

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

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

EQUITYBUILD, INC., et al.,

Defendants.

Case No. 1:18-cv-5587

Hon. Manish S. Shah

Magistrate Judge Young B. Kim

**CLAIMANT SHATAR CAPITAL PARTNERS' REPLY
IN SUPPORT OF MOTION FOR STAY PENDING APPEAL**

Claimant Shatar Capital Partners (“Shatar”), on behalf of 111 Crest Dr. LLC, Abraham Aaron Ebriani, Hamid Esmail and Farsaa Inc., and any subsequent assignees including Pakravan Living Trust, through its undersigned counsel, hereby submits this reply in support its Motion to Stay Pending Appeal (Dkt. 1710) in regards to distribution or disbursement of the proceeds from the sale of 5450 S. Indiana (Property 4) and 7749 S. Yates (Property 5) to the Individual Investors, pending appeal of the Court’s July 15, 2024 Order (Dkt. 1699) (the “Disbursement Order”).

ARGUMENT

I. All of the relevant factors favor a stay of the Court’s Disbursement Order.

All of the well-established factors relevant to analyzing whether a stay is warranted favor a stay of this Court’s Disbursement Order. As an initial matter, Shatar meets the so-called “threshold” requirements to show a substantial likelihood of success on the merits and that it will suffer irreparable harm if the request for stay is denied, such that the Court should consider all four of the relevant factors. Similarly, the remaining two factors—that a stay will not injure the opposing parties and will be in the public interest—also favor Shatar’s request for a stay. Moreover, although Respondents omit as much from their respective discussions of the applicable

legal standard, “a ‘sliding scale’ approach applies” in considering a stay pending appeal, meaning “the greater the moving party’s likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, *and vice versa*.” *In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (emphasis added). Correspondingly, if the appeal “has some though not necessarily great merit,” then the movant must show that the balance of equities strongly favors granting the stay. *See Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 546-47 (7th Cir. 2007). Here, both the merits and the balance of equities favor granting Shatar’s request for stay.

A. There is a significant probability of success on the merits of Shatar’s appeal, which presents key questions of law.

The Respondents do not present any arguments that undermine Shatar’s demonstration in its opening brief that there is a significant probability that it will succeed on the merits of its appeal.

The Individual Investors do not substantively challenge any of Shatar’s arguments. Instead, they suggest the Seventh Circuit “has already rejected many of the arguments that Shatar will make,” referring to the court of appeals’ resolution of BC57’s appeal in connection with Group 1. Dkt. 1726 at 3. This is not correct. While the resolution of the parties’ respective claims regarding various Group 1 and Group 2 properties necessarily involve the question of mortgage priority, the actual issues raised by BC57 and Shatar are very different. BC57’s appeal focused on (1) whether “payment in exchange for a mortgage with first priority extinguished the existing liens, regardless of the validity of the releases,” BC57 obtained from Equitybuild, and (2) whether those releases were valid. Dkt. 1684, Panel Opinion at 6. Shatar’s appeal does not relate to either of these issues.

Shatar is challenging this Court’s finding that Shatar was on inquiry notice that there were other investors who may have had an interest in 7749 S. Yates, and that a diligent inquiry would have disclosed that other investors already had a mortgage against 7749 S. Yates. Dkt. 1710 at 5-

6. Shatar is further challenging this Court's finding that the Individual Investors had equitable mortgages in 5450 S. Indiana prior to Shatar's mortgage being recorded, that Shatar was on inquiry notice with respect to such equitable mortgages, and that a diligent inquiry would have disclosed the equitable mortgages. *Id.* at 8-9. None of these points were at issue in BC57's appeal. Indeed, this Court specifically noted that it did not need to reach the question of inquiry notice in making its priority determination as to Group 1. Dkt. 1386 at 10. Moreover, no party or court ever suggested that any claimant in Group 1 possessed an equitable mortgage¹.

The Individual Investors also contend Shatar "rehashes the arguments it has already presented" to this Court which this Court "has already rejected." Dkt. 1726 at 3. The Receiver makes a similar argument. Dkt. 1727 at 5. These assertions lack merit.

As an initial matter, the Respondents' argument is particularly misguided as it pertains to 5450 S. Indiana. The Individual Investors never contended they had equitable mortgages with respect to any property. And the Receiver only briefly raised this point, in the alternative and without any citation to case law, via a three sentence blurb in its sur-response, Dkt. 1602-1 at 10, the final submission this Court permitted to be filed with respect to Group 2. Furthermore, while Shatar's appeal does include its respectful disagreement with the Court's determination as to inquiry notice and what a diligent inquiry would have found as to both properties, it is inherently the case that a party seeking appellate review will challenge a trial court's resolution of arguments previously presented to that court. Thus, it follows that a portion of Shatar's motion for stay

¹ The Individual Investors make a similarly misplaced argument based on the Seventh Circuit's resolution of BC57's appeal in the context of whether a stay is in the public interest, contending, "[w]ith the Seventh Circuit having ruled and having affirmed the Court's conclusions regarding Group 1, one would have hoped that Institutional Lenders like Shatar would see the writing on the wall and end their use of the litigation tactics designed only to insert uncertainty into the distributions." Dkt 1726 at 6. As described *supra*, the differences between the issues BC57 raised on appeal and those Shatar raises demonstrate that the Individual Investors' rhetoric lacks merit.

pending appeal will reference components of its prior briefing, explaining, in short, why it believes such points continue to have merit notwithstanding this Court's determination. Accordingly, Shatar's discussion of certain of these points is not a basis to deny its motion.

The Receiver briefly addresses certain of Shatar's points, but these arguments also lack merit. The Receiver first suggests Shatar will not succeed on appeal because "the claimants here, whether the investors, Shatar, or others, are 'like creditors of a debtor in bankruptcy, [and] must accept the distribution that the court believes appropriate.'" Dkt. 1727 at 4 (citing *SEC v. Enterprise Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009)). Importantly, this quote has nothing to do with the standard of review on appeal. Instead, it comes from a discussion of the appellate court's jurisdiction, explaining why investors are permitted to appeal in receivership proceedings without intervening and becoming formal parties. As the Seventh Circuit explained, such investors "can't file another suit seeking more from the pool of assets administered in the receivership." *Id* at 652.

Additionally, as to whether the Individual Investors had equitable mortgages in 5450 S. Indiana prior to Shatar's mortgage being recorded, the Receiver suggests Shatar seeks to impose a new requirement unsupported by the case law. Just the opposite is true. Shatar's point is that the case law demonstrates that equitable mortgages are primarily found in instances where a party that agrees to provide a mortgage to secure the receipt of funds ***actually already owns the property***, ***but when that is not the case***, such equitable mortgages are found in instances where the funds were ***actually used to purchase the property*** being pledged. Neither situation happened here. Equitybuild did not own 5450 S. Indiana prior to receiving the Individual Investors funds, nor did it use those funds to purchase the property. Instead, Shatar's funds were used to purchase this property. As such, the Individual Investors did not have equitable mortgages in 5450 S. Indiana.

Moreover, even if a “springing” equitable mortgage is found, despite the Individual Investors’ funds not going to the purchase of the property, there is no support in the case law or equity for giving that “springing” equitable mortgage priority over an actual purchase money mortgage where the purchase funds were sent through escrow directly to the third party seller of the property. The Receiver does not address any of these points. Indeed, in the one case the Receiver cites regarding equitable mortgages, *Silas v. Robinson*, 131 Ill App. 3d 1058 (1985), the money Silas loaned to Robinson was used to “purchase the property” at issue. 131 Ill App. at 1063.

Finally, the Receiver suggests that “it is beyond cavil that a reasonable person could (and would) agree” with this Court’s “thorough and thoughtful opinion” on the “issues associated with the Indiana and Yates properties.” Dkt. 1727 at 5. But such statements do not rebut Shatar’s key points. For example, the Receiver does not address the fact that even if Shatar was on inquiry notice as to one or both of the properties (which Shatar does not concede), respectfully, this Court did not conduct its analysis of what a “diligent inquiry would have disclosed,” in the context of the specific circumstances of this case.

Importantly, the Seventh Circuit, the SEC and this Court have all recognized the depths of the Cohens’ deceit and their willingness to lie to “keep the scheme afloat.” Dkt. 4 at 2. Indeed, when the SEC sought an emergency motion for a temporary restraining order and “conduct-based injunction” in this case, it justified the need for such relief as follows:

“Defendants’ violations have gone unabated for many years, *and will continue to do so absent an injunction*. Indeed, *by virtue of Defendants’ customary business activities, their fraudulent securities offering remains ongoing*. Rather than recognize their own culpability or provide assurances against future violations, *Defendants currently prey on unwitting investors*.”

Dkt. 4 at 15. (emphasis added). As noted in Shatar’s opening brief, such observations underscore that the Cohens would never have simply admitted that the Individual Investors had mortgages,

equitable or otherwise, against the two properties, much less provided Shatar with the names of such individuals so they could be contacted. There was simply no means for Shatar to determine who the Individual Investors were, let alone obtain their contact information, aside from Equitybuild. As such, no diligent inquiry would have uncovered such mortgages or the Cohens' scheme for that matter.

For these reasons and those explained in its opening brief, Shatar respectfully submits that it has met its "threshold burden" to establish a substantial likelihood of success on appeal.

B. Shatar will face irreparable harm absent a stay.

Without a stay, if Shatar is successful on appeal, it will be irreparably harmed by the futility in recovering the already-disbursed proceeds of the Receiver's sale of the two properties to 139 different claimants. As noted in Shatar's opening brief, this Court's observations regarding the harm BC57 faced in pursuing an appeal absent a stay similarly apply to Shatar. Dkt. 1710 at 13. And courts in the Seventh Circuit and across the country have ordered stays in similar circumstances involving pools of funds for distribution to avoid the harm Shatar faces absent a stay. *Id.*

The Individual Investors briefly acknowledge this Court's prior findings regarding the harm that will follow absent a stay, but suggest Shatar's "latest attempt to delay justice," "fails to acknowledge other comments from the Court that ring all the more true now," including the "litigation tactics of a few participants," and the detrimental impact of such tactics. Dkt. 1726 at 4-5. The Receiver similarly references this Court having "recognized that a material factor contributing to the length of the case has been the manner in which the institutional lenders have chosen to litigate this matter." Dkt. 1727 at 3. Respondents' rhetoric lacks merit.

Neither Respondent can or does identify any step Shatar has taken at any point during this process that can be described as an “attempt to delay justice,” or the kind of unnecessary “litigation tactics” this Court referred to in its comments. Shatar has timely submitted each of its filings, *all of which focused on the core issues in the case*, and Shatar has never sought any extensions. Indeed, Shatar filed its *unopposed* motion for an administrative stay *ahead* of this Court’s Disbursement Order, and then promptly filed its notice of appeal and motion for stay pending appeal only *two days* after this Court issued its Disbursement Order. Shatar’s appeal is a good faith and proper attempt to vindicate its rights, not “an attempt to delay justice” or improper “litigation tactic.”

The Investor-Individual investors also argue that irreparable harm cannot be “focused only on money.” (Dkt. 1726 at 4.) But courts have recognized that the type of loss Shatar faces here is sufficient to warrant a stay. For example, in *In re Quade*, 496 B.R. 520 (Bankr. N.D. Ill. 2013), the court ordered a partial stay and recognized that the movant had satisfied the “irreparable harm” prong of the motion for stay analysis, given the likelihood that the funds in question “may be quickly spent if the court fails to impose a stay.” *Id.* at 529. The court also specifically addressed whether monetary harm can qualify as irreparable harm. The court explained that while “monetary harm alone, without more, is insufficient to meet the requirement of irreparable injury absent” a stay because “[m]oney is fungible,” it nevertheless recognized that “[w]hile money is fungible, it may also in certain instances be *irreplaceable* as a matter of fact.” *Id.* at 528. That is precisely the risk here as this Court has recognized.²

² The Individual Investors accuse Shatar of being “tone deaf” for noting the simple fact that the delay in payment the Institutional Investors face if a stay is granted, *while still enjoying the certainty of knowing that the later payment will be in full if they prevail on Shatar’s appeal*, is not equivalent to what Shatar faces absent a stay—a *delay with no assurance that the funds will ever be fully recoverable* from 139 different individuals. The Individual Investors’ rhetoric lacks merit.

Finally, and tellingly, neither Respondent addresses the irreparable harm recognized in the cases Shatar cited in its opening brief, informing the practice of ordering stays in similar circumstances in this circuit and across the country.

For these reasons and those explained in its opening brief, Shatar respectfully submits that it has demonstrated that it will face irreparable harm absent a stay.

C. A stay will not injure any of the parties or claimants in this matter and the balance of harms weighs in Shatar’s favor.

As noted in Shatar’s opening brief, if a stay is granted, the funds obtained from the sale of the 7749 S. Yates and 5450 S. Indiana properties will be held safely in receivership, accruing interest. There is no risk of the funds diminishing or otherwise becoming unavailable to the Investor-Lenders. In other words, the Investor-Lenders do not face any harm.

The Receiver references testimony previously cited in opposing BC57’s motion for stay pending appeal from certain individual investors to demonstrate the “impact of *Defendants’ conduct*, first by having their funds deposited with the Defendants as part of their scheme, and then suffering the delay of receiving money back through the process designed to unwind the complex fraudulent web *established by the Defendants*.” (Dkt. 1727 at 2.) But the Receiver does not offer any testimony demonstrating Shatar’s request for stay is harming any individual investors. To the contrary, the April 26 testimony focused on issues of fairness, such as the fact that the Cohens “have continued to go scot-free” (Dkt. 1447 at 9:12-14) and concerns about the length of proceedings generally, including proceeding in tranches (*id.* at 42:10-20). That the individual investors have been victimized by the Defendants is definitely true, but so has Shatar³.

³ The Receiver also briefly cites generalized snippets of two messages he received from claimants “several years ago” referencing the importance of their “finances” during this “challenging time,” and having to come out of retirement to work full-time again. Dkt. 1727 at 3. Shatar in no way discounts the impact of Defendants’ deceitful conduct, but such statements do not justify exposing Shatar to the irreparable harm that will follow if a stay is not entered pending appeal.

All claimants in this case have been harmed by the Defendants, not just the Individual Investors. If a stay is entered, the funds slated for distribution will be maintained securely in interest-bearing accounts, awaiting appropriate and accurate distribution. Conversely, absent a stay, if Shatar prevails on appeal there is “no indication that the [Investor-Lenders] would be in a position to remedy the harm” if the proceeds are distributed to them and it is later determined that Shatar is entitled to them. *Life Ins Co. of N. Am.*, 2007 U.S. Dist. LEXIS 64454 at *4.

The Receiver cites *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833 (7th Cir. 2015) to suggest that “[i]n determining whether to grant or deny Shatar’s motion to stay distribution, the Court may consider the relative interests and circumstances of the claimants and the extent to which distribution now versus a stay of distribution would impact them.” Dkt. 1727 at 2 (citing at 840). The Receiver’s reliance on *Duff* is misplaced. While the Seventh Circuit in *Duff* referenced the fact that “some of the claimants are elderly, and many were very badly harmed by [the defendant’s] fraud,” this passing observation was made in the context of the appellate court’s analysis of the issue of equitable mootness, where funds had already been distributed, and “the other claimants also ha[d] a right to expect to keep what they received,” as the plan had been “**fully consummated, and the receivership [was] closed.**” *Duff*, 801 F.3d at 840 (emphasis added).

Finally, it is worth noting that Shatar’s appeal will be efficiently prosecuted. Indeed, Shatar’s opening brief is due on September 3, all briefing will be completed by October 24, and, for its part, Shatar will once again not be seeking any extensions of time. Shatar is as interested as any other party in obtaining an efficient resolution of its appeal.

For these reasons and those explained in its opening brief, Shatar respectfully submits that it has demonstrated that a stay will not injure any of the parties or claimants, and that the balance of harms weighs in Shatar’s favor.

D. A stay is in the public interest.

As noted in Shatar’s opening brief, the public interest is served in accurately distributing the proceeds from the sale of 5450 S. Indiana and 7749 S. Yates. Neither Respondent takes issue with this fundamental premise. As detailed *supra*, the Individual Investors offer only a rhetorical attack based on the flawed premise that the Seventh Circuit addressed issues relevant to the priority determination of the Yates and Indiana properties in resolving BC57’s appeal in connection with Group 1. Dkt. 1726 at 6. The Receiver similarly does not challenge the importance of accuracy, but instead emphasizes that “the distribution of such funds enhances the public policy supporting equity receiverships, where the goal is to distribute monies back to claimants efficiently and expeditiously.” Dkt. 1727 at 2 (citing *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)). Shatar does not disagree with *Hardy*’s actual observation that the “primary purpose of equity receiverships is to promote *orderly and efficient administration of the estate by the district court for the benefit of the creditors.*” 803 F.2d at 1038 (emphasis added). However, bound up in this objective is the fundamental premise that all creditors, including Shatar, are entitled to the benefit of an *accurate* administration of the claims at issue in the receivership proceedings. *See Life Ins. Co. of N. Am.*, 2007 U.S. Dist. LEXIS 64454, at *5 (“To the extent that an erroneous distribution of the money that is not corrected might tend to undermine confidence in courts, the public interest points in the direction of making sure that the courts decide the case correctly.”).

For these reasons and those explained in its opening brief, Shatar respectfully submits that it has demonstrated that a stay is in the public interest.

II. A supersedeas bond is not required.

The Individual Investors do not suggest Shatar should be required to post a bond if the Court grants its motion. The Receiver asks the Court to require Shatar to “post a bond in an amount determined by the Court to protect the receivership estate and the distributees from the financial

impact of its appeal.” Dkt. 1727 at 6. In making his request, the Receiver cites *In re Carlson*, 224 F.3d 716 (7th Cir. 2000), for the proposition that “[o]rdinarily a party is entitled to a stay pending appeal only by posting an appropriate bond.” 224 F.3d at 719. However, the next sentence in *Carlson* explains that a “district court has the discretion to waive this requirement,” where “appellant has a clearly demonstrated ability to satisfy the judgment in the event the appeal is unsuccessful and there is no other concern that the appellee’s rights will be compromised by a failure adequately to secure the judgment.” *Id.* at 719. As Shatar noted in its opening brief, the funds to pay the Individual Investors are being securely held in interest bearing accounts by the Receivership until distribution. Thus, Shatar respectfully submits that a bond is not required.

WHEREFORE, Claimant Shatar Capital Partners respectfully requests that this Court issue a stay, without security, of any distribution or disbursement of the proceeds from the sale 5450 S. Indiana (Property 4) and 7749 S. Yates (Property 5) to the Individual Investors pending appeal. If the Court is disinclined to order a stay, Shatar further respectfully requests that the Court continue the existing administrative stay of its Disbursement Order for 30 days to allow Shatar to seek an emergency stay from the Court of Appeals and to allow adequate time for a complete briefing schedule.⁴

Dated: August 8, 2024

Respectfully submitted,

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⁴ See, e.g., *U.S. SEC v. A.T. Bliss & Co.*, No. 84 C 6431, 1984 U.S. Dist. LEXIS 20851, at *8 (N.D. Ill. Dec. 31, 1984) (denying stay on December 31 but entering “[a] compliance date of January 31, 1985 is set to allow adequate time for respondents to seek a stay of this order from the Court of Appeals.”).

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2024, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ Andrew R. DeVooght
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