UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.,

Defendants.
_____/

RECEIVER'S REPLY TO CG INVESTORS' RESPONSE TO MOTION TO APPOINT APPRAISERS

Bernice C. Lee, as Receiver over the Receivership Defendants,[1] submits this reply in support of her motions to authorize the employment of appraisers for the Commodore Properties [ECF Nos. 328, 330] ("Appraiser Motions") and in reply to the response by CWL-CH, LLC, ASJAIA, LLC and Vieden Grove Oz, LLC ("CG Investors") [ECF No. 343].

Background

Over four months ago, the Receiver filed a motion to approve the sale of the Commodore Properties for $28.2 million [ECF No. 238]. The CG Investors were the only parties to object to the proposed sale.[2] The CG Investors' primary objection – other than their erroneous reliance on *S.E.C. v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017), which does not prohibit "free and clear" sales, and Florida state law receivership statutes, which do not apply to an equity

[1] Capitalized terms not otherwise defined have the meanings given in the Appraiser Motions.

[2] The 3138/3120 Ground Lessors asserted certain objections relating to their ground lease interests [ECF No. 245] but did not oppose the sale itself, and Grouper Financial, Inc. filed a limited response [ECF No. 270] that was resolved by language to be incorporated in the proposed sale order.

receiver appointed by a federal court – was that the Receiver had not strictly complied with 28 U.S.C. § 2001. In particular, the CG Investors objected that the Receiver had not obtained appraisals from three court-appointed appraisers before seeking approval and confirmation of the sale. [ECF No. 265 at 9-10.]

The CG Investors also requested the opportunity to obtain their own appraisal. The Receiver devoted substantial resources to: (a) address numerous comments raised by the CG Investors to a standard confidentiality agreement, which the Receiver originally circulated on October 11, 2024 but did not receive comments from the GC Investors until November 21, 2024, (b) comply with their request for documents relating to the properties, which the Receiver provided on December 3, 2024, (c) and facilitate a site visit to the five properties for their proposed appraiser on December 20, 2024. *See* ECF No. 322 at 3. Then after the Receiver undertook all those efforts, the CG Investors decided they didn't want to do their own appraisal after all. During the January 6, 2025 hearing, the CG Investors advised the Court that they had not obtained the appraisals, and would not be obtaining the appraisals. *See* ECF No. 331 at 3-4.

Now, in order to obviate any issue over compliance with 28 U.S.C. § 2001 and address concerns raised by the Halpern Parties who are making the ground lease payments, the Receiver has proposed to obtain two appraisals in addition to the first set of appraisals she already obtained prior to filing the Commodore Sale Motion, which have been shared with the Court [ECF No. 309] and with the CG Investors. Each of the additional appraisers has agreed to perform the appraisals on a flat fee basis. Even better, the Receiver has arranged to relieve the receivership estate of the cost of at least one of those additional appraisals, which will be reimbursed to the Receiver by the

Halpern Parties, and potentially the other as well, which may be reimbursed by the Buyer under the Commodore Sale Motion ("Commodore Buyer").

The CG Investors, having previously objected that the Receiver should be required to obtain two additional appraisals, now object to the Receiver's proposed engagement of the two additional appraisers whose work would address their objection. Their objections to the Appraiser Motions are specious, and designed solely to cause further delay and expense.

Discussion

(1) Disinterestedness

First, the CG Investors claim that the appraisers are not "disinterested." With respect to the engagement of Jonathan Whitney [ECF No. 330], they make this claim because the motion states that the Commodore Buyer may reimburse the Receiver for the cost of the appraisal at closing. The CG Investors argue that payment for the Whitney appraisal is "contingent upon the Nominal Buyer's closing," a "fatal defect" in the retention proposal. [ECF No. 343 at 5]. This is a complete misreading of the motion, which clearly and expressly states that "The Appraiser has agreed to perform all services for a flat fee of $15,000 (the "Fee"), which includes all associated expenses, **with $15,000 to be paid by the Receivership Estate after the completion of all appraisal services**." [ECF No. 330 at 5, ¶ 11] (emphasis added).[3] The Receiver has agreed to compensate Whitney upon completion of the appraisal from the receivership estate; the appraiser's

[3] The CG Investors claim that "paragraph 12 of D.E. 330 plainly states that the funds to pay Whitney are conditioned upon Nominal Buyer's closing on the appraised property," which (1) it does not say – plainly or otherwise – and (2) is a conclusion that could only possibly be drawn by completely disregarding Paragraph 11 which immediately precedes it.

compensation is not dependent in any way, shape or form on whether the Commodore Buyer closes, or reimburses the Receiver for that expense at closing.

The CG Investors also, bizarrely, claim that if Whitney has received prior information on the offer the Commodore Buyer has made, "that information would taint any appraisal that Whitney would offer." [ECF No. 343 at 6]. Apparently, the CG Investors believe that an appraiser is uncurably "tainted" if they know the terms of the proposed sale of the property they are appraising. If that were the case, it would be impossible to ever comply with 28 U.S.C. § 2001 – which, in addition to the engagement of three appraisers, contemplates a hearing on notice to all interested parties which must describe the terms of the sale – unless the appraiser is kept entirely in the dark as to the proposed subject of their engagement. And even were it possible to keep those blinders on the appraiser, doing so would be fundamentally inconsistent with the appraiser's responsibilities in the performance of their services: under the Uniform Standards of Professional Appraisal Practice ("USPAP"), Standards Rule 1-5, an appraiser is ***required*** to analyze all current sales agreements for the property being appraised.[4]

The CG Investors' citation to *Parrish v. State Farm Fl. Ins. Co.*, 356 So. 3d 771 (Fla. 2023) is entirely irrelevant. The Florida Supreme Court in *Parrish*, in the context of interpreting an insurance contract, held that a public adjuster who was to be compensated via a contingency fee had a pecuniary interest in the claim and could not qualify as a "disinterested" appraiser. *Id.* at

[4] USPAP Standards Rule 1-5 states: "When the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business … analyze all agreements of sale, options, and listings of the subject property current as of the effective date of the appraisal …".

779. As explained above, the Appraiser Motions do not involve a contingent fee arrangement, so the decision has no application here.

The CG Investors misconstrue a statement in the dissenting opinion in *Parrish* that "[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" (emphasis added by the CG Investors) to argue that "This language brings into question whether any appraiser who knows that her compensation will come directly from an interested party can be deemed 'disinterested.'" [ECF No. 343 at 6]. But if not an interested party, such as a receiver who seeks approval of a proposed sale, who do the CG Investors think will pay the appraiser? The appraisal fairy? There is no magical third party being with no involvement in the case who will gift funds to pay an appraiser. If any appraiser who receives (non-contingent) compensation from an interested party is disqualified, then the only appraisers who would ever be disinterested are those willing to work for free.[5]

Clearly, the CG Investors have (literally) put the emphasis in the wrong place. It is not the fact that an appraiser is paid by an interested party that compromises their disinterestedness; it is the pecuniary interest in the outcome created by contingent fee arrangements which are not present here. Thus, the fact that the Halpern Parties have agreed to reimburse the receivership estate for the cost of the Badell / Integra appraisal which is the subject of ECF No. 328 has no effect on the

[5] The dissent's position in *Parrish* had nothing to do with the strained interpretation offered by the CG Investors; rather, it was that the use of the term "disinterested" in the insurance contract was ambiguous, should be construed in favor of the insured, and accordingly should not preclude a public adjuster engaged on a contingency from serving as a "disinterested" appraiser. 356 So. 3d at 780-81.

appraiser's disinterestedness: regardless of the Halpern Parties' agreement to reimburse the cost, the appraiser has no financial interest in the outcome.

(2) Expert Discovery Cut-Off

Next, the CG Investors refer to the Pre-Trial Order entered in the S.E.C. case [ECF No. 49] to argue that the Receiver is precluded from employing the appraisers. This argument is equally unavailing.

First, the Pre-Trial Order governs the S.E.C.'s underlying enforcement claims against Mr. Kapoor – it does not apply to all proceedings in the receivership case. The Court's appointment of a receiver is an exercise of the Court's equity jurisdiction. *See S.E.C. v. Complete Bus. Sols. Grp., Inc.*, 44 F.4th 1326, 1334 (11th Cir. 2022). Having appointed a receiver, the Court overseeing the receivership has ancillary jurisdiction over proceedings geared towards preserving, collecting or distributing the estate's assets. *See Riehle v. Margolies*, 279 U.S. 218, 223 (1929); *Pope v. Louisville & C. Ry. Co.*, 173 U.S. 573, 577 (1899). The ongoing receivership proceedings are ancillary to the underlying enforcement claims against Mr. Kapoor which are the subject of the Pre-Trial Order; they are not set for trial in April 2025, and they are not subject to the deadlines and other provisions in the Pre-Trial Order.

Second, the CG Investors are not parties to the SEC. case. Accordingly, they lack standing to enforce or rely on the Pre-Trial Order even if it did apply.

Third, even if the Pre-Trial Order applied (which it does not), and even if the CG Investors were parties with standing to enforce it (which they are not), the appraisers are not being engaged as "expert witnesses." They are being engaged to provide appraisals in order to put to rest any dispute over compliance with 28 U.S.C. § 2001(b). The statute merely directs that the court appoint

three disinterested persons to appraise the property and that the sale price be no less than two-thirds of the appraised value. The Receiver plans to obtain the additional appraisals and submit them to the Court. Nothing in § 2001(b) requires expert *testimony* from the appraisers.[6]

Conclusion

It is particularly ironic that the CG Investors assert that the Court and Receiver should not divert resources to employ the appraisers, but "[i]nstead, such resources should be directed toward consideration and satisfaction of the potential claims, including those of the CG Members." [ECF No. 343 at 4-5]. That is precisely what the Receiver has been attempting to do for months by liquidating the Commodore Properties and turning them into cash, and negotiating a resolution with the Halpern Parties that eliminates their deficiency claim and provides a non-receivership source to pay the ground lease payments. The CG Investors have wastefully and pointlessly opposed and delayed those efforts. First, they objected that the Receiver had not obtained three appraisals. Then, they demanded the right to do their own appraisal. Then, after the estate spent time and resources facilitating their request to conduct an appraisal, they decided they actually didn't want to do an appraisal. Now that the Receiver has proposed to obtain two additional appraisals in order to obviate any objection under 28 U.S.C. § 2001, they continue to object on specious grounds, including objecting to the arrangements the Receiver has made for the

[6] The CG Investors gratuitously refer to a case in which they claim that Mr. Badell was excluded from testifying as an expert, but even by their own description of the case, the plaintiff had withdrawn Mr. Badell as an expert and accordingly the Court made no substantive ruling regarding his proposed testimony. *Congregation 3401 Prairie Bais Yeshaya d'Kerestir, Inc. v. City of Miami Beach*, No. 22-21213-CIV, 2023 WL 3258562, *1 (S.D. Fla. Apr. 12, 2023) ("Plaintiff does not address Defendant's arguments regarding Badell in its response and states it is withdrawing Badell as an expert witness.")

receivership estate to avoid some or possibly all of the financial burden of the additional appraisals undertaken to address the CG Investors' objection.

The Appraiser Motions should be granted, the CG Investors' objections should be overruled, and the Court should grant such additional relief to the Receiver as it deems appropriate. The Receiver respectfully requests that the Court rule on the papers on this matter, or alternatively set the Appraiser Motions for oral argument during the next status conference on March 6, 2025.

Respectfully submitted,

KOZYAK TROPIN & THROCKMORTON, LLP
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: dlr@kttlaw.com

By: /s/ *David L. Rosendorf*
David L. Rosendorf
Florida Bar No. 996823

Counsel for Bernice C. Lee, Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via CM/ECF upon all counsel of record this 17th day of February, 2025.

By: /s/ *David L. Rosendorf*
David L. Rosendorf