

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 06-81080 CIV-MIDDLEBROOKS/Johnson

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

MERCER CAPITAL, INC.,
MERCER CAPITAL MANAGEMENT, INC.,
TRI-STATE ENERGY GROUP, LLC,
TRI-STATE ENERGY GROUP I, LTD.,
TRI-STATE ENERGY GROUP II, LTD.,
MERCER ASSET MANAGEMENT, and
ROBERT FLICKINGER II,

Defendants.

**RECEIVER'S UNOPPOSED MOTION TO REJECT EXECUTORY CONTRACT
WITH EXXONMOBIL FOR PURCHASE OF OIL WELLS**

Receiver Daniel S. Newman, not individually, but solely in his capacity as Receiver ("Receiver") for MERCER CAPITAL INC., MERCER CAPITAL MANAGEMENT, INC., TRI-STATE ENERGY GROUP, LLC, TRI-STATE ENERGY GROUP I, LTD., TRI-STATE ENERGY GROUP II, LTD, AND MERCER ASSET MANAGEMENT (collectively the "Mercer Entities"), by his attorneys, Broad and Cassel, hereby files his Unopposed Motion to Reject Executory Contract with ExxonMobil for Purchase of Oil Well and states as follows:

Introduction

1. This action was initiated by the Securities & Exchange Commission on November 21, 2006. That same day, the Court appointed the Receiver to take and institute certain actions and legal proceedings for the benefit and on behalf of the Mercer Entities and

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their investors and other creditors as the Receiver deemed necessary. The Receiver is responsible for marshaling the Mercer Entities' property, assets and estates in accordance with the duties set forth in the Court's November 21, 2006 Order Appointing Receiver ("Order"). The Order also specifically granted the Receiver the authority to rescind contracts when necessary. (Order Appointing Receiver p. 2-3)

2. Upon his appointment, the Receiver and his counsel reviewed all of the contracts that related to the business of the Mercer Entities that they located at the offices of the Mercer Entities or otherwise uncovered during the course of their investigation.

3. During the course of the investigation, the Receiver learned that on October 11, 2006, one of the Mercer Entities, specifically, Tri-State Energy Group, LLC, ("Tri-State"), forwarded by wire transfer \$985,442.50 to an escrow account held at Compass Bank, ABA No.: 062001186, Trust Account No.: 070-3040-1, in an attempt to purchase several interests in oil wells.

4. The escrow account was maintained by an online oil and gas auction firm called Oil & Gas Asset Clearinghouse ("Oil & Gas"). Of the \$985,442.50 that was deposited into the escrow account, \$760,362.50 was for the purchase of a partial working interest in three wells in Haskell County, Oklahoma, in which Tri-State was to assume certain responsibilities under an existing operating agreement to operate the wells.

5. On November 11, 2006, Oil & Gas returned \$506,825.00 of the \$760,362.50 to Tri-State because, as represented by Oil & Gas, existing owners in two of the three wells exercised their preferential rights to purchase the auctioned interests.

6. Exxon Mobil Corporation ("ExxonMobil") currently operates the Eva McDaniel 1 Unit ("Eva McDaniel 1 Well") which is located in Haskell County, Oklahoma. The Eva

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McDaniel 1 Well is the sole remaining well Tri-State originally attempted to purchase at the October 11, 2006 auction. Upon completion of the payment, filing of an assignment and undertaking operations under the Operating Agreement, Tri-State's funds, which were placed in escrow, were to be released to the seller of the interests - here ExxonMobil. Currently, \$253,537.50 still remains in the escrow account from Tri-State's attempted purchase of an interest in the Eva McDaniel 1 Well.

7. The Receiver and his counsel have had several conversations with counsel for ExxonMobil in an effort to recover the \$253,537.50 held in escrow. It is the Receiver's position that because: (1) the funds have always remained, and continue to remain in escrow; (2) no assignment was filed; and (3) Tri-State never operated nor was qualified to operate the Eva McDaniel 1 Well, the contract for the Eva McDaniel 1 Well was executory. Thus, the Receiver rejects the contract.

8. The Receiver has asserted his position to ExxonMobil in writing. ExxonMobil, while not conceding that the contract for the purchase of the Eva McDaniel 1 Well was executory, has decided not to oppose the relief requested in this Motion.

9. Due to the great cost and risk in owning and operating an oil well, the Receiver determined that it was in the best interests of the investors to reject the attempt to purchase an interest in the Eva McDaniel 1 Well. Thus, the Receiver respectfully requests that the Court not only allows the Receiver to reject the executory contract for the purchase of interest in the Eva McDaniel 1 Well, but also enter an Order directing ExxonMobil to immediately return the \$253,537.50 held in escrow to Tri-State.

Memorandum of Law

10. A receiver has the option of either accepting or rejecting lease or contract agreements much like a bankruptcy trustee. *See e.g., Bayshore Executive Plaza P'ship v. FDIC*, 750 F. Supp. 507, 511 (S.D. Fla. 1990) (applying Florida law), *aff'd* 943 F. 2d 1290 (11th Cir. 1991). The Receiver is not obligated to carry out the executory contracts unless he elects to be bound thereby. *D.R. Mertens, Inc. v. State*, 478 So. 2d 1132, 1134-35, (Fla. 1st DCA 1985) (holding that when a receiver did not elect to be bound by a contract for payment of future commissions, the receiver was not obligated to pay any commissions which may have accrued after the commencement of receivership); *In re J. H. Land & Cattle Co.*, 8 B.R. 237, 239 (Bankr. D. Okla. 1981) (finding that "an oil and gas lease is within the purview of Code § 365 and may be rejected by a debtor (trustee) with court approval").

11. Further, pursuant to well-established Federal and Florida common law, there can be no breach, anticipatory or otherwise, of an executory contract by a receiver unless the receiver specifically elects to accept assignment of the contract. *See e.g., Bayshore*, 750 F. Supp at 511.

12. Because the a portion of the funds Tri-State transferred on October 11, 2006 remain in escrow, no assignment transferring ExxonMobil's interest in the Eva McDaniel 1 Well was ever filed, and because Tri-State cannot take over operation of the Eva McDaniel 1 Well, the contract was executory and therefore can be rejected at the option of the Receiver.

WHEREFORE, the Receiver respectfully requests that this Court enters an Order granting the Receiver's Motion to Reject Contract and directing ExxonMobil to immediately return to Tri-State the \$253,537.50 currently held in escrow for the previous attempted purchase of the Eva McDaniel 1 Well.

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Respectfully submitted,

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By: s/ Daniel S. Newman
Daniel S. Newman, P.A.
Florida Bar No. 962767

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel or parties of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Daniel S. Newman
Daniel S. Newman

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SERVICE LIST

SEC v. MERCER CAPITAL, INC., et al.
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United States District Court, Southern District of Florida

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