

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. PINNACLE DEVELOPMENT PARTNERS, LLC, and GENE A. O'NEAL Defendants.	Case 1:06-cv-02431-JTC Document 26-4 Filed 08/12/2007 Page CIVIL ACTION NO. 06 CV 2431
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**BRIEF IN SUPPORT OF RECEIVER'S UNOPPOSED MOTION TO
APPROVE REAL PROPERTY DISPOSITION PROCEDURES**

S. Gregory Hays, the court-appointed Receiver for Pinnacle Development Partners, LLC, files this Brief in Support of his Motion to Approve Property Disposition Procedures, showing this Court as follows:

BACKGROUND

Pursuant to the terms of an Order dated October 11, 2006 (the "Receivership Order"), S. Gregory Hays was appointed as Receiver for Pinnacle Development Partners, LLC ("Pinnacle") and its assets, including all assets of partnerships or other entities controlled by Pinnacle (the "Receiver Estate"). Among other things,

this Court authorized and directed the Receiver to take custody and control of assets of the Receiver Estate, to sell assets of the Receiver Estate, and to marshal and administer assets held by third-parties. (Receivership Order §§ VII and IX).

Since being appointed, the Receiver has taken custody and control of various assets of the Receiver Estate, including 21 parcels of real property (collectively the “Properties”).¹

The Receiver has devoted substantial efforts to analyzing the legal and factual issues related to each parcel of real property and to the development of a plan for the ultimate disposition of the Properties. A detailed report of each of the Properties is attached to the Receiver’s Second Interim Report, filed on January 26, 2007. The Receiver is now prepared to proceed with the sale of the Properties with the goal of realizing the highest value for each parcel. To move forward with these sales in an efficient and cost effective manner, the Receiver seeks this Court’s approval of the Receiver’s Real Property Disposition Procedures (“Disposition Procedures”) attached hereto as Exhibit A.

In a nutshell, these Disposition Procedures provide clarity for the Court, the Receiver and prospective third-party purchasers regarding how the Properties will

¹ Three of the 21 parcels actually consist of two contiguous properties. They are: (a) 1484 and 1500, Columbia Drive, Austell, GA; (b) 406 E. Rhinehill Road and 2217 Browns Mill Road, Atlanta, GA; and, (c) 8 and 16 Clifton Way, Atlanta, GA.

be sold. In particular, the Disposition Procedures establish guidelines and processes aimed at assuring that private sales are both effective and efficient in obtaining a fair sales price and prompt Court approval (or rejection) of a proposed transaction.

ARGUMENT AND CITATION OF AUTHORITY

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One of the primary purposes of an equity receivership is to “promote the orderly and efficient administration of the [receivership] estate by the district court for the benefit of creditors.” *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) (citations omitted). Accordingly, the district court’s discretion and “power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad.” *Id.*

Because each receivership case presents its own distinct circumstances, the Court must often employ case-specific procedures. *See id.* (recognizing that the Court must often craft reasonable administrative procedures to deal with the complex circumstances of each case). However, the Court may not have the resources to ascertain which procedures will be most efficient in the given situation. Accordingly, the Receiver has a duty to assist the Court in understanding the specific issues in the case and developing the appropriate procedures. *See id.* (citing *SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n.9 (9th Cir. 1986)) (noting

the duty of an equity receiver to aid the court in orderly and efficient administration of the estate); *see also Marsch v. Williams*, 23 Cal. App. 4th 238, 248 (Cal. Ct. App. 1994) (noting that the receiver is “the hand of the court, to aid it in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong”).

Where the administration of the Receiver Estate requires the sale of real property, 28 U.S.C. § 2001 provides the general procedures that a receiver must follow. In particular, the statute provides as follows:

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. 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. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

The proposed Disposition Procedures are consistent with the requirements of 28 U.S.C. § 2001 and have been developed in accordance with the express recognition that courts must determine how and whether those requirements have been met. Approval of the Disposition Procedures will ensure the cost-effective and efficient sale of the Properties and will conserve the resources of both the Court and the Receiver. The Procedures supplement 28 U.S.C. § 2001 and provide a concrete and consistent framework under which the Receiver can efficiently dispose of each of the Properties without burdening the Court with a myriad of small issues. For example, the Disposition Procedures, pursuant to 28 U.S.C. § 2001 (b), stipulate the conditions under which a bona fide counteroffer must be made in the sale of each Property. Thus, the Receiver will not have to seek Court direction to respond to counteroffers in each sale. Rather, the Receiver will be able to move forward according to the Disposition Procedures.

While “procedural” issues regarding timing and bid requirements are established, the most important issue addressed in the Disposition Procedures is the appointment of appraisers in the context of a private sale. While 28 U.S.C. § 2001 requires a receiver to get three court approved appraisals before the receiver can sell a property, it does not define the term “appraisal.” The Disposition Procedures alleviate potential confusion defining the term “appraisal” to include eight valuation methods that can be used by the Receiver to satisfy the appraisal requirement. These methods include appraisals by a traditional appraisal firm, broker opinion letters, appraisals previously prepared for Pinnacle Development Partners, LLC by a qualified appraiser, and other written offers received by the Receiver regarding the subject property.

Defining the term appraisal at the outset is intended to reasonably limit the expenses incurred by the Receiver Estate in the sales process. The Receiver has retained a well respected, highly qualified appraisal firm – Pritchett, Ball & Wise – to appraise all of the properties except the four single family residences. These appraisals cost a cumulative \$50,000. If the Receiver were required to hire two other traditional appraisal firms to conduct two additional appraisals on the Properties, these costs, under the circumstances of this case, seem to be excessive. Under the Disposition Procedures, however, the Receiver is expressly authorized

to look to other reliable indications of value as valid "appraisals" in the sales process.

Here, the Properties make up a significant portion of the Receivership Estate. Because the continued oversight and management of the Properties will require the expenditure of substantial additional resources from the Receiver Estate, the efficient sale of the properties is essential to maintain and realize the value of the Receiver Estate for distribution to investors and creditors.

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CONCLUSION

For the reasons set forth herein, the Receiver respectfully requests that this Court issue an order approving the above real property distribution process.

Respectfully submitted this 12th day of March, 2007.

By: /s/ J. David Dantzler, Jr.
J. David Dantzler, Jr.
Georgia Bar No. 205125
Attorney for S. Gregory Hays,
Receiver for Defendants Pinnacle
Development Partners, LLC

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Local Rule 7.1D Certificate of Compliance

The undersigned certifies that this brief has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B

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Georgia Bar No. 205125

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SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs.	CIVIL ACTION NO. 06 CV 2431 Case 1:06-cv-02431-JTC Document 24-4 Filed 03/12/2007 Page
PINNACLE DEVELOPMENT PARTNERS, LLC, and GENE A. O'NEAL Defendants.	

CERTIFICATE OF SERVICE

This shall certify that on March 12, 2007, I electronically filed this BRIEF IN SUPPORT OF RECEIVER'S MOTION FOR THE COURT TO APPROVE REAL PROPERTY DISTRIBUTION PROCESS with the Clerk of Court using the CM/EFC system, which will automatically send an e-mail notification of such filing to the following attorneys of record:

James Alexander Rue

The undersigned hereby further certifies that the within and foregoing BRIEF IN SUPPORT OF RECEIVER'S MOTION FOR THE COURT TO APPROVE REAL PROPERTY DISTRIBUTION PROCESS was served via electronic mail upon counsel for Defendant Gene A. O'Neal:

Michael J. O'Leary
moleary@molearyl原因.com

This 12th day of March, 2007.

By: /s/ J. David Dantzler, Jr.
J. David Dantzler, Jr.
Georgia Bar No. 205125
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Receiver For Defendant Pinnacle
Development Partners LLC

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EXHIBIT "A"

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REAL PROPERTY DISPOSITION PROCEDURES

Consistent with the provisions of the Receivership Order entered in this case on October 11, 2006 and the procedural requirements of 28 U.S.C. § 2001, the Receiver will dispose of real property assets in the Receiver Estate as follows:

1. Disposition of Real Property. The Receiver may, in his discretion, dispose of any real property assets in the Receiver Estate ("Property" or, collectively, "the Properties") by: (a) public sale, (b) private sale, or (c) abandonment or turnover to a secured creditor holding a valid security interest in any of the Properties.

2. Title, Liens. All sales of any of the Properties shall be by limited warranty deed and shall be free and clear of all monetary liens, fieri facias, judgments or similar encumbrances (the "Monetary Liens") whether by way of private sale or public sale, so long as the net sales proceeds exceed the amount of any Monetary Liens validly asserted against the Property or Properties subject to the sale. In the event that the Receiver contests any aspect of an asserted lien or encumbrance, he shall escrow from the sales proceeds an amount equal to the amount of such asserted lien or encumbrance. The Receiver shall be authorized to settle and compromise disputed liens and encumbrances, including monetary liens, and, if necessary, file a motion with this Court seeking resolution of any such dispute. Upon resolution of any such dispute, whether by agreement or a decision of this Court, the Receiver may use the escrowed funds in accordance with the terms of the resolution and shall then be relieved of any further obligation to maintain the escrow.

3. Public Sale. All public sales shall be conducted within the ambit of 28 U.S.C. §2001. The Receiver may conduct an auction in any commercially reasonable manner that he deems appropriate, including an electronic auction. In addition, the Receiver may conduct any such sale at any location that he deems appropriate within the counties of Fulton,

DeKalb or Cobb and shall not be limited to sales being conducted at the court house or at the Property itself.

4. Private Sale. Private sales shall be conducted within the ambit of 28 U.S.C. §2001 which shall include the right of the Receiver to conduct private sales in accordance with the following:

(a) The Receiver shall have the unfettered authority to negotiate private sales upon the terms and conditions the Receiver deems appropriate; provided, however, that each such contract of private sale shall include a provision conditioning the consummation of the transaction on Court approval. Private sales shall be made pursuant to a written contract on such form and upon such terms as the Receiver and such potential purchaser shall agree, but any such sale shall not be consummated without the approval of this Court.

(b) Upon execution of contract for sale by the Receiver and a prospective purchaser of a Property, the Receiver shall publish notice of the terms of such sale in the Atlanta Journal Constitution and on the Receiver's website for a period of ten (10) days in order to allow for competing bids. The notice will provide procedures by which third parties may submit competing bids, and shall specify that only bona fide offers (bids with a purchase price that is at least a ten percent (10%) higher than the existing

contract price) and on substantially similar terms as the existing contract will be considered by the Receiver. The notice will also specify that certified funds in an amount not less than five percent (5 %) of the new purchase price must be deposited on the same day such bid is made by the bidder with the Receiver in order to constitute a bona fide offer.

- i. In the event that no competing bid is timely made

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in accordance with this subsection 4(b), the

Receiver shall file a motion in accordance with subsection 4(c), below, seeking this Court's approval of the proposed sale.

- ii. In the event that a bona fide competing bid is timely made, the Receiver may, in his discretion, enter into negotiations with both the original proposed purchaser and any competing bidder(s). The Receiver may, in his discretion, enter into a contract with any of these parties, subject to the approval of this Court, and shall then file a motion seeking such approval in accordance with subsection 4(c), below.

(c) Within a reasonable period of time following the satisfaction of the conditions set forth in 4(b), above, the Receiver shall file a motion seeking approval of the private sale. The Receiver's motion shall be served upon the parties to this action, as well as any party who has made a bona fide offer to purchase the Property that is the subject of the motion.

The Receiver shall also post the motion on his website. The Receiver's

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motion for approval shall include information that the Receiver believes

would be useful to the Court and others in assessing the reasonableness of the sales price, including the following:

- i. A copy of the subject contract or a detailed description of the terms of the private sale.
- ii. The three "appraisals" that the Receiver has considered in arriving at the sales price. In this regard, the Court authorizes the Receiver to use any of the following as an "appraisal" in accordance with the provisions of 28 U.S.C.

§2001 (b):

1. The appraisal conducted by Pritchett, Ball & Wise, Inc., the appraisal firm retained by the Receiver;

2. Any appraisal prepared by a qualified appraiser for the proposed purchaser, its lender or the Receiver;

3. Broker opinion letters;

4. The purchase price paid by Pinnacle

Development Partners, LLC;

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5. Any appraisal prepared for Pinnacle

Development Partners, LLC by a qualified appraiser;

6. Other written offers received by the Receiver regarding the subject Property;

7. Development and/or renovation proposals that include the estimated net result to the Receiver Estate.

d. The following persons shall have standing to object to the Receiver's motion for approval of a private sale: parties to this litigation, any person or entity who submitted to the Receiver a written offer to purchase the subject Property, and any investor in a Pinnacle Partnership or other creditor of Pinnacle. All objections must be made in writing within ten

(10) days of service of the motion (publication on the Receiver's website or actual service of the motion, whichever is later).

i. In the event that no objection is timely filed, the Court will enter an Order approving the sale of the subject Property and authorizing the Receiver to take all actions necessary to close under the approved Contract promptly upon the expiration of any applicable appeal period under that Order.

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ii. In the event that an objection is timely filed, the Court shall schedule a hearing as soon as is reasonably practicable for the purpose of deciding the issues raised by the objection and, ultimately, determining the party to whom the subject Property should be sold and the terms of such sale. *The party filing the objection must appear at the hearing.* At the conclusion of any such hearing, the Court will enter an Order regarding the sale authorizing the Receiver to take all actions necessary to convey title to the subject Property

promptly upon the expiration of any applicable
appeal period under that Order.

5. Disposition of Secured Creditors. In the event that the Receiver determines that a Property should be turned over to a secured creditor having a valid lien on the Property or otherwise disposed of other than by public or private sale, the Receiver shall publish notice of such determination and obtain Court approval of such turn-over or disposition in accordance with the procedures set forth in Section 4, above.

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APPROVED:

Having considered the Receiver's Motion to Approve Property Disposition Procedures and Brief in Support Thereof, these Property Disposition Procedures are hereby APPROVED.

SO ORDERED, this ____ of _____, 2007.

Jack T. Camp
United States District Court Judge