

1 Elissa Miller (CA Bar No. 120029)
emiller@sulmeyerlaw.com
2 Daniel A. Lev (CA Bar No. 129622)
dlev@sulmeyerlaw.com
3 Avi E. Muhtar (CA Bar No. 260728)
amuhtar@sulmeyerlaw.com
4 **SulmeyerKupetz**
A Professional Corporation
5 333 South Hope Street, Thirty-Fifth Floor
Los Angeles, California 90071-1406
6 Telephone: 213.626.2311
Facsimile: 213.629.4520

7 Attorneys for Thomas Seaman, Trustee of the Creditors' Trust
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION**

11 In re
12 JAMES C. GIANULIAS,
13 Debtor.

14
15 In re
16 CAMEO HOMES, a California corporation,
17 Debtor.

Case No. 8:08-bk-13150-RK
Substantively Consolidated With:
Case No. 8:08-bk-13151-RK
Chapter 11

**MOTION TO DISALLOW CLAIMS FILED
BY M.W. HOUSING PARTNERS III, LP
(JCG CLAIM NO. 17 AND CAMEO
CLAIM NO. 10); MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF JOHN MCFADDEN
IN SUPPORT THEREOF**

DATE: February 8, 2011
TIME: 2:30 p.m.
PLACE: 411 West Fourth Street
Santa Ana, California
Courtroom 5D

1 TO THE HONORABLE ROBERT KWAN, UNITED STATES BANKRUPTCY JUDGE,
2 THE OFFICE OF THE UNITED STATES TRUSTEE, AND INTERESTED PARTIES:

3 Thomas Seaman, Trustee of the Creditors' Trust (the "Trustee")
4 established under the Fourth Amended Plan of Reorganization (the "Plan") filed by
5 James C. Gianulias ("JCG") and Cameo Homes ("Cameo", and together with JCG, the
6 "Debtors"), respectfully requests an order disallowing the following two claims filed by
7 M.W. Housing Partners III, LP (the "Claimant") (the "Claims"). Copies of the Claims are
8 organized by claim number and attached to the accompanying declaration of John
9 McFadden (the "McFadden Declaration").

<u>Filed</u> <u>against:</u>	<u>Claim No.</u>	<u>Claimant Name</u>	<u>Amount of Claim</u>
JCG	17	M.W. Housing Partners III, LP	\$5,300,000.00 plus accrued interest, fees, and costs
Cameo	10	M.W. Housing Partners III, LP	\$18,640,000.00 plus accrued interest, fees, and costs

16 Claimant filed the Claims based on certain pre-petition guaranty
17 agreements (the "Guarantees") entered into by the Debtors. Generally, pursuant to the
18 Guarantees, the Debtors guaranteed payment of portions of certain loans (the "Loans")
19 made for the development of certain construction projects. Claimant fails to document
20 any amounts due under the loans. There are no loan statements or other evidence of
21 amounts funded and amounts owing. Thus, the Trustee cannot determine how Claimant
22 calculated the amount due and owing under the loans and thereby the Guarantees.

23 Further, the Trustee believes, based on evidence presented by the Debtors
24 that the amounts asserted in the Claims are overstated

25 This motion is brought in accordance with Federal Rule of Bankruptcy
26 Procedure 3007 and Local Bankruptcy Rule 3007-1, and is based on the attached
27 Memorandum of Points and Authorities, the supporting declaration, and exhibit(s)
28 attached hereto.

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL 213.626.2311 • FAX 213.629.4520

1 **WHEREFORE**, the Trustee respectfully requests that the Court enter an
2 order:

3 (1) Disallowing both Claims in their entirety; and,

4 (2) Granting such other relief as the Court deems just and proper.

5 DATED: December 6, 2010

SulmeyerKupetz
A Professional Corporation

By: /s/ Elissa D. Miller
Elissa D. Miller
Attorneys for Thomas Seaman, Trustee of the
Creditors' Trust

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
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MEMORANDUM OF POINTS & AUTHORITIES

I.

BACKGROUND

A. The Bankruptcy Case

1. On June 6, 2008, certain creditors filed involuntary petitions against James C. Gianulias ("Gianulias") and Cameo Homes ("Cameo", and together with Gianulias, the "Debtors") commencing the instant bankruptcy cases. On July 1, 2008, the Debtors each filed a Consent to the Entry of an Order for Relief and Election to Convert Chapter 7 Case to a Case Under Chapter 11 of the Bankruptcy Code. On July 2, 2008, the Court entered Orders for Relief and converted both cases to ones under chapter 11.

3. On July 19, 2010, the Court entered the Order confirming Debtor's Fourth Amended Plan of Reorganization (the "Plan"). Pursuant to the Plan, the responsibility for objecting to claims was assigned to the Creditors' Trust (the "Trust").

3. The last date to file a proof of claim in these cases was November 11, 2008 (the "Claims Bar Date"). See, Notice of Claims Bar Date [Docket Nos. 127 & 128].

4. The last date to file objections to claims pursuant to the Plan, is December 6, 2010.

B. The Subject Claims

Prior to the petition date, M.W. Housing Partners III, LP ("Claimant") provided certain loans (the "Loans") for the development of certain construction projects in which the Debtors held an interest. As a condition of providing the required financing, the Debtors entered into certain pre-petition guaranty agreements (the "Guarantees") pursuant to which they guaranteed payment of portions of the Loans.

Claimant filed two claims against the Debtors' in connection with the Guarantees. The claim filed against Gianulias as claim no. 17 (the "JCG Claim"), was filed in the amount of \$5,300,000 plus accrued interest, fees, and costs. The second

1 claim, filed against Cameo as claim no. 10 (the "Cameo Claim", and together with the
2 JCG Claim, the "Claims"), was filed in the amount of \$18,640,000 plus accrued interest,
3 fees, and costs. Copies of the Claims are organized by claim number and attached to
4 the accompanying declaration of John McFadden (the "McFadden Declaration"). As
5 filed, the Claims lack supporting documentation and, in addition, the Trustee believes the
6 Claims overstate the amounts that presently remain due and owing under the Loans.

7 As such, the Claims should be disallowed in full.

8 II.

9 Argument

10 Section 502(b) of the Bankruptcy Code provides, in part:

11 Except as provided in [various] subsections ..., if such objection to a claim
12 is made, the court ... shall allow such claim in such amount, except to the
extent that--

13 (1) such claim is unenforceable against the debtor and property of the
14 debtor, under any agreement or applicable law for a reason other than
because such claim is contingent or unmatured[.]

15 11 U.S.C. § 502(b)(1) (emphasis added).

16 Once an objection to a claim is filed asserting "facts tending to defeat the
17 claim by probative force equal to that of the allegations of the proofs of claim
18 themselves," Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991), then "the
19 burden reverts to the claimants to prove the validity of the claim by a preponderance of
20 the evidence." Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer
21 Mortgage), 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996).
22 "[T]he ultimate burden of persuasion is always on the claimant." Holm, 931 F.2d at 623
23 (*emphasis added*).

24 In this case, both Claims should be disallowed in full.

25 Initially, both claims should be disallowed because the amounts asserted in
26 each of the Claims are unsupported by any evidence. The only documentation attached
27 to the Claims are the guarantees and a narrative summary of amounts purportedly owed
28 which, based on the footer on the document, appears to have been prepared by the

1 attorney, not a person with knowledge. (In fact the Claims themselves are signed by
2 Steven Polard, the Claimant's attorney, not a person with personal knowledge of facts
3 supporting the claim).

4 There are no notes or account statements attached to either of the Claims.
5 Moreover, there is no breakdown provided which identifies the amount owing for
6 principal, interest, fees or costs. As such, the Trustee cannot determine whether or not
7 the Claims accurately state the amounts due and owing.

8 Moreover, with regard to one component of both Claims and another as to
9 the Cameo Claim, the amounts included appear to be overstated.

10 Claimant has asserted, as part of both Claims, a claim (the "Silver Oak
11 Claim") in the amount of \$1,505,088.64 in connection with the Silver Oak Project. As
12 reflected in the Debtor's contemporaneous records related to the Silver Oak Claim,
13 copies of which are attached to the McFadden Declaration hereto as **Exhibit 'A'**, the
14 loan relating to the Silver Oak Claim was paid off in February 2005.¹ Accordingly, at a
15 minimum, both claims are overstated by \$1,505,088.64.

16 Moreover, with regard to the portion of the Cameo Claim attributable to the
17 BEG guaranty, an account statement provided to Debtors by Claimant in May, 2008
18 reflects an amount due that is different from that claimed by Claimant. According to the
19 Account statement, only \$4,836,537.48 was due. The documentation submitted in
20 support of the Cameo Claim fails to substantiate the \$5,761,728.78 amount asserted in
21 the Cameo Claim.

22 The Trustee suspects that Claimant is attempting to charge Debtors for
23 "additional interest" and possibly other unidentified charges. Generally, while the
24 Guarantees provided for a full guaranty of all amounts due under the related notes, the
25 Guarantees specifically excluded the guaranty of additional interest "on any portion of the

26 ¹ It should be noted that Debtor's accounting system refers to the loan underlying the
27 Silver Oak Claim as "account 1400"; accordingly, the attached general ledger which
28 references "account 1400-2804" corresponds directly to the Claimant's loan with respect
to Silver Oaks 183, LLC.

1 Project that remains unsold by Borrower if and when Lender forecloses against the
2 Project (whether judicially or non-judicially) or accepts a deed-in-lieu of foreclosure."
3 McFadden Decl., ¶ 9.

4 On May 7, 2008, Cal National Bank, foreclosed. At the time of the
5 foreclosure, portions of the property remained unsold. Pursuant to the terms of the
6 Guarantees, no claims for additional interest may be asserted in connection with the
7 unsold property.

8 What is clear from the above is that the Claimant has not properly
9 substantiated the amounts asserted in its Claims and has appeared to assert claims for
10 amounts that have been paid and / or are not otherwise due and owing. Accordingly, the
11 Claims should be disallowed in their entirety.

12 III.

13 **CONCLUSION**

14 For the reasons set forth above, the Trustee respectfully requests that the
15 Court enter an Order:

- 16 (1) Disallowing the JCG Claim in its entirety;
17 (2) Disallowing the Cameo Claim in its entirety; and,
18 (3) Granting such other relief as the Court deems just and proper.

19 DATED: December 6, 2010

SulmeyerKupetz
A Professional Corporation

20
21
22 By: /s/ Elissa D. Miller
23 Elissa D. Miller
24 Attorneys for Thomas Seaman, Trustee of the
25 Creditors' Trust
26
27
28

SulmeyerKupetz, A Professional Corporation
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1406
TEL 213.626.2311 • FAX 213.629.4520

DECLARATION OF JOHN MCFADDEN

I, JOHN McFADDEN, declare as follows:

1. I am the Corporate Controller of G Companies Management, LLC ("G Companies") and provide services to various entities in which James C. Gianulias ("Gianulias" or "JCG") has an interest. In my position as Corporate Controller, I provide oversight of all accounting services and tax related matters for Gianulias, Cameo Homes ("Cameo", and together with JCG, the "Debtors"), G Companies and various related entities.

2. In my capacity as Controller, my duties and responsibilities also include overseeing the records as they pertain to all accounting services for G Companies and the Debtors and related entities. I am required to know, and in fact I have personal knowledge of, the duties of the G Companies' employees and record keeping methods used by these employees who are responsible for maintaining the files and documents.

4. The exhibits attached hereto are from the books and records of G Companies. I have personal knowledge of the duties of G Companies employees and record keeping methods used by these employees.

5. The business records of G Companies referred to in this declaration are prepared and kept by G Companies in the ordinary course of G Companies business. The entries made in such business records were made at or near the time of the occurrence of the events recorded. Furthermore, these business records are, in all instances, kept in a safe and secure location and all said business records were made by persons who have a business duty to G Companies to make such records.

3. I make this declaration in support of the attached *Disallow Claims Filed By M.W. Housing Partners III, LP (JCG Claim No. 17 and (2) Cameo Claim No. 10)* (the "Objection").

4. Prior to the petition date, M.W. Housing Partners III, LP (the "Claimant") provided certain loans (the "Loans") for the development of certain construction projects in which the Debtors held an interest. As a condition of providing the required financing,

1 the Debtors entered into certain pre-petition guaranty agreements (the "Guarantees")
2 pursuant to which they guaranteed payment of portions of the Loans.

3 5. The Claimant filed two claims against the Debtors' in connection with the
4 Guarantees. Attached hereto as Exhibit 17 is the claim filed against Gianulias as claim
5 no. 17 (the "JCG Claim"). The JCG Claim asserts a claim in the amount of \$5,300,000
6 plus accrued interest, fees, and costs. Attached hereto as Exhibit 10 is the claim filed against
7 Cameo as claim no. 10 (the "Cameo Claim", and together with the JCG Claim, the
8 "Claims"). The Cameo claim asserts a claim in the amount of \$18,640,000 plus accrued
9 interest, fees, and costs.

10 6. I have reviewed the claims. I cannot determine from the claims how
11 claimants calculated Debtors liability on each claim. The only documentation attached to
12 the Claims is the guaranties and a narrative summary of the total amount due per
13 guaranty. There are no account statements attached to either claim. There is no
14 breakdown provided which identifies the amount owing for principal, interest, fees or
15 costs.

16 7. With regard to one component of both Claims and another as to the
17 Cameo Claim, the amounts included appear to be overstated. Claimant has asserted,
18 as part of both Claims, a claim (the "Silver Oak Claim") in the amount of \$1,505,088.64 in
19 connection with the Silver Oak Project. As reflected in the Debtor's contemporaneous
20 records related to the Silver Oak Claim, true and correct copies of which are attached
21 hereto as **Exhibit 'A'**, the loan relating to the Silver Oak Claim was paid off in February
22 2005. Accordingly, at a minimum, both claims are overstated by \$1,505,088.64.

23 8. Moreover, with regard to the portion of the Cameo Claim attributable
24 to the BEG guaranty, an account statement provided to Debtors by Claimant in May,
25 2008 reflects an amount due that is different from that claimed by Claimant. According to
26 the Account statement, only \$4,836,537.48 was due. The documentation submitted in
27 support of the Cameo Claim fails to substantiate the \$5,761,728.78 amount asserted in
28 the Cameo Claim.

1 9. I suspect that Claimant is attempting to charge Debtors for
2 "additional interest" and possibly other unidentified charges. While the Guaranty
3 provides for a full guaranty of all amounts due under the note, the Guaranty specifically
4 excludes a guaranty of additional interest "on any portion of the Project that remains
5 unsold by Borrower if and when Lender forecloses against the Project (whether judicially
6 or non-judicially) or accepts a deed-in-lieu of foreclosure." (See Guarantees attached to
7 the Cameo Claim as Exhibits 10 and 17).

8 10. On May 7, 2008, Cal National Bank, foreclosed on the project. At that time,
9 portions of the property remained unsold. As such, the Guaranty specifically excludes
10 from the Guaranty liability, additional interest

11 I declare under penalty of perjury under the laws of the United States of America
12 that the foregoing is true and correct.

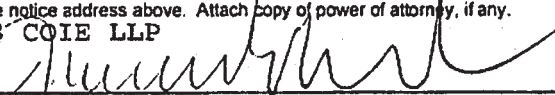
13 Executed December 6, 2010, at Newport Beach, California.

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16 _____
17 John McFadden
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M.W. HOUSING CLAIM NO. 10

In re Cameo Homes, a California corporation; Case No. 8:08-bk-13151-RK

B10 (Official Form 10 (12/07))

UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA		PROOF OF CLAIM
Name of Debtor Cameo Homes, a California corporation		Case Number SA 08-13151 RK
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): M.W. Housing Partners III, LP		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: Steven G. Polard Perkins Coie LLP 1620 26th Street, 6th Floor, South Tower Santa Monica, CA 90404 Telephone number:		Court Claim Number: (If known) Filed on: _____
Name and address where payment should be sent (if different from above): M.W. Housing Partners III, LP 1301 Fifth Avenue, Suite 3100 Seattle, WA 98101 Telephone number: 206-494-4050		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$ 18,640,000 plus accrued interest, fees, costs, and late charges If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507(a)(5) <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507(a) (). Amount entitled to priority: \$ _____ *Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
2. Basis for Claim: <u>Guaranties of Commercial Loans - See addendum "A"</u> (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) <u>Guaranties unsecured</u> Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____ Annual Interest Rate _____ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:		
Date: Oct. 30, 2008	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. PERKINS COIE LLP By  Steven G. Polard, Attorney for MW Housing Partners III, LP	FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

CCD-B10