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of the Consolidated Legacy Debtors Liquidating
Trust*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re:

CASTLE ARCH REAL ESTATE
INVESTMENT COMPANY, LLC; CAOP
MANAGERS, LLC; CASTLE ARCH
KINGMAN, LLC; CASTLE ARCH
SECURED DEVELOPMENT FUND, LLC;
CASTLE ARCH SMYRNA, LLC; CASTLE
ARCH STAR VALLEY, LLC; *and*

CASTLE ARCH OPPORTUNITY
PARTNERS I, LLC; CASTLE ARCH
OPPORTUNITY PARTNERS II, LLC,

Debtors.

Case Nos. 11-35082, 11-35237,
11-35243, 11-35242 and 11-35246
(Substantively Consolidated)

Case Nos. 11-35241 and 11-35240
(Jointly Administered)

(Chapter 11)
The Honorable Joel T. Marker

- Affects All Debtors
- Affects Only the Substantively Consolidated Debtors
- Affects only Castle Arch Opportunity Partners I, LLC
- Affects only Castle Arch Opportunity Partners II, LLC

**LIQUIDATING TRUSTEE’S REPLY TO DSSIII’S OBJECTION TO
MOTION OF THE LIQUIDATING TRUSTEE FOR ORDER APPROVING
BIDDING PROCEDURES AND GRANTING BIDDING PROTECTIONS**

D. Ray Strong (the “Liquidating Trustee”), as the duly appointed Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust (the “Legacy Trust”) and post-confirmation estate representative for the “Legacy Debtors,” by and through his undersigned counsel, submits this Reply to the *DSSIII’s Objection to Motion of the Liquidating Trustee for Order Approving Bidding Procedures and Granting Bidding Protections* (the “DSSIII Objection”),¹ filed by DSSIII Holding Co., LLC (“DSSIII”) to the *Motion of the Liquidating Trustee for Order Approving Bidding Procedures and Granting Bidding Protections* (the “Bidding Procedures Motion”)² filed in conjunction with the *Trustee’s Motion Seeking (1) Approval of Sale of Property, Including, and Relating to Real Property Located in Rutherford County, Tennessee, to Robert Geringer Out of the Ordinary Court of Business, Free and Clear of Liens, Claims, Encumbrances and Interests, and Subject to Higher and Better Offers, Pursuant to 11 U.S.C. § 363(b) and (f) and Federal Rule of Bankruptcy Procedure 2002 and 6004; (2) Authorization to Pay Fee to Real Estate Broker; and (3) Authorization to Pay Taxes and Ordinary Sale Costs; and (4) Related Relief* (the “Geringer Sale Motion”).³ For the reasons stated herein and as will be discussed at the hearing on the Bidding Procedures Motion scheduled for July 15, 2015, the DSSIII Objection should be overruled, and the Bidding Procedures Motion should be granted. Unless otherwise stated, all capitalized terms are as stated in the Bidding Procedures Motion.

INTRODUCTION

DSSIII maintains that the Bidding Procedures Motion should be “dismissed” or that the Court should stay the Bidding Procedures Motion because this Court must wait for the United

¹ Docket No. 1122.

² Docket No. 1095.

³ Docket No. 1103.

States District Court for the Middle District of Tennessee (“Tennessee District Court”) to adjudicate a specific performance complaint that DSSIII filed on July 12, 2015 (the “Specific Performance Action”). The Liquidating Trustee respectfully submits that the DSSIII Objection should be overruled and that the Bidding Procedures Motion should be granted. Specifically, the Liquidating Trustee maintains that (1) DSSIII lacks standing to object to the Bidding Procedures Motion; (2) this Court should not stay the Bidding Procedures Motion based on the Specific Performance Action; and (3) DSSIII’s arguments, based on select portions of the relevant documents and a select account of the events, which is disputed by the Liquidating Trustee, are not relevant to the relief sought in the Bidding Procedures Motion.⁴

REPLY

I. DSSIII LACKS STANDING TO OBJECT TO THE BIDDING PROCEDURES MOTION

“Generally, frustrated bidders do not have standing to object to the sale of property.”⁵ In *G-K Dev. Co., Inc. v. Broadmore Place Inv. Et al. (In re Broadmore Place Investments)*,⁶ the debtor, a single-asset real estate company, obtained two offers for the sale of its property. The bankruptcy court approved the sale of the property to the bidder with the least contingencies in its offer, even though the bid was \$200,000 less than the offer of the other bidder. The unsuccessful

⁴ DSSIII has submitted the Affidavit of Tyson Reilly (the “Reilly Affidavit”) in support of the DSSIII Objection. The Liquidating Trustee contests many of the statements made therein, and submits that the story being told by DSSIII is not a complete and accurate statement of the facts. The Liquidating Trustee intends to file a Supplemental Declaration in support of the Geringer Sale Motion that will outline the evidence he intends to present in support of termination of the DSSIII Purchase Agreement. At this stage, the submission of evidence on whether the Geringer Sale Motion should or should not be granted is inappropriate and irrelevant. The Reilly Affidavit should be stricken.

⁵ *Stark v. Moran et al. (In re Moran)*, 566 F.3d 676, 681 (6th Cir. 2009); see also *Squire v. Scher (In re Squire)*, 282 Fed. Appx. 413, 416 (6th Cir. 2008) (same); *GAF Holdings, LLC v. Rinaldi et al. (In re Farmland Indus., Inc.)*, 639 F.3d 402, 405 (holding that unsuccessful bidder did not have standing).

⁶ 994 F.2d 744 (10th Cir. 1993).

bidder then appealed the bankruptcy court's order, arguing that its bid was the highest offer for the property. In affirming the bankruptcy court's order, the Tenth Circuit Court of Appeals noted the unsuccessful bidder's lack of standing to appeal the sale order by stating: "We note that given the Bankruptcy Court's acceptance of the [successful] bid, [unsuccessful bidder], absent some other meritorious ground for appeal, lacks standing to appeal, being merely an unsuccessful bidder and not an 'aggrieved person' as required."⁷

Here, DSSIII lacks standing to object to the Bidding Procedures Motion because DSSIII is not "aggrieved" or otherwise affected by the Motion. Indeed, DSSIII filed the Reilly Affidavit in conjunction with the DSSIII Objection, and in that Affidavit, DSSIII does not submit one statement as to how it is aggrieved or otherwise affected by the Bidding Procedures Motion. Further, DSSIII has not argued, nor could it in good faith argue, that the proposed bidding procedures—which allow for an open and competitive sales process—are tainted by fraud, collusion or unfairness."⁸ In short, DSSIII has not shown any prejudice by the granting of the Bidding Procedures Motion. Instead, DSSIII focuses solely on objections to the Geringer Sale Motion. As discussed below, however, these arguments are premature. Accordingly, because DSSIII is merely a disgruntled party, it does not have standing to object to the Bidding Procedures Motion.

⁷ *Id.* at 745 n.2.

⁸ *See Stark*, 566 F.3d at 681–82 (recognizing that an unsuccessful bidder may have standing to oppose a sale if "the intrinsic structure of the sale is tainted by fraud, mistake or unfairness").

II. THE COURT HAS JURISDICTION TO DETERMINE THE BIDDING PROCEDURES MOTION AND THERE SHOULD BE NO STAY PENDING THE SPECIFIC PERFORMANCE ACTION

DSSIII contends that only the Tennessee District Court can determine whether DSSIII should be afforded specific performance and, thus, this Court must delay ruling on the Bidding Procedures Motion pending a determination in the Specific Performance Action.⁹ This argument is without merit for at least two reasons.

First, the Specific Performance Action is not ripe. The time for closing under the DSSIII Purchase Agreement has not occurred and DSSIII has provided absolutely no proof of its ability to perform as required under the DSSIII Purchase Agreement and under applicable law.¹⁰

Second, this argument is wholly without merit given the very Sale Order that DSSIII seeks to enforce. The DSSIII Purchase Agreement specifically states in relevant part:

- (a) the sale of the Property to DSSIII is wholly contingent on this Court's entry of a "Sale Order";¹¹
- (b) "Sale Order" is defined to mean "an Order by the Bankruptcy Court in the form and content reasonably satisfactory to Buyer and Seller which is final, under applicable law, nonappealable, not subject to stay and which shall not have been

⁹ DSSIII Objection at p. 2 & ¶¶ 40-50.

¹⁰ In its Complaint, DSSIII incorrectly states that it has "performed all of its obligations under the Agreement and the Amended Agreement." Docket No. 1115 (Specific Performance Action Complaint ¶ 50). Not only has DSSIII not tendered the Purchase Price, but it has also failed, prior to the expiration of the Due Diligence Period, to provide the Trustee with "(i) reasonable evidence that Buyer has sufficient cash funds available to purchase the Property at the Closing; or (ii) arranging and securing one or more commitments for financing of the purchase of the Property" DSSIII Purchase Agreement ¶ 4.7(d). Indeed, DSSIII makes many statements that it will and can close, *see* Reilly Affidavit, but it has provided no proof that it can close as it was expressly required to do prior to the expiration of the Due Diligence Period. This alone is grounds for the Liquidating Trustee's termination of the DSSIII Purchase Agreement.

¹¹ DSSIII Agreement at ¶ 7.

vacated or modified prior to Closing, except with the written consent of Buyer”;¹² and

- (c) the Sale Order must include certain provisions, including that “the Bankruptcy Court shall retain jurisdiction to enforce this Agreement in all respects.”¹³

The Sale Order that was presented to DSSIII for approval prior to being filed with the Court and which was ultimately entered by the Court expressly states: “This Court retains jurisdiction to resolve any issues that may arise with respect to the Purchase Agreement or the Property.”¹⁴ Not only is this language clear and unambiguous, but the Court retains jurisdiction to interpret and enforce matters relating to its own Orders.¹⁵ Thus, all matters related to the Sale Order, the Purchase Agreement with DSSIII and the Property are properly before this Court.

Additionally, DSSIII incorrectly argues that this Court’s jurisdiction is limited based on the post-confirmation posture of the case. The DSSIII Purchase Agreement was entered into by the Liquidating Trustee pursuant to the authority afforded to him under the Confirmed Plan, Confirmation Order and the Legacy Trust Agreement in this case. The sale of the Property is expressly contemplated under, and specifically relates to, implementation of the Confirmed Plan, Confirmation Order and Legacy Trust Agreement.¹⁶ As such, the Liquidating Trustee’s

¹² DSSIII Agreement at ¶ 6.7 (emphasis added), *quoted in* Reilly Affidavit at ¶ 11.

¹³ DSSIII Agreement at ¶ 6.7(g).

¹⁴ Docket No. 1049 at ¶ 7.

¹⁵ *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 138 (2009) (“The Bankruptcy Court plainly ha[s] jurisdiction to interpret and enforce its own prior orders[.]”); *Baker v. Simpson*, 613 F.3d 346, 352 (2d Cir. 2010) (“A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders.”).

¹⁶ *See* Confirmed Plan at § 6.6.1 (transfer of Consolidated Legacy Debtor assets to Legacy Trust); *Confirmation Order* at ¶¶ 4–5 (appointing the Liquidating Trustee as post-confirmation estate representative of the Legacy Debtors and Liquidating Trustee of the Legacy Trust to administer the Confirmed Plan).

disposition of the Property is part of the Liquidating Trustee's implementation, execution and administration of the Confirmed Plan, and this Court retains jurisdiction over the manner of disposing of the Property.¹⁷

Accordingly, based on all of the above, DSSIII expressly agreed, and this Court has ordered, that all issues related to the Property are to be determined by this Court. The Specific Performance Action is not only premature, but it is improperly filed in the Tennessee District Court inasmuch as it involves an attempt to enforce an agreement approved by this Court and which DSSIII agreed should be heard in this Court.

III. THE DSSIII OBJECTION RAISES NO OBJECTION TO THE PROPOSED BIDDING PROCEDURES

The DSSIII Objection does not in any way set forth the basis for objecting to the Bidding Procedures Motion. There are no factual allegations related the propriety of the Bidding Procedures Motion, and DSSIII has not cited any law that would prevent the Court from granting the Bidding Procedures Motion. Rather, the majority of the DSSIII Objection is factual allegations and legal arguments devoted solely to its contention that the Liquidating Trustee cannot terminate the DSSIII Purchase Agreement or obtain approval of the agreement outlined in the Geringer Sale Motion.¹⁸ The Liquidating Trustee expressly disputes many of the factual allegations, and both the factual allegations and the arguments are irrelevant to the matter presently before the Court—whether the Bidding Procedures Motion should be granted. The

¹⁷ See *In re Resorts Int'l, Inc.*, 372 F.3d 154, 167 (3d Cir. 2004) (stating that a bankruptcy court has post-confirmation jurisdiction of a matter if the matters concerns the interpretation, implementation, consummation, execution or administration of the confirmed plan); see also *In re Houlik*, 481 B.R. 661, 675–76 (B.A.P. 10th Cir. 2012) (recognizing the test established by *In re Resorts*, as well as other standards enunciated by other courts, and recognizing that the Tenth Circuit has not established the test for post-confirmation jurisdiction).

¹⁸ DSSIII Objection at ¶¶ 51-67 & Reilly Affidavit.

issues raised in the DSSIII Objection may only be relevant in response to the Geringer Sale Motion, and if so, the Liquidating Trustee should be afforded an appropriate opportunity to contest the factual allegations and legal arguments in a context in which the dispute is relevant. As such, the Liquidating Trustee does not respond to DSSIII's factual allegations or legal arguments at this time, but reserves the right to do so in response to any objection that DSSIII may file to the Geringer Sale Motion.

CONCLUSION

For the reasons set forth above, the Liquidating Trustee requests that the Court overrule the DSSIII Objection and grant the Bidding Procedures Motion.

Dated this 13th day of July, 2015.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

Nathan S. Seim

Attorneys for Liquidating Trustee

CERTIFICATE OF SERVICE – BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on July 13, 2015, I electronically filed the foregoing **LIQUIDATING TRUSTEE’S REPLY TO DSSIII’S OBJECTION TO MOTION OF THE LIQUIDATING TRUSTEE FOR ORDER APPROVING BIDDING PROCEDURES AND GRANTING BIDDING PROTECTIONS** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

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