

1 MacCONAGHY & BARNIER, PLC
JOHN H. MacCONAGHY, State Bar No. 83684
2 JEAN BARNIER, State Bar No. 231683
645 First St. West, Suite D
3 Sonoma, California 95476
Telephone: (707) 935-3205
4 Facsimile: (707) 935-7051
Email: macclaw@macbarlaw.com

5 Attorneys for Reorganized Debtor

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7 UNITED STATES BANKRUPTCY COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9 OAKLAND DIVISION

10 In re

11 DONALD F. GAUBE,

12 Reorganized Debtor.

) Case No. 15-43783 CN
) (Chapter 11)

) **MOTION FOR ORDER**
) **AUTHORIZING SALE OF PROPERTY**
) **FREE AND CLEAR OF LIENS AND**
) **INTERESTS**

) Hearing Date: February 2, 2017
) Time: 10:00 a.m.
) Courtroom 215 - Judge Novack

16
17 **TO: JEFFREY A. DUDUM, INDIVIDUALLY AND THROUGH PAUL S. MANSDORF,**
18 **HIS CHAPTER 7 TRUSTEE IN BANKRUPTCY; TORREY PINES BANK; 643**
19 **CAPITAL MANAGEMENT, INC.; AND ALL OTHER CREDITORS AND OTHER**
20 **PARTIES IN INTEREST:**

21 The Motion of the Reorganized Debtor Donald F. Gaube, respectfully represents:

22 **JURISDICTION**

23 1. On December 13, 2015, the Debtor Donald F. Gaube filed his voluntary petition
24 for relief under Chapter 11 of the Bankruptcy Code in the above-entitled Court. The Debtor
25 remained in ownership and management of his property as a debtor-in-possession up through
26 October 6, 2016, at which time the Court entered its "Order Confirming Debtors' Plan of
27 Reorganization" dated July 28, 2016.

28 2. The terms of the Debtor's confirmed Plan (Dkt. No. 213, pp. 25-26) provided in

1 relevant part as follows:

2 **7.1 Post Confirmation Operations and Management of the Post**

3 **Confirmation Estate.** On and after the Effective Date, the
4 Reorganized Debtor shall be free to operate its business without
5 further supervision or control by the Bankruptcy Court and free of
6 any restrictions imposed by the Bankruptcy Code except as
7 provided in the Plan or by an order of the Bankruptcy Court.

8 Specifically and without limitation, the Reorganized Debtor may
9 sell, lease, or refinance its properties without further Order of
10 Court.

11 **7.2 Retained Power to Sell Free and Clear of Liens.** The

12 Reorganized Debtor reserves its preconfirmation rights and powers
13 to sell its property free and clear of liens and interests by notice
14 motion pursuant to Bankruptcy Code Section 363(f), as to any lien
15 or interest whether scheduled or unscheduled, and whether
16 perfected or unperfected. ...

17 3. This Court has subject matter jurisdiction over this Motion pursuant to the
18 provisions of 28 U.S.C. Sections 1334 and 11 U.S.C. Sections 363, 1141, and 1142. This
19 Motion is a “core” proceeding as defined by 28 U.S.C. Section 157(b)(2)(N). Venue is proper
20 here pursuant to the provisions of 28 U.S.C. Section 1409.

21 **SUMMARY OF RELIEF REQUESTED**

22 4 Among the assets of the estate is an undivided one-half joint tenancy interest in
23 the real property commonly known as 206 Cameo Drive, Danville, CA, APN 195-072-001 (the
24 “Property”). The Debtor’s ex-spouse Jane Gaube, a non-debtor in this or any other proceeding,
25 owns the other one-half joint tenancy interest. Pursuant to applicable non-bankruptcy law, the
26 joint tenancy interests of the Debtor and Jane Gaube are deemed to be their separate property
27 and Ms. Gaube’s interest is not property of this Post-confirmation Estate.

28 5. On or about January 3, 2017, the Debtor and Jane Gaube agreed to sell the entire

1 fee interest in the above-mentioned property to Brian Baumgartner and Suzie Baumgartner
2 (“Buyers”) for the sum of \$ 962,000. A true and correct copy of the purchase agreement is
3 attached to this Motion as Exhibit 1. The Buyers are the daughter and son-in-law of the Debtor
4 and Ms. Gaube. By this Motion, the Debtor seeks authority to consummate this transaction.

5 **DETERMINATION OF THE SALES PRICE**

6 6. Due to the fact that the Buyers are relatives of the Debtor, the Debtor recognizes
7 that the Court may want to give careful scrutiny as to how the purchase price was determined
8 and to otherwise ensure that this sale is as favorable as a third party, arm’s length transaction.

9 7. The Property is a single family dwelling purchased by the Debtor and Mrs. Gaube
10 in 2012 for the sum of \$632,000 in an arm’s length transaction. They have have leased it to the
11 Baumgartners since that time. It is subject to an undisputed, institutional first deed of trust in
12 favor Wells Fargo Bank in the approximate amount of \$240,000. The Debtor listed the Property
13 in his Schedule A with a scheduled value of \$800,000.

14 8. After the Wells Fargo Bank first deed of trust, the next most senior lien on the
15 Property was the judgment lien in favor of CCF Holdings, Inc., in the approximate amount of
16 \$15,724,660.27 as evidenced by its Abstract of Judgment recorded on June 24, 2014, in the
17 Official Records of the County of Contra Costa as Document No. 2014-0103590. Although CCF
18 Holdings, Inc. has additional collateral for its judgment liens, even if this other collateral is fully
19 exhausted, CCF Holdings, Inc. would still be owed in excess of \$10,000,000, and there is no
20 possibility that there would be any equity in the Cameo Dr. Property available for any junior
21 lienholders or unsecured creditors of this Estate.

22 9. As the record in this case reflects, CCF Holdings, Inc. and the Debtor have been
23 longstanding, hard fought litigation adversaries.

24 10. In an attempt to generate a fair return to CCF Holdings, Inc on account of its
25 senior judgment lien, while still avoiding the cost and disruption to all parties of an
26 execution/partition process, the Debtor’s confirmed Plan provided for a “dueling appraisal”
27 process as between the Debtor and CCF Holdings, whereby the “Fair Market Value” for the
28 Property would be determined, and then the Debtor would have the option to cash out CCF

1 Holdings on or before December 31, 2016, at an “Agreed Price” [FMV less \$10,000 transaction
2 costs, less amount of first deed of trust, divided by 2]. See confirmed Plan, Dkt. No. 228 at pp.
3 24-25.

4 11. Thus, the adverse party CCF Holdings was incentivized to fix the highest
5 sustainable “Fair Market Value” for the Property.

6 12. Pursuant to Section 6.2 of the confirmed Plan, the Debtor and CCF Holdings
7 jointly determined the Fair Market Value of the Property to be \$962,000. Using the formula in
8 the Plan, this meant that the “Agreed Price” to cash out CCF Holdings of its lien on the Debtor’s
9 50% joint tenancy interest was \$352,000.

10 13. The Debtor, Jane Gaube, and the Buyers have agreed that the Fair Market Value
11 agreed to by CCF Holdings will be the sales price for the Property.

12 **DISPOSITION OF THE SALES PROCEEDS**

13 14. On closing of the subject sale the Debtor and Jane Gaube will pay from their
14 respective shares the approximate sum of \$240,000 to Wells Fargo Bank in full satisfaction of
15 its first deed of trust.

16 15. The Debtor shall use the balance of the 50% of the sales proceeds otherwise due
17 him to satisfy the judgment lien of CCF Holdings, Inc. To be clear, on December 28, 2016, the
18 Debtor received a short-term loan from JF Capital Series, LLC in the amount of \$352,000 at 6%
19 per annum to cash out the CCF Holdings lien position. That sum was tendered to CCF Holdings
20 on December 29, 2016, prior to the deadline of December 31. CCF Holdings has executed and
21 returned a recordable Release of Lien, which is being held in trust and is to be recorded on the
22 closing of the sale and the full repayment to JF Capital Series, LLC. The principal of JF Capital
23 Series, LLC is Jeffrey W. Johnson, the person who funded the retainer for Debtor’s counsel in
24 this case. It is anticipated that the pay off of this obligation will consume the Debtors’ entire
25 share of the sales proceeds.

26 **SALE FREE AND CLEAR OF LIENS**

27 16 The Property is subject to certain junior liens and encumbrances of record which
28 are all in bona fide dispute and which the Debtor asserts are subject to a sale free and clear as set

1 forth in Bankruptcy Code § 363(f)(4). A description of these liens, along with the basis for
2 treatment under Section 363(f), is as follows:

- 3 (i) The judgment lien in the name of Jeffrey A. Dudum, et al, in the stated amount of
4 \$101,125.00, as evidenced by that certain Abstract of Judgment recorded on
5 March 20, 2014 in the Official Records of the County of Contra Costa as
6 Recorder's Serial Number 2014-0042597-00. This lien has been satisfied in full
7 through payment by the Debtor of a Court-approved compromise with Paul
8 Mansdorf, Mr. Dudum's Chapter 7 Bankruptcy Trustee, in the proceeding *In re*
9 *Jeffrey A. Dudum*, Case No. 12-43471 WJL. However, an Acknowledgement and
10 Satisfaction of Judgment was never recorded;
- 11 (ii) The judgment lien held by Torrey Pines Bank, in the stated amount of
12 \$247,302.13 as evidenced by that certain Abstract of Judgment recorded on
13 December 17, 2014 in the Official Records of the County of Contra Costa as
14 Recorder's Serial Number 2014-0223502. This lien has previously been valued
15 at zero and the lienholder's claim deemed wholly unsecured pursuant to that
16 certain "Order Valuing Lien of Torrey Pines Bank on 206 Cameo Dr." duly
17 entered by this Court on September 8, 2016 as Dkt. No. 228;
- 18 (iii) The judgment lien held by 643 Capital Management, Inc., in the stated amount of
19 \$374,847.71, as evidenced by that certain Abstract of Judgment recorded on
20 April 6, 2015 in the Official Records of the County of Contra Costa as Recorder's
21 Serial Number 2015-0063452, and amended by those documents recorded on
22 June 5, 2015 as recorder's serial number 2015-0114943. This lien has previously
23 been valued at zero and the lienholder's claim deemed wholly unsecured pursuant
24 to that certain "Order Valuing Lien of 643 Management, Inc. on 206 Cameo Dr."
25 duly entered by this Court on September 8, 2016 as Dkt. No. 230;

26
27 17. Good cause exists to authorize the Debtor to consummate this sale. The Debtor
28 has investigated the fair market value of the Property and believes that the purchase price is fair

1 and in the best interests of the Post Confirmation Estate. The sale results in a favorable paydown
2 of the blanket lien in favor CCF Holdings, Inc, thus minimizing the unsecured deficiency claim
3 of that creditor.

4 WHEREFORE, the Reorganized Debtor prays that the Court enter its Order authorizing
5 the proposed sale of the Property free and clear of liens and interest; and granting any such
6 further relief as the Court deems proper.

7 Dated: January 5, 2017

MACCONAGHY & BARNIER, PLC

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/s/ John H. MacConaghy
John H. MacConaghy
Attorneys for Reorganized Debtor,
DONALD F. GAUBE

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EXHIBIT 1

**REAL ESTATE SALES AND
PURCHASE AGREEMENT**

BRIAN AND SUZIE BAUMGARTNER, ("Buyer") and DONALD F. GAUBE AND JANE S. GAUBE, ("Sellers") hereby agree as follows:

1. Property. Sellers agrees to sell to Buyer that certain real property commonly known as 206 Cameo Dr., Danville, CA.
2. Purchase Price. The purchase price shall be the sum of nine hundred sixty two thousand and no/100 dollars (\$962,000.00), all cash, subject to the terms and conditions set forth below.
3. Terms. The purchase price shall be payable as follows:
 - a. a deposit in the amount of \$500.00, payable into escrow, on acceptance of this offer;
 - b. a gift to Buyer by Jane Gaube, mother and mother-in-law of Buyer, of her net equity as the holder of an undivided one-half joint tenancy interest in the Property, to be effective as of Closing;
 - c. the balance of the purchase price, in an amount sufficient to satisfy the valid liens of record in the approximate amount of \$600,000.00, shall be deposited into escrow within two business days of Closing.
4. Escrow.
 - a. Within 7 days from acceptance by Sellers, a neutral escrow shall be established at Old Republic Title Company, Lodi, California, or such other escrow agent mutually agreed upon by the parties. Written escrow instructions shall be prepared by the parties in accordance with the terms of this Agreement. Buyer and Sellers shall also deposit with the escrow holder all instruments, documents and other items identified in the escrow instructions or reasonably required by the escrow holder to close the sale on the closing date specified below.
 - b. Close of escrow "Closing" shall occur on or before February 28, 2017, or at such later date mutually acceptable to Buyer and Sellers.
5. Conditions of Sale. Buyer's obligation to purchase the subject property is contingent on satisfaction of the following conditions, which are solely for Buyer's benefit unless otherwise indicated:

- a. Bankruptcy Court Approval. Sellers Donald Gaube is currently a Chapter 11 Reorganized Debtor in the proceeding *In re Donald F. Gaube*, U.S. Bankruptcy Court, N.D. Cal. Case No. 15-43783 CN. The parties' obligations under this Agreement are subject to entry of an Order Authorizing Sale of Real Property Free and Clear of Liens by the U.S. Bankruptcy Court within 45 days of the execution of this Agreement.
 - b. Approval of Title. Buyer's approval of the title to be conveyed by Sellers not less than 10 business days from issuance of a preliminary title report by the escrow holder.
 - c. Inspection. Buyer's approval, within 10 days after execution of this Agreement, of the physical condition of the subject property, including any contractors, engineers, surveyors, licensed pest control inspectors, or other professionals deemed appropriate by Buyer. Buyer shall have the right to perform any inspections which Buyer may desire so long as such tests or inspections do not materially damage or expose the Property or Sellers to any lien or liability. Buyer shall restore the Property to its original condition after concluding each test, and agrees to indemnify Sellers from any liability, claim, cause of action, cost and expense, including attorneys fees, arising out of Buyer's inspection or testing of the Property. The cost of any such inspection shall be borne by Buyer.
 - d. Financing. This Agreement is contingent upon Buyer obtaining a loan or other financing commitment on such terms and conditions acceptable to Buyer in an amount sufficient to satisfy the existing encumbrances against the Property in the approximate amount of \$600,000.00, within 30 days after execution of this Agreement.
 - e. CLTA Title Insurance. The issuance to Buyer of a CLTA coverage title insurance policy insuring that title to the subject property is free and clear of all title defects, liens, encumbrances and other matters, except those approved in writing by Buyer.
6. Closing Costs. Buyer shall pay all documentary transfer taxes, title insurance premiums and escrow fees arising from the sale of the subject property. Buyer shall pay any other closing costs customary for residential real property sales in the County of Contra Costa.
 7. No Prorations. All rent, utilities, insurance, real property taxes and assessments shall be paid by Buyer as of the close of escrow.
 8. Warranties of Sellers. As further consideration for Buyer's obligations under this Agreement, Sellers makes the representations and warranties set forth below, which warranties shall survive delivery of deed:

- (ii) Buyer warrants that prior to the Closing, Buyer will have (1) concluded whatever studies, tests and investigations he desires relating to the Property and improvements, including without limitation, soils tests, engineering analyses, asbestos presence or lack thereof, environmental analyses, analyses of any zoning or use restriction affecting the premises and analysis of any applicable records of planning, building public works or any other governmental or quasi-governmental entity, that affects the premises and operations, which Buyer deems relevant, including, without limiting the generality of the foregoing, all documents referred to in the Title Report and all documents concerning the improvements, any equipment, and water and septic conditions, (2) made such independent studies, analyses, actual site inspection and investigations as Buyer deemed necessary, and (3) been furnished with any and all information requested by Buyer.
- (iii) Except as is specifically set forth in this Agreement, Buyer acknowledges that no person acting on behalf of Seller is authorized to make, and by execution hereof Buyer acknowledges that no person has made any promise, representation or warranty of any kind or nature whatsoever, regarding the Property. No representation, warranty, agreement, statement, guarantee or promise, if any, made by any person acting on behalf of Sellers which is not contained herein shall not be valid or binding on Sellers.

11. Loss, Destruction and Condemnation. The parties agree that the Uniform Vendor and Purchase Risk Act set forth in Cal Civil Code § 1662 and its provisions governing the allocation of risk of loss shall govern this transaction.

12. Fixtures. The Property purchased pursuant to this Agreement includes all wall to wall carpeting, window coverings, light fixtures, appliances, plants and landscaping.

13. Time. Time is of the essence.

14. Modification/Integration. This Agreement may be modified only by a document in writing. This Agreement supersedes any prior representations and/or agreements and contains the entire agreement of the parties on the matters described herein. No other agreement, statement or promise made by any party that is not in writing and signed by all parties to this Agreement shall be binding upon the parties hereto.

15. Governing Law. This Agreement shall be governed by the laws of the State of California.

16. Broker's Commission. No party is obligated to pay a real estate broker's commission to any party in connection with this Agreement.


17. Possession. Buyer acknowledges that Buyer currently is in possession of the Property as a tenant of Sellers.

18. Termination of Offer. This Purchase Agreement shall be null and void if not executed by the parties on or before January 3, 2017.

SIGNATURES

BUYER

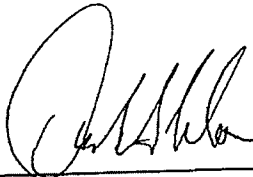
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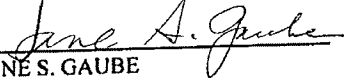

BRIAN BAUMGARTNER


SUZIE BAUMGARTNER

THE FOREGOING IS ACCEPTED:

Dated: 1/3/2017


DONALD F. GAUBE


JANE S. GAUBE