

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

In re:)	
)	Chapter 11
OGGUSA, Inc., <i>et al.</i> ,)	
)	Case No. 20-50133-grs
Debtors.)	
)	(Jointly Administered)
)	
)	Honorable Gregory R. Schaaf
)	

**GENCANNACQUISITION CORPORATION’S OBJECTION TO
4274 COLBY’S MOTION TO SET HEARING TO ESTABLISH CURE AMOUNT**

GenCanna Acquisition Corporation (“GenCanna”), hereby files this objection (the “Objection”) to *4274 Colby’s Motion to Set Hearing to Establish Cure Amount* [Docket No. 2135] (the “Motion”) filed by 4274 Colby, LLC (“Colby”). In support of this Objection, GenCanna states as follows:

BACKGROUND

I. Colby and OGG Entered into the Lease Agreement.

1. On or about July 30, 2015, Colby and OGGUSA, Inc. f/k/a GenCanna Global USA, Inc. (“OGG”) entered into a *Lease Agreement* [Docket No. 2132-1] (the “Lease Agreement”), by which Colby leased several buildings and real property located at 4274 Colby Road, Winchester, Kentucky to OGG.

2. In or around November 2019, Colby and OGG executed a *First Amendment to Lease Agreement* [Docket No. 2132-2] (the “Amendment”), which extended the term of the Lease Agreement through June 30, 2026.

3. The Lease Agreement obligated OGG to insure the buildings on the leased property with general liability and fire insurance, and to name Colby as an additional insured on

those policies.

4. In the event of damage or destruction to the leased property, the Lease Agreement provided:

If the building and/or other improvements on the Leased Premises shall be damaged or rendered untenable by fire or other casualty, Tenant shall repair or replace said improvements. Provided Tenant is not in default under the terms of this Lease, Tenant shall have the right to use all insurance proceeds from policies maintained and paid by Tenant and/or Landlord payable by reason of such damage or destruction, all such proceeds to be used solely to repair or reconstruct the improvements upon the Leased Premises. It is further agreed that the rent herein required to be paid shall abate during said period of untenability, or if the improvements shall be damaged but not rendered untenable thereby, the rent shall abate in an amount proportionate to the decrease in the utility of the Leased Premises. In the event that any damage or destruction occurring during the term of this Lease, or any renewal term or extension, is greater than fifty percent (50%) or more of the insurable value of the building, either Landlord or Tenant may, at its option, to be evidenced by notice in writing given to the other within thirty (30) days after the occurrence of such damage or destruction, in lieu of repairing or replacing such building, elect to terminate this Lease as of the date of said damage or destruction, and all insurance proceeds shall be paid to Landlord or its mortgagee as their interests may appear.

Lease Agreement, Article 21.

5. In compliance with the Lease Agreement, OGG acquired an insurance policy from Cincinnati Insurance Company (“Cincinnati Insurance”) that included: (i) coverage for loss to the leased buildings; (ii) coverage for the loss of business income caused by a loss; and (iii) personal property insurance coverage.

6. In November 2019, one of the leased buildings, which housed part of OGG’s manufacturing and production facilities, suffered an explosion and caught fire. Subsequently, OGG filed a claim under its insurance policy and received a portion of the proceeds under same for the loss to the building caused by the fire.

II. OGG Became a Debtor in the Chapter 11 Case.

7. On January 24, 2020 (the “Petition Date”), Pinnacle, Inc., Crawford Sales, Inc.,

and Integrity / Architecture, PLLC filed an involuntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) against OGG with the United States Bankruptcy Court for the Eastern District of Kentucky (the “Bankruptcy Court”).

8. On February 5, 2020, OGG affiliates GenCanna Global, Inc. and Hemp Kentucky LLC (together with OGG, the “Debtors”) filed their own voluntary chapter 11 petitions under the Bankruptcy Code with the Bankruptcy Court.

9. On February 6, 2020, OGG consented to the involuntary petition and the Bankruptcy Court entered an Order for Relief against OGG.

10. As a result of these petitions, OGG and its affiliates consented to, or commenced, the chapter 11 bankruptcy cases jointly administered as In re OGGUSA, Inc. et al., Lead Chapter 11 Case No. 20-50133-grs (the “Chapter 11 Case”).

III. The Debtors Sold Substantially All of Their Assets to GenCanna, Including the Insurance Proceeds, Free and Clear of Liens, Claims, and Encumbrances.

11. On February 18, 2020, OGG filed the *Debtors’ Motion for Entry of an Order (I) Approving Bidding Procedures in Connection with the Debtors’ Bidding Process; (II) Approving the Transaction Ultimately Selected as the Highest and Best Alternative Through the Bidding Process, Including a Possible Sale of Assets Free and Clear of Liens, Claims and Encumbrances; and (III) Granting Related Relief* [Docket No. 136] (the “Bid Procedures Motion”), by which it sought entry of an order establishing sales procedures for the sale of substantially all of its assets, including, but not limited to, OGG’s rights to the recovery of proceeds of insurance with respect to loss incurred in connection with the explosion and fire that occurred on November 17, 2019 at 4274 Colby Road, Hemp Research Campus, Winchester, Kentucky (the “Insurance Proceeds”). The Bid Procedures Motion also sought entry of an order authorizing the assumption and assignment of certain unexpired leases and executory contracts (the “Assigned Contracts”) to

GenCanna as part of the contemplated sale.

12. On April 10, 2020, Colby submitted a proof of claim in the Chapter 11 Case. [Claim No. 10012].

13. That same day, Colby filed the *Objection of 4274 Colby, LLC, a Kentucky Limited Liability Company, to Debtors' Notice of Proposed Cure Amounts and Possible Assumption and Assignment of Executory Contracts and Unexpired Leases*. [Docket No. 566].

14. On April 27, 2020, OGG filed the *Notice Regarding Status of Bids* [Docket No. 682], identifying GenCanna as the successful bidder for OGG's assets.

15. On April 28, 2020, Colby filed the *Objection of 4274 Colby, LLC, a Kentucky Limited Liability Company, to Debtors' Sale Motion and Proposed Sale to Credit Bidder MGG Investment Group, LP and Reservation of Rights of 4274 Colby, LLC*. [Docket No. 697].

16. On May 6 and 7, 2020, the Bankruptcy Court conducted a hearing to consider approval of the sale of OGG's assets, including the sale of the Insurance Proceeds to GenCanna.

17. On May 19, 2020, the Bankruptcy Court entered the *Order (I) Approving the Sale of Certain of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests Other than Permitted Liens, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and (III) Granting Related Relief* [Docket No. 850] (the "Sale Order"). The Sale Order effectuated the sale of substantially all of OGG's assets to GenCanna, including, but not limited to, the Insurance Proceeds.

18. In relevant part, the Sale Order provided as follows:

Upon the Closing, the Debtors shall be, and hereby are, authorized empowered and directed, pursuant to sections 105, 363(b) and 363(f) of the Bankruptcy Code to sell the Purchased Assets... to the Purchaser in accordance with the APA. The sale and assignment of the Purchased Assets to the Purchaser **vests the Purchaser with all right, title and interest of the Debtors in and to the Purchased Assets free and clear** of any and all Liens (other than Permitted Liens), Excluded Liabilities **and**

other liabilities or interests of any kind or nature whatsoever (including all tax liabilities of the Debtors but excluding **all Assumed Liabilities**), **whether imposed by agreement, understanding, law, equity or otherwise...**

Sale Order, ¶ 10 (emphasis added).

19. The asset purchase agreement incorporated by reference into the Sale Order [Docket No. 850, Pages 35-171] (the “APA”) defined “Purchased Assets” to include “all insurance proceeds... including all rights to the recovery of proceeds of insurance with respect to loss incurred in connection with the explosion and fire that occurred on November 17, 2019 at 4274 Colby Road, Hemp Research Campus, Winchester, Kentucky (including but not limited to all proceeds recovered in connection with property damage, Inventory and business losses);”. Sale Order, Page 46, Section 2.1(j).

20. The Sale Order further authorized the assumption and assignment of the Assigned Contracts to GenCanna, including the Lease Agreement, as amended, and a Recognition Agreement between OGG and MGG Investment Group LP (collectively, the “Agreements”):

Assumption and Assignment of Assigned Contracts. Under sections 105(a), 363 and 365 of the Bankruptcy Code, and subject to and conditioned upon the closing of the Sale Transaction and the resolution of any objections based on adequate assurance of future performance or any disputed Cure Amount, **the Debtors’ assumption and assignment to the Purchaser of the Assigned Contracts free and clear of all Liens (other than Permitted Liens) and Excluded Liabilities pursuant to the terms set forth in the APA**, as modified by the terms of any amendments reached directly by the Purchaser with the respective counterparty, is hereby approved, and the requirements of sections 365(b)(1) and 365(f)(2) of the Bankruptcy Code (including to the extent, if any, modified by section 365(b)(3) of the Bankruptcy Code) with respect thereto are hereby deemed satisfied. **Except with respect to any objection to assumption, assignment or Cure Amount, each counterparty to the Assigned Contracts is hereby forever barred, estopped and permanently enjoined from raising or asserting against the Debtors or the Purchaser,** or the property of any of them, any assignment fee, default, breach, claim, pecuniary loss, liability or obligation (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, known or unknown, liquidated or unliquidated, senior or subordinate) arising under or out of, in connection with, or in any way related to the Assigned Contracts existing as of the Closing Date or arising by reason of the Closing.

Sale Order, ¶ 20 (Emphasis added).

21. The Sale Order further provided:

To the extent the Closing of the Sale Transactions has occurred prior to the resolution of any outstanding Cure Objections, **the applicable Assigned Contracts will be conditionally assumed and assigned** as of the Closing Date, subject to the consent of the Purchaser, pending a resolution of the Cure Objection after notice and a hearing. **If a Cure Objection is not resolved to the satisfaction of the Purchaser, the Purchaser may determine that such Assigned Contract should be rejected and not assigned, in which case the Purchaser will not be responsible for any Cure Amounts in respect of such contract...** For the avoidance of doubt, the Purchaser shall be responsible for (a) the payment of Cure Amounts in connection with any Assigned Contract that is ultimately designated by Purchaser as an Assumed Contract[.]

Sale Order, ¶ 23 (Emphasis added).

IV. The Debtors Entered Into the Amended MGG Settlement and Confirmed the Plan.

22. On October 9, 2020, OGG filed the *Notice of Filing First Amended Global Settlement Agreement and Release with MGG Investment Group LP and Affiliated Parties* [Docket No. 1407] (the “Amended MGG Settlement”).

23. Notwithstanding the sale of the Insurance Proceeds to GenCanna, the Amended MGG Settlement provided that the Debtors would conduct the necessary litigation to recover the Insurance Proceeds for GenCanna’s benefit:

The Debtors and their professionals shall prosecute (including through the commencement of adversary proceedings in the Court, if necessary) recoveries in respect of the following... (iii) the Debtors’ insurance claims with respect to the fire that occurred at the Debtors’ HRC facility (“Insurance Litigation”)...

[Docket No. 1407-1, Pages 6-7, Section 5(a)].

24. Additionally, the Amended MGG Settlement provided, in relevant part:

Any cash proceeds recovered in connection with the Insurance Litigation, whether through a settlement or final judgment (the “Insurance Litigation Proceeds”), shall be shared as follows: (i) first to pay for any accrued but unpaid Litigation Costs incurred by the Debtors in litigating such matter; (ii) second, to reimburse the Buyer

for the amount of Litigation Costs incurred by the Debtors in litigating such matter actually paid by the Buyer to the Debtors; and (iii) for the remaining net cash proceeds, 8% to the Debtors' bankruptcy estates (up to a cap of \$350,000.00), 17% to Benesch (to the extent the partial contingency arrangements are applicable), and 75% to the Buyer (or 92% to the extent partial contingency arrangements are not applicable).

[Docket No. 1407-1, Page 10, Section 5(i)].

25. On November 6, 2020, OGG filed the *Debtors' Second Amended Joint Plan of Liquidation (With Modifications)* [Docket No. 1496] (the "Plan").

26. The Plan provided, in relevant part:

Without prejudice to the Debtors' ability to pursue approval of the MGG Settlement by the separate motion requesting such relief filed by the Debtors on July 30, 2020 [Docket No. 1145], as such motion has been and may be amended from time to time (including such changes as are contemplated by the Mediation Settlement Term Sheet), the Plan also shall be deemed a motion to approve the MGG Settlement in accordance with the terms of the MGG Settlement Agreement.

Plan, Page 14, Article IV(A)(2).

27. The Plan was served on the Debtors' entire creditor matrix, including to Colby.

28. Moreover, OGG filed a list of exhibits to the Plan, one of which exhibits was an executed copy of the Amended MGG Settlement. [Docket No. 1499-15].

29. Despite being served, Colby did not object to the Amended MGG Settlement or the disposition of Insurance Proceeds therein.

30. On November 10, 2020, the Bankruptcy Court entered the *Order Granting the Debtors' Motion for Approval of Global Settlement Agreement and Release With MGG Investment Group LP and Affiliated Parties Under Bankruptcy Rule 9019* [Docket No. 1511] (the "Settlement Order"). The Settlement Order provided that "[t]he terms of the First Amended Settlement Agreement are hereby approved. The Debtors are authorized to enter into, deliver and perform under the First Amended Settlement Agreement, and may execute and deliver any document or

instrument, and take any other action, necessary or appropriate to effectuate the terms thereof.” Settlement Order, ¶ 2.

31. On November 11, 2020, the Bankruptcy Court entered the *Findings of Fact, Conclusions of Law and Order Approving and Confirming Debtors’ Second Amended Joint Plan of Liquidation (With Modifications)* [Docket No. 1517] (the “Confirmation Order”). The Confirmation Order incorporated the terms of the Plan, including the provisions regarding the Amended MGG Settlement.

32. Further, the Confirmation Order provided, in relevant part:

Except as otherwise specifically provided in the Plan or this Confirmation Order, from and after the Effective Date, all Persons and Entities who have held, hold, or may hold Claims or rights giving rise to any equitable relief against the Assets or any Interests in the Debtors arising prior to the Effective Date are permanently enjoined from taking any of the following actions against, as applicable, the Debtors, the Wind-Down Trust, the Exculpated Parties, or the Released Parties¹: (a) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (b) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests... (e) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan[.]

Confirmation Order, ¶ 20.

ARGUMENT

33. To the extent that any cure amounts with respect to the Agreements remain recoverable, GenCanna is not opposed to the relief requested in Colby’s Motion. The assumption and assignment of the Agreements was conditioned on GenCanna’s satisfaction with the resolution of any related cure objections, so GenCanna still reserves the right to reject the Agreements.

¹ “Released Parties” is defined to include the “Non-Debtor Potentially Released Parties”. Confirmation Order, Page 88. In turn, “Non-Debtor Potentially Released Parties” is defined to include “the Purchaser”, i.e., GenCanna. Confirmation Order, Page 85.

Further, to the extent that GenCanna may be liable for any cure amounts with respect to the Agreements, an evidentiary hearing is necessary to determine the proper cure amounts, as the methodology employed by Colby is erroneous.

BASIS FOR RELIEF REQUESTED

I. The Assumption and Assignment of the Agreements and the Payment of any Cure Amounts Relating Thereto Remain Subject to GenCanna's Consent.

34. Pursuant to the Sale Order, the Agreements were only conditionally assumed and assigned, subject to the resolution of any related cure objections to GenCanna's satisfaction:

To the extent the Closing of the Sale Transactions has occurred prior to the resolution of any outstanding Cure Objections, the applicable Assigned Contracts will be conditionally assumed and assigned as of the Closing Date, subject to the consent of the Purchaser, pending a resolution of the Cure Objection after notice and a hearing. If a Cure Objection is not resolved to the satisfaction of the Purchaser, the Purchaser may determine that such Assigned Contract should be rejected and not assigned, in which case the Purchaser will not be responsible for any Cure Amounts in respect of such contract.

Sale Order, ¶ 23.

35. Accordingly, to the extent that any of Colby's cure objections are not resolved to GenCanna's satisfaction, GenCanna reserves the right to reject and forego assumption of any Agreements.

II. The Cure Amount Does not Include the Insurance Proceeds, Which Were Sold to GenCanna Free and Clear of any Liens, Liabilities, or Interests of any Kind.

36. The Sale Order effectuated a sale and assignment of several of the Debtors' assets (the "Purchased Assets") to GenCanna, including the Insurance Proceeds, free and clear of any liens, liabilities, or interests of any kind:

The sale and assignment of the Purchased Assets to the Purchaser **vests the Purchaser with all right, title and interest of the Debtors in and to the Purchased Assets free and clear** of any and all Liens (other than Permitted Liens), Excluded Liabilities **and other liabilities or interests of any kind or nature whatsoever** (including all tax liabilities of the Debtors but excluding all Assumed

Liabilities), whether imposed by agreement, understanding, law, equity or otherwise[.]

Sale Order, ¶ 10 (emphasis added).

37. The APA defined “Purchased Assets” to include “all insurance proceeds... including all rights to the recovery of proceeds of insurance with respect to loss incurred in connection with the explosion and fire that occurred on November 17, 2019 at 4274 Colby Road, Hemp Research Campus, Winchester, Kentucky (including but not limited to all proceeds recovered in connection with property damage, Inventory and business losses);”. Sale Order, Page 46, Section 2.1(j).

38. Further, the Bankruptcy Court has already determined how the Insurance Proceeds will be divided, pursuant to the Amended MGG Settlement approved in the Settlement Order. *See* Docket No. 1145-1, Page 10, Section 5(i).

39. Indeed, the Bankruptcy Court has already made findings to this effect. [Docket No. 2131, Page 5] (“[T]he Sale Order protects [GenCanna] and the Debtor’s estate from Colby’s attempt to recover the Property Loss insurance proceeds.”); *Id.* at Page 6 (“The Global Settlement several months later again recognized the sale of the insurance proceeds to GAC... Colby no longer has an interest in insurance proceeds owed to the Debtor and sold to GAC.”)

40. Nevertheless, Colby claims that “at least \$1,251,501.54 and up to \$1,587,674.40” in Insurance Proceeds received by OGG comprise a component of its cure claim. Motion, Page 4.

41. Accordingly, the foregoing amount must not be included in determining the ultimate cure amount.

III. The Rent Component of the Cure Amount Must be Reduced to the Extent that Rent was Abated.

42. The Lease Agreement provided that:

If the building and/or other improvements on the Leased Premises shall be damaged or rendered untenable by fire or other casualty... It is further agreed that **the rent herein required to be paid shall abate during said period of untenability**, or if the improvements shall be damaged but not rendered untenable thereby, **the rent shall abate in an amount proportionate to the decrease in the utility of the Leased Premises**.

Lease Agreement, Article 21 (emphasis added).

43. Accordingly, GenCanna contends that most, if not all, of the rent purportedly owed to Colby abated, pursuant to the foregoing provision. Indeed, the Bankruptcy Court acknowledged this issue in one of its prior orders. [Docket No. 2131, Page 6] (“[T]he Lease abates rent while the leased premises are untenable.”)

44. Colby has asserted that abatement required (i) damage or destruction to more than fifty percent of the insurable value of the leased property, and (ii) GenCanna to provide notice to Colby. [Docket No. 2132, Page 14]. Consequently, Colby alleges that GenCanna is liable for “at least \$229,818.50” in rent owed under the Lease Agreement subsequent to July 1, 2019. Motion, Page 3.

45. However, a brief review of the Lease Agreement reveals otherwise. Pursuant to the above provision, abatement of rent did not depend on any condition other than untenability. Lease Agreement, Article 21 (“[T]he rent herein required to be paid **shall** abate during said period of untenability.”) (Emphasis added). Colby mistakes the conditions for rent abatement with the conditions for termination of the Lease Agreement.²

46. Accordingly, the rent component of the cure amount must be reduced to the extent

² “In the event that any damage or destruction occurring during the term of this Lease, or any renewal term or extension, is greater than fifty percent (50%) or more of the insurable value of the building, either Landlord or Tenant may, at its option, to be evidenced by notice in writing given to the other within thirty (30) days after the occurrence of such damage or destruction, in lieu of repairing or replacing such building, elect to terminate this Lease as of the date of said damage or destruction, and all insurance proceeds shall be paid to Landlord or its mortgagee as their interests may appear.” Lease Agreement, Article 21.

that rent was abated, pursuant to the Lease Agreement.

WHEREFORE, GenCanna respectfully requests entry of an order: (i) denying the Motion; and (ii) granting such other and further relief as may be just and proper.

Dated: March 25, 2024

Respectfully submitted,

/s/ James R. Irving

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CERTIFICATE OF SERVICE

I certify that on March 25, 2024, a copy of the foregoing was sent via this Court's ECF system on all those parties registered to receive said electronic service.

/s/ James R. Irving

James R. Irving

Counsel to GenCanna Acquisition Corp.