

INTRODUCTION

1. As set forth in prior motions, the Receivership Assets include 48 condos located at 106 Surrey, Glen Ellyn, Illinois (collectively, the “Surrey Property”), which are currently being leased.¹ The Receiver, with the assistance of 33 Realty, has prepared a real estate marketing and sale process for the Surrey Property that is robust, efficient and intended to maximize the value of the Receivership Estate for the benefit of all stakeholders (collectively, the “Sales Procedures”).² As described herein, the Sales Procedures will be carefully run in accordance with the Receivership Order and applicable law. And, in no case will the Receiver close on a proposed sale of such property absent further order of the Court.

2. By this Motion, the Receiver seeks approval of: (a) the commission rate to be charged by 33 Realty for the marketing and sale of the Surrey Property and authority to pay such commission at the closing of the Surrey Property and (b) the Sales Procedures (as set forth below).

AUTHORITY

3. Pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934, the Securities and Exchange Commission (the “SEC”) sought and obtained the appointment of a Receiver pursuant to the Receivership Order. Under the Receivership Order, the Receiver has authority in equity, as well as under 28 U.S.C. §§ 754, 959, and 1692, and Fed. R. Civ. P. 66, and was given broad powers to investigate and safeguard the assets of the Receivership Defendants. Among other powers, the Receiver is authorized to retain a broker, otherwise engage a broker or take “all necessary and reasonable actions” to cause the sale or lease of all real

¹ The Receivership Entities include the land trust that is the fee owner.

² The Surrey Property is believed to be worth in excess of \$6 million and the currently mortgage balance on the Surrey Property is approximately \$3 million (i.e. there is likely significant equity in the property).

property in the Receivership Estate. See *Receivership Order*, ¶¶ 8K, 38, 50. Although the Receivership Order and relevant law may authorize the Receiver to retain 33 Realty as broker for the Surrey Property and utilize the Sales Procedures to sell the Surrey Property and seek further order of the Court in order to close such a sale, Receiver presently seeks approval of the Sales Procedures out of abundance of caution and in the interest of full disclosure to the Court and interested parties.

RELEVANT BACKGROUND

4. Prior to the Receivership, the Receivership Entities purchased a 60 unit apartment building and converted those units into condominiums. Twelve of those units were subsequently sold. The Surrey Property represents the remaining 48 units. The Surrey Property is part of a condominium association (the “Surrey Association”).

5. Maximizing the value of the Receivership Defendants’ real estate assets is a major objective of the Receivership. With the assistance of Receiver’s property manager, 33 Realty, the Receiver has prepared the Surrey Property to be marketed for sale. This effort included updating the rent roll, getting the building’s leases and finances on a generally acceptable property management software system, creating a financial pro forma of the Surrey Property, creating a data room and identifying comparable sales. 33 Realty is producing marketing materials (the “Marketing Materials”) that will be distributed to potential buyers.

6. With respect to the Surrey Property, during this case, the Receiver was made aware of the 33 Realty’s experience bulk condominium sales and condominium deconversions (i.e. taking condominiums and converting them into apartments) and “broken” condominium deals generally and requested a proposal to act as broker. Additionally, the Receiver solicited a proposal from another Chicagoland broker. For the reasons set forth further below, the Receiver

selected 33 Realty's proposal.

RATES TO BE CHARGED BY 33 REALTY

7. The proposed commission rate to be charged by 33 Realty is 2.5% of the sale price for the Surrey Property (the "Commission"). If there is a cooperating broker, such broker will be paid from the Commission. The listing agreement between the Receiver and 33 Realty is attached hereto as **Exhibit A** and is incorporated herein. The Receiver selected 33 Realty as broker for the Surrey Property because (among other reasons): (a) 33 Realty's rate was lower than the other proposal; (b) 33 Realty demonstrated the most experience with respect to marketing and selling this type of multi-family housing in the greater Chicagoland area; and (c) efficiencies that will result from 33 Realty's property management arm being property manager. Put simply, 33 Realty's proposed commission rate is fair, reasonable, appropriate and in the best interest of the efficient and economical administration of this Receivership. Further, 33 Realty does not hold or represent an interest materially adverse to the interests of the receivership.

PROPOSED SALES PROCEDURES

8. Pursuant to the Sales Procedures, 33 Realty plans to market the Surrey Property on a local and national basis, exposing such property to as much of the market as possible. The Receiver seeks to sell the Surrey Property on an "as is where is" basis with no representations or warranties of any kind (other than delivering good free and clear title to the property).

9. Additionally, because the Surrey Property is comprised of condominiums and due to the number of such condominiums as compared to the total number (i.e. 48 out of 60 or 80%), there presently exists the following options for sale of the Surrey Property: (a) sell the Surrey Property on a unit by unit basis; (b) sell the Surrey Property in bulk; or (c) use majority

ownership to sell all 60 units (with the sale proceeds of the twelve non-Receivership units being paid to their owners). With respect to the first option, 33 Realty has advised us that selling each unit could take years. Additionally, the Receiver would have to wait until each tenant's lease term was expired and would likely have to do some improvements before going to market. As a result, while this approach may result in the largest gross recovery, it would take an unknown amount of time and required improvements may mean no increase in net recovery. With respect to the second option, this is more like selling a stand-alone apartment portfolio. With respect to the third option, there may be premium achieved by selling the entire 60 units, but doing so would involve additional costly legal hurdles. As a result, 33 Realty has recommended to the Receiver that the Surrey Property be marketed as a bulk sale (second option), but that we communicate to buyers a willingness to sell all 60 units if a buyer offers a large enough premium to do so.

10. The proposed Sales Procedures are as follows:

a. **Marketing Phase (approximately 60 days)**:³ As of mid-December, 33 Realty will send out marketing materials through the following channels: (a) an extensive database of multifamily property owners and buyers in the greater Chicagoland area (such owners and buyers are local and national) that is maintained by 33 Realty; (b) Co-Star, Loopnet, and Crexi which are all national databases of potential buyers and brokers; and (c) 33 Realty's website. During this period, 33 Realty will also call high probability buyers, distribute a press release to major real estate publications around the country and

³ Due to the upcoming holidays, these time frames may be extended to accommodate potential buyers. The Receiver seeks authority to extend deadlines and reasonably modify these procedures if the Receiver deems such actions to be in the best interests of the Receivership. Additionally, there are scenarios where potential buyers make offers that are in excess of what is believed to be market (e.g. in the situation of an expiring 1031 exchange). The Receiver seeks authority to shorten deadlines and bring such an offer before the Court in his reasonable business judgment.

will place notice of sale in the Chicago Tribune and Crain's.

b. **Call for Offers:** 33 Realty currently anticipates setting an offer deadline of late-January or early-February. Due to the holidays, the Receiver requires some flexibility on the offer deadline. Such offer deadline, however, will be clearly communicated to all potential buyers well in advance of such deadline. 33 Realty and the Receiver will review the bids (including the Prior Offers and any revisions to same) and determine which bids will be invited to participate in a final round of bidding.

c. **Best and Final:** 33 Realty currently anticipates setting a best and final offer deadline within ten business days of the offer deadline.

The Receiver, with the assistance of 33 Realty, will then select the highest and best offer and seek Court approval of same. The Receiver, with the assistance of 33 Realty, will use among the following criteria to select the highest and best offer: (a) price; (b) contingencies (financial, due diligence, etc.) or lack thereof; (c) ability to close (e.g. evidence of financial *bona fides*); (d) terms related to good faith deposit (e.g. amount, "hard" deposit); and (e) any other terms which the Receiver determines in his reasonable judgment are in the best interests of the Receivership Estate.

BEST INTERESTS OF RECEIVERSHIP ESTATE

11. A receiver's proposed sale of assets in an equity receivership is generally governed by 28 U.S.C. § 2001. Sale of property in the possession of a receiver must generally be conducted by public sale at the courthouse of the county, parish or city where the property is located or on the premises of the property. 28 U.S.C. § 2001(a). Courts may also determine in equity receiverships that the best interests of the estate are served by permitting private sales, with adequate notice to all interested parties, but requires three independent appraisals. 28 U.S.C.

§ 2001(b). 28 U.S.C. § 2004, however, allows the Court to deviate from section 2001 and “order otherwise.” *See* 28 U.S.C. 2004 (“Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with 28 U.S.C. § 2001, **unless the court orders otherwise.**”) (emphasis added). Courts throughout the country have exercised their discretion in permitting receivers to enter into private asset sales, outside of the requirements of sections 2001 and 2004. *See FTC v. E.M. Sys. & Serv., LLC*, 2016 WL 11110381, *3 (M.D. Fla. 2016) (citing to *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, Dkt. No. 1050 (M.D. Fla. Aug. 13, 2013) (waiving requirements of three (3) independent appraisals and publication of terms of sale)); *SEC v. Kirkland*, No. 6:06-cv-183-Orl-28KRS, 2008 WL 4264532, at *3 (M.D. Fla. Sept. 12, 2008) (permitting sale of motorcycle based on highest of six (6) offers received). Additionally, District Courts have broad power and wide discretion in determining relief in an equity receivership. *SEC v. Elliott*, 953 F. 2d 1560, 1566 (11th Cir. 1992); *see also A.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (once the equitable jurisdiction of a district court has been properly invoked, the Court may use all of its equitable remedies to effectuate the statutory purpose, including ordering non-injunctive relief in a variety of forms). The Court’s wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F. 2d at 1566. The relief sought by the Receiver in this Motion falls squarely within the Court’s discretionary powers.

12. Here, the Receiver seeks approval from the Court to deviate from the requirements of section 2001 (i.e. not require three appraisals) and sell the Surrey Property in a manner consistent with the process multifamily properties in Illinois are normally marketed and sold. The proposed Sales Procedures have been designed to expose the Surrey Property to the market (local and national) in order to obtain the highest and best offer for the Surrey Property.

The Sales Procedures are the product of a joint effort between the Receiver and 33 Realty and are based on their collective experience in maximizing the value of real estate assets such as the Surrey Property. The Receiver respectfully submits that the Court should approve the Sales Procedures because they are in the best interests of the Receivership Estate and are commercially reasonable. Lastly, the Sales Procedures contemplate that the Receiver will return to the Court and file a motion seeking approval of the sale (the “Sale Motion”). The Sale Motion will describe, among other things: (a) the marketing process conducted (i.e. confirm the Sales Procedures were followed); (b) disclose the number of offers received; (c) describe the Receiver’s consideration of offers generally and set forth the reasons the Receiver choose the “winning” proposal as highest and best; and (d) attach the proposed purchase and sale agreement. The Sale Motion will also seek entry of an order authorizing the Receiver, among other things, to convey title to the Surrey Property free and clear of all claims, liens and encumbrances and to pay certain costs at closing (i.e. payoff the existing mortgage, 33 Realty’s real estate commission, etc.).

NO OBJECTION BY THE SEC

13. Counsel for the SEC has indicated that the SEC does not object to the relief requested herein.

WHEREFORE, the Receiver respectfully requests that the Court (a) grant this Motion and enter the *Order Approving Sales Procedures (Surrey Property)* (a proposed form of which is attached hereto as **Exhibit B**) as of September 16, 2019 and (b) grant all other or further relief that is just and proper.

Dated: December 10, 2019

N. Neville Reid, Receiver

By: /s/ Suj M. Pandya

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