

**UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,**

V.

Defendants.

Magistrate Judge Susan E. Cox

1 Capitalized terms not specifically defined herein shall have the meanings ascribed in the Timber Lake Sale Motion and/or Sale Motion Supplement.

REPLY

1. The Timber Lake Sale Motion seeks: (1) authority to sell the Timber Lake Property (defined below) to the Proposed Buyer (Turner) for \$50.25 million and related relief; (2) approving and directing payoff of the secured lender at closing; and (3) modifying the Receivership Order to add a Receivership Defendant. As a threshold matter, there has been no objection to payoff of the secured lender or adding Timberwood Recreational Center, Inc. as a Receivership Defendant. But the Mueller Objection does object to the proposed sale to Turner. In summary, the Mueller Objection: (a) sets forth that pre-Receivership offers were in excess of the current sale price; (b) objects to the Receiver's deviation from the Court-approved Sales Procedures (that the Receiver disclosed in the Timber Lake Sale Motion and that were made in response to the COVID-19 crisis); (c) alleges that Sapphire was not properly noticed of the sale; and (d) argues that the Receivership should sign a contract with Sapphire and allow Sapphire thirty (30) days to perform due diligence to determine if Sapphire wants to move forward with a purchase for \$60 million. Addressing each in turn:

2. First, with respect to pre-Receivership offers, all were non-binding letters of intent that all required further due diligence in order to proceed toward a sale (i.e. no "hard" earnest money or purchase price subject to further negotiation). Indeed, it is common practice for buyers to offer a high price prior to due diligence in order to get "control of the deal" only to then lower the offer after due diligence is completed. Additionally, the Receiver has no knowledge of what information was provided to these buyers or the level of due diligence conducted prior to making such offers. In any event, two of the three parties that submitted letters of intent participated in the Receiver's sale process — Standard and Trevian. Both were provided with the same robust financial due diligence that all other potential buyers received.

With respect to Standard, their highest offer to the Receiver was \$47 million. With respect to Trevian, it did not even submit an offer to purchase the Timber Lake Property. Whether the lower offer from Standard was due to access to additional (and likely more accurate) due diligence and/or the COVID-19 crisis is impossible to tell. But, that Turner outbid Standard by \$3.25 million is telling.

3. Second, the Timber Lake Motion sets forth all deviations from the Court-approved sale procedures and the Receiver's reasons for doing so in the face of the COVID-19 pandemic. In summary, and as more fully set forth in the Timber Lake Motion, the Receiver sought to test the market to see if an acceptable sale price could be achieved during the pandemic. In April it was far from clear how the COVID-19 crisis would develop (in fact it still is uncertain) and the Receiver did not want to be in a position where he could have locked in a favorable sale for the benefit of the Receivership Estate, did not do so and later the entire economy and/or market crashed.

4. Specifically, with respect to the sale process:

Mueller Objection	Receiver Response
The Receiver delayed the start of marketing from mid-March to April. Mueller Objection at ¶9.	The COVID-19 crisis hit right as marketing was to begin. The Receiver hit the "pause" button because of the uncertainty surrounding the early days of the crisis and the risk that tours of the property would have violated "Stay at Home" orders then in effect.

Mueller Objection	Receiver Response
<p>The more-limited and targeted marketing of the Timber Lake Property to 112 potential buyers. Mueller Objection at ¶¶10-11.</p>	<p>First, CBRE advised that if the Timber Lake Property was broadly marketed and the sale process was unsuccessful, it could hurt the long-term value of the Timber Lake Property more than if a targeted marketing was unsuccessful. Second, CBRE is one of the largest and most sophisticated real estate brokerage firms in the country and, therefore, it was within the Receiver's reasonable business judgment to rely on CBRE to identify the most likely and best potential buyers of the Timber Lake Property. And clearly the marketing had national reach as Turner is a California-based company. Third, that only nine buyers toured the property was a direct result of the limitations faced due to the COVID-19 crisis. As set forth in the Timber Lake Sale Motion, however, despite the lack of touring (due to a pandemic) the Receiver received 16 offers for the Timber Lake Property.</p>
<p>The marketing process was not robust or efficient and resulted in a "low" offer from Turner. Mueller Objection at ¶¶13-14.</p>	<p>See above responses. Also, obtaining 16 offers and then requiring all of those parties to compete to be the best and highest offer was robust and efficient.</p>

5. Third, with respect to notice to Sapphire, the Receiver points out that Sapphire never bid on the property prior to the Receivership (it was another entity called Balance Partners Properties, LLC). Additionally, the Receiver's Motion for Court Approval of (A) The Rates to be Charged by Receiver's Real Estate Broker (Timber Lake Property) and (B) Sales Procedures (Timber Lake Property) [Dkt. No. 112] was served on Lou Virgilio of American Realty Services, Inc. *See* Dkt. 113. Mr. Virgilio was Mr. Mueller's pre-Receivership broker and, upon information and belief, represents Sapphire in connection with Sapphire's efforts to purchase the Timber Laker Property (the majority of Sapphire's communications have come through Mr. Virgilio). As a result, Sapphire actually did receive notice through Mr. Virgilio. Moreover, the

Receiver has been in constant contact with Mueller and his counsel and repeatedly invited Mueller to refer any interested parties to CBRE who would then follow up on the leads (as CBRE did with Trevian and Standard). As a result, Mueller was free to communicate with Sapphire (who he apparently knew and the Receiver did not) and confirm any interest with CBRE. That did not happen until Sapphire's interest was disclosed to the Receiver after Turner had been selected as buyer and its contract with the Receiver went "hard".

6. In any event, these notice concerns are a red herring because Sapphire did learn of the sale and since September 1 of this year the Receiver has given Sapphire every opportunity to participate fully in the sale process and conduct whatever due diligence it seeks so that it can make a "hard" offer. To date, Sapphire has declined. [See Sale Motion Supplement, Dkt. 192].

7. Fourth, Mueller prefers that the Receiver sign a contract with Sapphire. Mueller Objection at ¶¶ 15-25. Under Mueller's logic, the Receiver can sign a contract with Sapphire, allow Sapphire thirty (30) days to conduct due diligence to see if Sapphire makes good or, if not, sell to Turner. As a threshold matter, despite Mueller's assertion to the contrary, the Receiver has never suggested that Sapphire submit a "hard" offer prior to completing due diligence (including physical due diligence). In fact, the Receiver has consistently proposed the opposite: that Sapphire conducts its due diligence **and then** submits a "hard" offer. See Sale Motion Supplement. Mueller provides no explanation as to why Sapphire has refused to complete its due diligence despite having access since September 1, 2020. As a result, it is not the Receiver that is "dug in". Sapphire has simply refused to move forward with due diligence (even after being offered an expense reimbursement and potentially a break-up fee). Put simply, at this point, it would be unreasonable for the Receiver to have confidence that Sapphire will close at a \$60 million purchase price when Sapphire will not even spend minimal funds to complete due

diligence.

8. Overall, the Receiver's is being eminently reasonable under the circumstances and is protecting the Receivership Estate from losing a substantial, hard and fully vetted offer that is estimated to yield over \$29 million for the victims in this case. As explained to Mueller and Sapphire, while Turner's PSA contains a specific performance clause for the Receiver to compel Turner to purchase the property if the Receiver performs its obligations under the PSA but Turner backs out, it makes no sense to invite potential litigation over enforcement of that clause just to entertain an "option" for Sapphire who to date has nothing to show that it is a credible buyer on the level Turner has shown. To be sure: Turner has provided \$5 million in non-refundable earnest money, Sapphire has given \$0 to the Receiver; Turner has signed a now non-contingent contract, Sapphire has in effect just provided a longer version of a non-binding letter of intent disguised as a PSA; Turner has completed due diligence at its own expense and is eager to close, Sapphire has apparently done no onsite due diligence despite the Receiver's offer to pay its expenses to do so in the event Sapphire does make a "hard" offer and is subsequently outbid or otherwise not awarded the deal. In short, granting the Objection would create an unacceptable risk of leaving the Receivership with no "hard" agreement in place during these uncertain times, which is not a result that protects the Receivership Estate and its creditors (i.e. the investors).

CONCLUSION

9. With the COVID-19 epidemic still ongoing and winter fast approaching (when higher priced capital improvement issues such as boiler issues and roofing issues tend to occur), it is important that this sale move swiftly toward a closing. The Receiver believes that the Court should overrule the Mueller Objection and approve the sale to Turner. By refusing to even start

any meaningful due diligence after 6 weeks, Sapphire has failed to demonstrate that it is a credible buyer. If, however, the Court seeks to entertain Sapphire's interest further, the Receiver recommends that the Court conduct an expedited hearing on this matter and require Sapphire and Turner to both participate so that a going forward process can be fashioned.

Dated: October 16, 2020

N. Neville Reid, Receiver

By: /s/ Ryan T. Schultz

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