UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 23-24903-CIV-JB/Torres

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, *et al.*,

Defendants.
_____/

CWL-CH, LLC, ASJAIA, LLC AND VIEDEN GROVE OZ, LLC'S OBJECTIONS TO THE RECEIVER'S MOTIONS FOR AUTHORIZATION TO APPOINT APPRAISERS

CWL-CH, LLC ("CWL-CH"), ASJAIA, LLC ("ASJAIA"), and VIEDEN GROVE OZ, LLC ("VIEDEN GROVE OZ") (jointly and severally referred to hereafter as the "CG Members"), by and through the undersigned counsel[1], hereby file their Objections to the Receiver's Motions for Authorization of Employment of (a.) Integra Realty Resources [D.E. 328], and (b.) Aucamp, Dellenback & Whitney [D.E. 330] as Real Estate Appraisers for the Commodore Properties. In support of their Objections, the CG Members state as follows:

DISCUSSION OF POINTS AND AUTHORITIES:

1. **Procedures specified in 28 U.S.C. § 2001 are Mandatory**.

[1] The CG Members and the undersigned counsel have appeared for the limited purpose of seeking relief from this Court's stay and to object to the sale of the Commodore Properties. The CG Members do not concede that this Court has jurisdiction over the liens that they have asserted in the Commodore Properties.

For decades, the Courts in the 11th Circuit have recognized that the procedures set forth in 28 U.S.C. § 2001 are mandatory. Indeed, shortly after Congress adopted the current version of that statute, the predecessor Fifth Circuit announced the following ruling:

> The section of the statute authorizing private sales of real estate is of recent enactment. It was designed to cure a defect with reference to the sale of land under court authority in cases where a public sale under existing statutes would result in a sacrifice of the property. *Due to the opportunity for frauds in private sales, the Congress limited the power of the courts to confirm such sales to cases where notice, hearing, and appraisal had been afforded as provided in the statute authorizing the same*. This purpose could not be effected if non-compliance with any material requirement were permitted, and, for that reason, all of the requirements are, by the express terms of the statute, made conditions precedent to a valid sale.
>
> We are not confronted here even with a substantial compliance with the provisions of the statute, but with a total disregard thereof. Under these circumstances, to hold this sale of real estate valid would have the effect of violating essential provisions of the very statute from which the power to act is derived. ***This sale was void because the court was lacking in jurisdiction to confirm it***. *Cf. Williamson v. Berry*, 8 How. 495, 12 L.Ed. 1170; *Elliott v. Peirsol*, 1 Pet. 328, 7 L.Ed. 164; *Pan American Petroleum Co. v. Chase National Bank,* 9 Cir., 83 F.2d 447.

Acadia Land Co. v. Horuff, 110 F.2d 354, 354-55 (5th Cir. 1940) (emphasis added). Thus, under *Horuff*, the law in the 11th Circuit is that, until the procedures set forth in 28 U.S.C. § 2001 are followed, the Courts lack jurisdiction to confirm a judicial sale.

Here, the exercise of judicial authority to conduct a sale of real property is a matter of subject matter jurisdiction. In the *Williamson* decision, as cited by the U.S. Supreme in *Horuff*, the Court accepted the following argument:

> In this case **the "subject-matter" over which the Chancellor had jurisdiction by these private statutes was not the real estate**, for then he might have authorized its alienation by another person than Mr. Clarke; nor was it every alienation by him, for then a mortgage or an exchange might have been authorized under the first act; **but it was to determine whether or not the circumstances were such as to justify his assent to a sale** or mortgage for cash, and upon a sale or mortgage to superintend the application of the proceeds. When he went beyond this, his act was coram non judice, and void.

Williamson v. Berry, 49 U.S. (8 How.) 495, 531 (1850) (emphasis added). Ultimately, the Court ruled as follows:

> The acts in this case provide that the Chancellor may act upon them summarily, upon the application or petition of Clarke, and in each of them what the Chancellor can do is precisely stated. **In such cases, the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute.** In other words, *it cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition*, either in a public act, giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

49 U.S. (8 How.) at 495, 537; (emphasis added). As such, this Court's decision to grant or withhold its assent to a judicial sale is a question of subject matter jurisdiction.

From the *Horuff* decision and its progeny, it should be evident to the Court that the procedures that Congress specified in §§ 2001 *et seq*. protect the Court and the judicial process as much as the CG Members. Indeed, these procedures "impose an independent, mandatory obligation on the Court generally to ensure objective fairness in the sale and public notice." *SEC v. Gity*, No. 20-14342-CIV-CAN, 2022 U.S. Dist. LEXIS 56419, at *3-4 (S.D. Fla. Dec. 30, 2021). Thus, before it exercises any authority it might have to approve or confirm a sale of the Commodore Properties, this Court should require compliance with all procedures set forth in §§ 2001 *et seq. Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms").

2. **Prior to the Confirmation of a Private Sale, Title 28, Section 2001(b) Requires Appraisals by Three Disinterested Appraisers**.

The Receiver has not yet sought this Court's confirmation of the proposed sale of any of the Commodore Properties. Nevertheless, she appears to have filed these motions to prepare for

such a request for confirmation. If so, then the Court should note that the present motions cannot yield appraisals that will satisfy this statutory requirement:

> Before confirmation of any private sale, the court shall *appoint three disinterested persons* to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value.

28 U.S.C.§2001(b) (emphasis added). This language constrains this Court's jurisdiction to confirm a private judicial sale of real property. Such jurisdiction is only available if three disinterested persons appraise the Commodore Properties. The language imposes other constraints; however, at this point, the Court need only consider whether the terms that the Receiver has proposed could yield appraisals by "disinterested persons".

Even if the Receiver has not filed these motions in connection with an intention to seek confirmation of a sale, then the CG Members would still object. Under such a circumstance, the proposed employment would be a waste of judicial resources. Indeed, at this point, any attempt by the Receiver to employ persons who are not "disinterested appraisers" would be a waste of judicial resources. The Receiver has indicated that she does not anticipate that the Receivership Estate will have sufficient financial resources to satisfy all those with claims against the Commodore Properties. Consequently, neither this Court nor the Receiver should divert any resources to employ appraisers whose work product would not meet the requirements of §2001(b).[2] Instead,

[2] Other than the "disinterested" qualifier, § 2001(b) does not explicitly provide guidance as to what qualifications an appraiser must possess to provide a satisfactory appraisal for its purposes. Nevertheless, as is discussed below, the Receiver's motions have not been accompanied by any disclosure that would satisfy Rule 26(a)(2) [*Disclosure of Expert Testimony*]. As such, neither the Court nor the CG Members are presently able to assess the qualifications of the appraisers who the Receiver has proposed. As such, any decision that the Court makes regarding these motions should neither prejudice any further challenge to those qualifications nor prevent a *Daubert* motion or other challenge to the admissibility of any report offered by these appraisers.

such resources should be directed toward consideration and satisfaction of the potential claims, including those of the CG Members.

3. **Receiver's Motions Recite Facts that Show that the Appraiser Candidates are not "Disinterested"**.

In D.E. 330, the Receiver explains that Coconut Grove Commodore Development Ventures, LLC (the "Nominal Buyer") "*may* agree to provide $15,000 towards the cost of the appraisals *in the event* ***it*** *closes on the sale* …". *See* ¶ 12, p. 5 (emphasis added). By including this language in her motion, the Receiver has given a clear and unambiguous signal to all readers, including the potential appraiser. That signal says: **the funds that will be used to pay for the appraisal will only become available if the Nominal Buyer closes on the sale that the Nominal Buyer has proposed**. In short, the Receiver has announced that the funds to pay for the Whitney appraisal are contingent upon the Nominal Buyer's closing.

This announcement by the Receiver reflects a fatal defect in her proposal to hir Whitney. Under Florida law, an appraiser whose compensation is contingent is not disinterested.

> Because Mr. Keys's company, KCC, is to be compensated via contingency fee, he has a pecuniary interest in the outcome of the claim and cannot qualify as a "disinterested" appraiser. We approve the Second District's decision and disapprove the Third District's decision to the extent it is inconsistent with our decision here.

Parrish v. State Farm Fla. Ins. Co., 356 So. 3d 771, 779 (Fla. 2023); *compare Rodriguez v. Geovera Specialty Ins. Co.*, No. 1:18-cv-23585-UU, 2019 U.S. Dist. LEXIS 227349, at *5 (S.D. Fla. Oct. 22, 2019) ("This contingent fee structure does not run afoul of the Rules [*5] of Professional Conduct: Mr. Aucar is not being paid as an inducement for his expert services or testimony; he is being paid a contingent fee for his service as a public adjuster."). Here, paragraph 12 of D.E. 330 plainly states that the funds to pay Whitney are conditioned upon the Nominal Buyer's closing on the appraised property. For that reason alone, The Court cannot accept an

appraisal by Whitney if it has been conducted under these terms. Likewise, if Whitney has received prior information on the offer that the Nominal Buyer has made, then that information would taint any appraisal that Whitney would offer. So, even if the Receiver has an alternate source of funds with which to compensate Whitney, it is difficult to see how Whitney might escape that taint.

Along with that, the dissenting opinion in *Parrish* provides another impediment to the terms that the Receiver has proposed. According to the dissent, "[u]nder the majority's plain meaning analysis, a public adjuster *compensated by an insured* under a contingency fee agreement is disqualified from serving as a 'disinterested' appraiser." *Ibid*. (emphasis added). This language brings into question whether any appraiser who knows that her compensation will come directly from an interested party can be deemed "disinterested." This defect would seem to stand on its own, even if it is separated from the contingent nature of the compensatory arrangement.

As with D.E. 330, the Receiver's Motion to employ Charles E. Badell and Integra Realty Resources also indicates that the funds to compensate the appraiser are to be provided by an interested party. *See* D.E. 328, ¶ 11. In that regard, the Receiver states that: "[t]he Halpern Parties have agreed to provide funds to the Receivership Estate to pay the Fee upon entry of an Order granting this Motion." According to the *Parrish* decision, this arrangement would be a fatal defect in any quest to have the Court recognize Charles E. Badell and Integra Realty Resources as "disinterested appraisers." For this and other reasons, this Court should not grant the relief that the Receiver seeks in D.E. 328.

4. **The Receiver's Motions seek Authorization to Designate Experts after the Discovery Cut-Off Dates in the Trial and Pre-Trial Schedule**.

Earlier in this Case, Judge Altonaga entered an Order that established the Trial and Pre-Trial Schedule. *See* D.E. 49 (hereafter, the "Pre-Trial Order"). The Pre-Trial Order sets deadlines pertaining to the disclosure of and discovery proceedings that relate to experts. Because those

deadlines have now passed, the Pre-Trial Order precludes any further such designations by the Receiver. Consequently, if the Receiver chooses to proceed with a sale of the Commodore Properties, her sole available avenue is to do so via 28 U.S.C. § 2001(a). This is because a private judicial sale under § 2001(b) would require the designation of experts, i.e., appraisers, which designations can no longer be made if the Pre-Trial Order is to be respected.

Here, the Receiver proposes to employ two additional appraisers, presumably to meet the prerequisites for confirming a private judicial sale pursuant to § 2001(b). To that end, "Integra Realty has agreed to provide appraisal reports that estimate the value of such ownership and leasehold interests in the Commodore Properties." D.E. 328 at ¶ 9. Similarly, "[Whitney] the Appraiser has agreed to provide appraisal reports that estimate the value of such ownership and leasehold interests in the Commodore Properties." D.E. 330 at ¶ 9. Further, both motions are accompanied by "Appraiser's Affidavits" that purport to offer sworn testimony from and to have been executed by the proposed appraisers. In short, both motions contemplate the delivery of appraisal reports by and include written testimony from the named appraisers. As such, the motions clearly fall under the holdings in *Morton's of Chi./Miami, LLC v. 1200 Castle 100-A, Inc.*, No. 13-23366-CIV-GRAHAM/SIMONTON, 2014 U.S. Dist. LEXIS 193011 (S.D. Fla. Sep. 19, 2014) (where defendant employed an expert witness to provide testimony on the fair market rental rate but failed to provide a written report by the court's deadline, *inter alia*, the court excluded the expert's testimony); *see also CityPlace Retail, LLC v. Wells Fargo Bank, N.A.*, No. 18-CV-81689-ROSENBERG/REINHART, 2019 U.S. Dist. LEXIS 188999 (S.D. Fla. Oct. 31, 2019).

In pertinent part, the Pre-Trial Order set the following deadlines:

December 9, 2024. Parties exchange expert witness summaries or reports.

December 23, 2024. Parties exchange rebuttal expert witness summaries or reports.

> **January 6, 2025**. All discovery, including expert discovery, is completed.[3]
>
> **January 21, 2025**. All pre-trial motions and *Daubert* motions (which include motions to strike experts) are filed. Each party is limited to filing one *Daubert* motion. If all evidentiary issues cannot be addressed in a 20-page memorandum, leave to exceed the page limit will be granted. **The parties are reminded that *Daubert* motions must contain the Local Rule 7.1(a)(3) certification.**

(Emphasis in original.) The Court will note that all these deadlines had passed before the Receiver filed the present motions. The Pre-Trial Order contained no exceptions. It contained no limitations. Expert discovery had to be completed timely, and the experts had to be disclosed in advance of the deadlines to allow that. And for all experts, disclosures had to be made consistent with the disclosures described in Rule 26.

In another recent case where a plaintiff proposed Charles E. Badell as an appraiser, because of similar violations of Rule 26, the defendant also opposed Mr. Badell's proffer as an expert. *See Congregation 3401 Prairie Bais Yeshaya D'Kerestir, Inc. v. City of Miami Beach*, No. 22-21213-CIV-ALTONAGA/Torres, 2023 U.S. Dist. LEXIS 79828, at *3-4 (S.D. Fla. Apr. 12, 2023) and D.E. 126 in that case. Ultimately, the Court excluded Mr. Badell from testifying as an expert after the plaintiff withdrew its designation of him.

CONCLUSION

WHEREFORE, CWL-CH, LLC, ASJAIA, LLC, and VIEDEN GROVE OZ, LLC, respectfully pray that the Court deny the Receiver's Motions for Authorization of Employment of (a.) Integra Realty Resources [D.E. 328], and (b.) Aucamp, Dellenback & Whitney [D.E. 330] as

[3] In footnote 1 of the Scheduling Order, the Court provides that "[t]he parties by agreement, and/or Magistrate Judge Reid, may extend this deadline, **so long as such extension does not impact any of the other deadlines contained in this Scheduling Order**." (Emphasis added.) Here, any extension of the above-described deadlines would necessarily impact the other deadlines in the Scheduling Order. Therefore, this permissive footnote would not be effective to cure the untimeliness of the Receiver's motions.

Real Estate Appraisers for the Commodore Properties, and grant the CG Members such further relief as is just and proper.

Dated: February 10, 2025.

Respectfully submitted,

BARAKAT + BOSSA, PLLC
Attorneys for CWL-CH, LLC, ASJAIA, LLC, and VIEDEN GROVE OZ, LLC
201 Alhambra Circle, Suite 1060
Coral Gables, Florida 33134
Tel (305) 444-3114

By: */s/ Brian Barakat*
BRIAN BARAKAT
Florida Bar Number 457220
barakat@b2b.legal
service@b2b.legal
cguzman@b2b.legal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10th, 2025, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, and that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: */s/ Brian Barakat*
BRIAN BARAKAT