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

JOINDER IN LIQUIDATING TRUSTEE’S EMERGENCY MOTION FOR COURT TO RECONSIDER ITS CONTINUANCE OF HEARINGS RELATED TO GERINGER SALE MOTION AND TO POSTPONE JULY 30, 2015 CLOSING

Robert D. Geringer (“Geringer”) hereby joins in the relief sought through the Liquidating Trustee’s Emergency Motion for Court to Reconsider its Continuance of Hearings Related to Geringer Sale Motion and to Postpone July 30, 2015 Closing.

PRELIMINARY STATEMENT

At the status hearing conducted on July 14, 2015, the Court continued without date the hearing on the Bid Procedures Motion. The Court did so based upon filings made two days prior by DSSIII Holdings Company, LLC (“DSSIII”) on Saturday, July 12, 2015. The Trustee was not present at the July 14, 2015 status hearing, and the Court did not receive or consider any evidence at that hearing. Geringer believes that the Court may have misapprehended the facts at the July 14 status hearing. Specifically, DSSIII led the Court to believe that it performed all of its obligations under the parties’ agreement and was ready, willing, and able to close the transaction. The evidence demonstrates that DSSIII breached, or at a minimum, anticipatorily breached and repudiated the contract. DSSIII terminated the parties’ contract by its own actions. Moreover, because the Liquidating Trustee relied on the statements and actions of DSSIII in entering into the agreement to sell the property to Geringer, DSSIII is now estopped from its attempt to reverse course and enforce the contract it previously breached.

FACTUAL BACKGROUND

1. The facts relevant to this matter are detailed in the accompanying Supplemental Declaration of D. Ray Strong (the “Strong Declaration”). Geringer here will highlight the key facts concerning DSSIII’s breaches, or at a minimum, anticipatory breaches of the Purchase and Sale Agreement (as amended, the “DSSIII Purchase Agreement”) between the Liquidating Trustee and DSSIII.

2. On December 16, 2014, this Court entered its *Order Granting Trustee's Motion Seeking Authorization and Approval of (1) Sale of Property, Including and Relating to Real Property Located in Rutherford County, Tennessee, Out of the Ordinary Course 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 Rules of Bankruptcy Procedure 2002 and 6004; (2) Buyer's Potential Break-Up Fee; and (3) Payment of Costs of Sale, Including Commission to Real Estate Broker* [Docket No. 1049] (the "DSSIII Sale Order").

3. DSSIII conducted extensive due diligence concerning the feasibility of its closing the DSSIII Purchase Agreement and successfully developing the Property. By email dated May 12, 2015, attached as Exhibit 11 to the Strong Declaration, DSSIII's attorney requested a conference call with the Trustee in part to "discuss price in order to proceed to close." DSSIII would not close the DSSIII Purchase Agreement without a price concession.

4. DSSIII told the Liquidating Trustee that it would not close the transaction without a substantial price reduction. Geringer submits that the Liquidating Trustee acted in reliance on this statement. It is evident from the Strong Declaration that the Liquidating Trustee believed what DSSIII said, and in reliance on that statement agreed to sell the the property located in Rutherford County, Tennessee, which is the subject of the DSSIII Purchase Agreement (the "Property") to Geringer instead.

5. On May 14, 2015, DSSIII's attorney sent another email (attached as Exhibit 12 to the Strong Declaration) reinforcing DSSIII's unwillingness to close without a substantial price concession. This email states in part:

While we certainly anticipated some off-site/master infrastructure costs, these exceed those expectations by a substantial amount, and make the economics of

the project difficult at the current PSA price. And the same costs will apply to any buyer/developer of the property, and hence they affect the market value of the property.

Therefore, we need to discuss these facts with the Trustee, to seek a mutually agreeable resolution.

6. According to paragraph 20 of the Strong Declaration, the Liquidating Trustee and DSSIII had a conference call on May 15, 2015. The Strong Declaration states that during this call, DSSIII stated that it would not move forward with the transaction absent a \$500,000 discount from the purchase price in the DSSIII Purchase Agreement.

7. The next day, on May 16, 2015, DSSIII's attorney confirmed in writing what it stated orally on the May 15 conference call, as evidenced by Exhibit 13 to the Strong Declaration. DSSIII demanded a "[p]rice adjustment from \$1.5mm to \$1mm."

8. Meanwhile, the Liquidating Trustee and Geringer completed their third day of mediation, which resulted in the Memorandum of Understanding (the "MOU") between the Trustee and Geringer, signed on May 20, 2015. The Liquidating Trustee agreed in the MOU to sell the property located in Rutherford County, Tennessee, which is the subject of the DSSIII Purchase Agreement (the "Property") to Geringer, and the Liquidating Trustee was willing to sell the Property to Geringer, according to paragraph 28 of the Strong Declaration, in part because DSSIII had repudiated its contract to purchase the Property.

9. DSSIII repeated its position through its email to the Trustee dated May 27, 2015, and attached as Exhibit 14 to the Strong Declaration. There, DSSIII stated: "We cannot make the commitment to the Town on the infrastructure obligations/costs, without having a formal resolution for the price for the closing, as we discussed on our call."

LEGAL BASIS FOR RELIEF SOUGHT BY THE TRUSTEE

I. This Court has Sole and Exclusive Jurisdiction over the Property and the DSSIII Purchase Agreement

28 U.S.C. § 1334(e) provides in relevant part (with emphasis added):

The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate

Under this statute, this Court has the exclusive jurisdiction over all property of CAREIC as of the filing of its bankruptcy petition. See, e.g., Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (“Bankruptcy courts have exclusive jurisdiction over a debtor’s property, wherever located, and over the estate.”); see also Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 870 (9th Cir. 2005) (“With the commencement of the case, the bankruptcy court acquired exclusive in rem jurisdiction over all the debtor’s legal or equitable interest in property wherever located and by whomever held”); Universal Oil Ltd v. Allrirst Bank (In re Millennium Secarriers, Inc.), 419 F.3d 83 (2d Cir. 2005) (“The bankruptcy court’s in rem jurisdiction over a debtor’s estate, in turn, permits a determination of all claims that ‘anyone, whether named in the action or not, has to the property or thing in question.’”) (quoting Hood, 541 U.S. at 448). No other court in the country may exercise jurisdiction over property of this bankruptcy estate.

Geringer understands that DSSIII may contend that it holds equitable title to the Property, and accordingly it is no longer property of the estate and thus the Court lacks jurisdiction over it. See Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (“When property leaves the bankruptcy estate, however, the bankruptcy court’s jurisdiction typically lapses”). But there are three reasons in this case that this principle has no application in this case.

First, and most fundamentally, the Property has never “left” the bankruptcy estate. It is beyond dispute that the Liquidating Trustee has not transferred title to DSSIII. The Property remains property of CAREIC’s estate under Bankruptcy Code § 541(a) and thus subject to this Court’s exclusive in rem jurisdiction.

Second, Gardner can be distinguished where “the dispute directly affects the bankruptcy estate.” Rhino Energy LLC v. C.O.P. Coal Development Co. (In re C.W. Mining Co.), 2015 U.S. Dist. LEXIS 90123, *34 fn. 17 (D. Utah July 10, 2015). Clearly the amount the Liquidating Trustee can realize from the sale of the Property directly affects the bankruptcy estate. And “orders approving the sale of property” are squarely within this Court’s core jurisdiction. 28 U.S.C. § 157(b)(2)(N).

Third, this Court retained jurisdiction under the DSSIII Sale Order “to resolve any issues that may arise with respect to the Purchase Agreement or the Property.” DSSIII Sale Order ¶ 7. Likewise, the DSSIII Purchase Agreement required entry of a sale order containing a provision that “the Bankruptcy Court shall retain jurisdiction to enforce this Agreement in all respects.” DSSIII Purchase Agreement § 6.7(g). Even if the Court did not otherwise have jurisdiction, DSSIII has plainly consented to this Court’s jurisdiction, which is an independent reason that jurisdiction is proper in this Court. Wellness Int’l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942-44 (2015).

II. DSSIII Breached, or at a Minimum, Anticipatorily Breached the DSSIII Purchase Agreement and is Estopped from Enforcing it; and These Changed Circumstances Are Grounds to Vacate the DSSIII Sale Order

As detailed above, DSSIII told the Liquidating Trustee in no uncertain terms that it would not perform under the DSSIII Purchase Agreement unless the Trustee agreed to a \$500,000 price reduction. Under Tennessee law, which governs the DSSIII Purchase Agreement, this constitutes an anticipatory breach and repudiation of the DSSIII Purchase Agreement.

The Supreme Court of Tennessee has recognized that “[a] party to a contract can take certain actions or make certain statements that repudiate it. Such a repudiation can occur when a party ‘commit[s] a voluntary act which renders the party unable or apparently unable to perform the contract.’” UT Medical Group, Inc. v. Vogt, 235 S.W.3d 110, 120 (Tenn. 2007) (quoting Wright v. Wright, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991)). An anticipatory breach also occurs where “the words and conduct of the contracting party . . . amount to a total and unqualified refusal to perform the contract.” Id.

In this case, DSSIII’s words and conduct amounted to a total and unqualified refusal to perform, unless the Liquidating Trustee agreed to a \$500,000 price concession. Accordingly, DSSIII committed an anticipatory breach of the contract, which entitles the Liquidating Trustee to “treat the repudiation as an immediate breach by bringing suit or changing position in some way.” Id. The Liquidating Trustee elected to treat the DSSIII Purchase Agreement as an immediate breach and changed his position by entering into the MOU with Geringer.

Furthermore, the Liquidating Trustee took the statements of DSSIII at face value, and believed DSSIII when it told him that it would not close without a substantial discount. In reliance on these statements, he signed the MOU and agreed to sell the Property to Geringer. As

a result, DSSIII is now estopped from reversing course and attempting to enforce the contract it previously repudiated.

At the status hearing the Court conducted on July 14, the Court expressed a concern that parties should be able to rely on its orders approving sales. While Geringer certainly acknowledges that this is an important concern, he respectfully submits that concern is not implicated in this case. It is DSSIII, not the Liquidating Trustee, who breached the DSSIII Purchase Agreement. Moreover, under these changed circumstances, which are entirely a result of DSSIII's voluntary repudiation of its agreement with the Liquidating Trustee, it is appropriate for the Court to revisit and to vacate the DSSIII Sale Order. See In re Gledhill, 76 F.3d 1070, 1081 (10th Cir. 1996) (granting trustee's motion pursuant to vacate prior order of the court due to changed circumstances of case).

Geringer does not believe the Court was apprised of the relevant facts at the July 14 status conference, and submits that based upon the complete record of this case the Liquidating Trustee was entirely justified in treating the DSSIII Purchase Agreement as anticipatorily breached. As a result, the approval of the Bid Procedures Motion and the sale of the Property to Geringer for greater consideration to the estate is justified and appropriate.

Dated: July 27, 2015

JONES DAY

/s/ Richard L. Wynne
Richard L. Wynne
Attorneys for Robert D. Geringer

COHNE KINGHORN, P.C.

/s/ George Hofmann
George Hofmann

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2015 I electronically filed the foregoing **JOINDER IN LIQUIDATING TRUSTEE'S EMERGENCY MOTION FOR COURT TO RECONSIDER ITS CONTINUANCE OF HEARINGS RELATED TO GERINGER SALE MOTION AND TO POSTPONE JULY 30, 2015 CLOSING** 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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