Midland, Celia Tong (on behalf of the Celia Tong Revocable Trust, Blessing Strategies, LLC, and Quantum Growth Holdings LLC), Dennis McCoy, Kathleen Martin (on behalf of the heirs of John Martin), Lorenzo Jaquias, and Jeffrey Lee Blankenship.

6. Claimant Tong subsequently conceded that she, Blessing Strategies, LLC, and Quantum Growth Holdings LLC had each rolled their secured interests to other EquityBuild properties, and were no longer asserting a claim against any of the Subject Properties. Likewise, claimants McCoy, Jaquias, and Blankenship have each confirmed that their investments were rolled to other properties and they also are no longer asserting claims against any of the Subject Properties.

7. Claimant Martin reached a negotiated agreement regarding the distribution of the funds in the account held for 3723 W 68th Place (Property 33), as set forth in Exhibit A (distribution plan). Claimant Martin does not oppose this motion, she and the estate of John Martin have accepted the distributions proposed in this motion with respect to any claim secured by Property 33, and agree that they will not seek appeal from any rulings associated with the Subject Properties.

8. The moving parties have reached agreement as to the distribution plan set forth in Exhibit A, which provides for: (i) payment to the Receiver's law firm for uncontested fees allocated to the property (constituting the allocation of fees submitted in approved fee applications through the Second Quarter of 2022, plus the 20% of fees held back from the payment of fees allocated to the Subject Properties in the Third Quarter of 2022 (see Dkt. 1366, 1371, 1372), plus fee allocations for the Fourth Quarter of 2022, minus a credit for agency fees paid to the Receiver's counsel); (ii) reimbursement to the Receiver's account for previously incurred expenses attributable to the Subject Properties; (iii) payments to claimant Martin of the amount negotiated for the settlement of her claim against Property 33; and (iv) distribution of the remaining balance in the separate property accounts to Midland or its nominee.

9. Midland agrees that with respect to the Subject Properties, Midland will withdraw its objections to the Receiver's lien entered by the Court (Dkt. 1030) and to the Receiver's pending fee allocation motions (Dkt. 1107, 1321), subject to the agreements reached by the movants as set forth in this Motion and the Court's granting of this Motion.

10. Midland and the Receiver further agree that their agreement resolves all disputes between the Receivership Estate and the Receiver and Midland with respect to the Subject Properties, and neither party will appeal from any rulings associated with the Subject Properties. Midland's agreement to the proposed distribution is without prejudice to any claim it may have against any applicable title insurer.

Legal authority

11. It is well-settled that the district courts have broad powers and are afforded wide discretion in approving a distribution plan of receivership funds. *SEC v. Forex Asset Mgmt.*, 242 F.3d 325, 331 (5th Cir. 2001); *SEC v. Enterprise Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009)

("District judges possess discretion to classify claims sensibly in receivership proceedings."); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992).

12. Because the Receiver is a fiduciary and officer of this Court, the Court may give some weight to the "…Receiver's judgment of the most fair and equitable method of distribution." *CFTC v. Eustace*, No. 05-2973, 2008 WL 471574, at *5 (E.D. Pa. Feb. 19, 2008) (approving receiver's pro-rata distribution plan and recognizing that the receiver does not represent a particular group of investors or claimants but rather proposes a plan that is fair to all investors).

13. Based on the facts and circumstances, the Receiver believes that the distribution plan with respect to the Subject Properties as described in this motion is fair and equitable. The recommended distribution amounts represent a substantial payment of the principal amount of the loans to secured lenders for the Subject Properties. The Receiver has further determined that there are no other issues that he is aware of that would necessitate any further holdback from the amounts set forth above.

14. There are also additional savings of time and resources achieved based on the agreements reached between the Receiver, Midland, Kathleen Martin (on behalf of herself and the heirs of John Martin's estate), Celia Tong (on behalf of the Celia Tong Revocable Trust, Blessing Strategies, LLC, and Quantum Growth Holdings LLC), Dennis McCoy, Lorenzo Jaquias, and Jeffrey Lee Blankenship. As a result of the agreements set forth in this motion, there are no objections that remain associated with the Receiver's lien or fees allocated to the Subject Properties. The claimants' agreement to not seek appeal from any rulings associated with the Subject Properties will be a further saving time and resources for many involved in the Receivership. Effectively, as a result of the agreement and distribution, the claims and issues between the Receivership, Midland, Martin, Celia Tong Revocable Trust, Blessing Strategies,

LLC, Quantum Growth Holdings LLC, McCoy, Jaquias, and Blankenship with respect the Subject Properties have concluded.

15. Notice of this motion is being given to each of the claimants asserting a claim against any of the Subject Properties, as well as to each of the other claimants who have submitted claims in this matter. In addition, this motion will be made publicly available to all interested and potentially interested parties by posting a copy of it to the Receivership web site.

WHEREFORE, the movants seek the following relief:

a) a finding that adequate and fair notice has been provided to all interested and potentially interested parties of the claims process, the Receiver's proposed fee allocations, and the current Motion, and that each interested or potentially interested party has had a full and fair opportunity to assert its interests and any objections;

b) a finding that the agreement described herein is fair and reasonable;

c) approval of the payment of the attorneys' fees the Receiver has allocated to the Subject Properties in his pending fee allocation motions (Dkt. 1107, 1321), and the Court's further approve the payment of fee allocations to the Subject Properties for the fourth quarter of 2022;

d) approval of the distribution of funds as set forth in Exhibit A to this motion, with distributions to be made within ten (10) business days of the Court's approval of this motion; and

e) such other relief as the Court deems fair and equitable.

Dated: February 13, 2023

Respectfully submitted,

/s/ Michael D. Napoli
Thomas B. Fullerton (6296539)
Akerman LLP
71 S. Wacker Drive, 47th Floor
Chicago, IL 60606
(312) 634-5700
thomas.fullerton@akerman.com

Michael D. Napoli (TX 14803400)
Akerman LLP
2001 Ross Avenue, Suite 3600
Dallas, TX 75201
(214) 720-4360
michael.napoli@akerman.com

Counsel for Midland Loan Services, a Division of PNC Bank, National Association

/s/ Michael Rachlis
Michael Rachlis
Jodi Rosen Wine
Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
(312) 733-3950
mrachlis@rdaplaw.net
jwine@rdaplaw.net

Counsel for Kevin B. Duff, Receiver

CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing **Joint Motion To Approve Distributions Of Proceeds From The Sales Of Properties Located At 3723 W 68th Place, 61 E 92nd Street And 7953 S Woodlawn Avenue**, via CM/ECF system, to all counsel of record on February 13, 2023.

I further certify that I caused true and correct copy of the foregoing **Joint Motion** to be served upon all individuals or entities that submitted a proof of claim in this action with respect to the properties identified in the foregoing **Joint Motion**: Kathleen Martin (on behalf of herself and the heirs of John Martin's estate) <SMILE4MENOW222@msn.com>; Jeffrey Blankenship <jeff_blankenship99@yahoo.com>; Dennis McCoy dennismccoy@sbcglobal.net; Lorenzo Jaquias <hiloboy@live.com>; Celia Tong (on behalf of the Celia Tong Revocable Trust, Blessing Strategies, LLC, and Quantum Growth Holdings LLC) celiayt@hotmail.com; and upon all 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) and their counsel.

I further certify that the **Joint Motion** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

/s/ Michael Rachlis

Michael Rachlis
Rachlis Duff & Peel, LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
Phone (312) 733-3950
Fax (312) 733-3952
mrachlis@rdaplaw.net

EXHIBIT A

Prop #	PROPERTY ADDRESS	Net proceeds of Sale	Transfers pursuant to 9/21/20 Court Order (Dkt. 796)	Post-Sale Reconciliations	17th Fee Application Payments (1/18/23)	Interest Paid	Balance of Receivership Account for Property (as of 1/31/23)
33	3723 W 68th Place	$ 116,218.63	$ -	$ 7,813.54	$ (1,479.33)	$ 1,385.82	$ 123,938.66
35	61 E 92nd Street	$ 96,208.20	$ -	$ 7,032.18	$ (1,346.04)	$ 1,153.03	$ 103,047.37
40	7953 S Woodlawn Avenue	$ 116,712.51	$ -	$ 11,720.31	$ (1,982.55)	$ 1,432.22	$ 127,882.49
	TOTALS	**$ 329,139.34**	**$ -**	**$ 26,566.03**	**$ (4,807.92)**	**$ 3,971.07**	**$ 354,868.52**

Prop #	Fee Allocations (thru Q2 2022)	Holdbacks (Q3 2022)	Fee Allocations (Q4 2022)	Credit for agency fees paid to Receiver's counsel	Net Distribution to Receiver for Fees
33	$ 13,444.30	$ 369.83	$2,779.10	$ (1,487.50)	$ 15,105.73
35	$ 12,741.00	$ 336.51	$2,629.48	$ (1,487.50)	$ 14,219.49
40	$ 14,594.75	$ 495.64	$1,060.92	$ (1,487.50)	$ 14,663.81
	$ 40,780.05	**$ 1,201.98**	**$ 6,469.50**	**$ (4,462.50)**	**$ 43,989.03**

Prop #	Balance of Receivership Account for Property (as of 1/31/23)	Net Distribution to Receiver for Fees	Net Distribution to Receiver's Account for Cost Reimbursements	Amount Available for Distribution to Claimants
33	$ 123,938.66	$ (15,105.73)	$ (2,278.81)	$ 106,554.12
35	$ 103,047.37	$ (14,219.49)	$ (2,252.95)	$ 86,574.93
40	$ 127,882.49	$ (14,663.81)	$ (2,481.71)	$ 110,736.97
	$ 354,868.52	**$ (43,989.03)**	**$ (7,013.47)**	**$ 303,866.02**

Prop #	Amount Available for Distribution to Claimants*	Distribution to Kathleen Martin	Distribution to Midland Loan Services*
33	$ 106,554.12	$ 19,000.00	$ 87,554.12
35	$ 86,574.93		$ 86,574.93
40	$ 110,736.97		$ 110,736.97
	$ 303,866.02	**$ 19,000.00**	**$ 284,866.02**

*The Receiver will pay any pro rata interest earned as of the date of distribution to Midland

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.6.3
Eastern Division

United States Securities and Exchange Commission, et al.

Plaintiff,

v.

Case No.: 1:18−cv−05587
Honorable Manish S. Shah

Equitybuild, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, February 14, 2023:

MINUTE entry before the Honorable Manish S. Shah: The Receiver may submit a proposed order granting the motion to approve distributions [1382] in Microsoft Word format to proposed_order_shah@ilnd.uscourts.gov. All interested claimants having received notice of the motion and the settlement of the claims appearing to be an appropriate and reasonable resolution of the claims to the properties at issue, the court intends to grant the motion upon review of the proposed order.Notices mailed. (psm,)