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2 **UNITED STATES BANKRUPTCY COURT**
3 **IN AND FOR THE DISTRICT OF ARIZONA**

4 **In Re**)
5 **COLLEGE PROPERTIES LIMITED**)
6 **PARTNERSHIP,**)
7 **Debtor.**)

In Chapter 11 proceedings
(Jointly Administered
Case No. 02-10095-PHX-CGC

8 **In Re COLLEGE PROPERTIES, II,**)
9 **Debtor.**)

Case No. 05-15155-PHX-CGC

10 **BRIAN J. MULLEN, Chapter 11**)
11 **Trustee for College Properties Limited**)
12 **Partnership and College Properties II,**)
13 **LANDIS MITCHELL, et al.,**)
14 **Plaintiffs,**)

Adversary No. 06-00063

15 **v.**)
16 **COLLEGE PROPERTIES LIMITED**)
17 **PARTNERSHIP,**)
18 **Defendant.**)

UNDER ADVISEMENT DECISION
RE: TRUSTEE’S MOTION TO ADD
PARTY PLAINTIFF AND TO AMEND
AND SUPPLEMENT COMPLAINT AND
MONTAGE INDUSTRIES, INC. AND
CASA DEL ORO DEVELOPMENT,
LLC’s MOTION TO DISQUALIFY
SPECIAL COUNSEL

19 On May 30, 2006, the Court held oral argument on a variety of pending motions, some
20 of which were decided on the record at the hearing. Taken under advisement, however, was the
21 Trustee’s Motion to Add Party Plaintiff and Amend and Supplement Complaint and Montage
22 Industries, Inc. and Casa Del Oro Development, LLC’s Motion to Disqualify Special Counsel.

23 Briefly, in August, 2004, three limited partners of the Debtor, Landis Mitchell, Anthony
24 DePetris and Patricia Palmer (“Individual Plaintiffs”), filed suit in Pinal County against Black
25 Mountain Homes, LLC, Montage Industries, Inc., Casa Del Oro Development, LLC (collectively
26 referred to as “the Montage Defendants”), the two Debtors – College Properties, Ltd., and
27 College Properties II, Ltd. – and various other defendants unrelated to these motions. The
28 Individual Plaintiffs asserted a variety of claims, including breach of fiduciary duty, breach of
partnership agreement, securities law violations, and unjust enrichment that injured not only
themselves, but also the Debtors. The Montage Defendants answered and counterclaimed against

1 the Individual Plaintiffs and cross-claimed against Debtors. Subsequently, Debtors filed an action
2 in Maricopa County against the Individual Plaintiffs. The two matters were combined in the Pinal
3 County litigation and subsequently removed to this Court.

4 Now, the Trustee seeks to be added as a party plaintiff and to supplement and amend the
5 complaint, removing any claims for injunctive relief and mooted the class action nature of the
6 complaint *inter alia*. In addition, the Trustee supplements a variety of facts in the complaint due
7 to the discovery of additional information and the occurrence of events since the filing of the
8 original complaint.

9 Also at issue today is the Trustee's application in November, 2005, to employ Clifford
10 Altfeld and John Battaile of Leonard, Felker, Altfeld, Greenberg & Battaile, PC as Special
11 Counsel for the Chapter 11 Trustee to prosecute the Pinal County litigation on behalf of Debtors'
12 estates. Counsel already represented the Individual Plaintiffs in the original Pinal County
13 litigation.

14 The Montage Defendants object not only to the motion to add and amend, but also to the
15 employment of Special Counsel. According to the Montage Defendants, significant prejudice will
16 result if amendment is permitted, especially the apparent removal of the Individual Plaintiffs from
17 the lawsuit despite the Montage Defendants' existing counterclaims. Further, they assert that the
18 amendment will cause undue delay with the addition of new counts to this case. The Montage
19 Defendants contend that Special Counsel should be disqualified because its relationship with the
20 Trustee and the Individual Plaintiffs creates a conflict of interest, as Special Counsel is attempting
21 to represent the Individual Plaintiffs, who are creditors of the Estate, as well as the Estate against
22 other creditors of the Estate.

23 The Court determines that there is merit to the positions of both parties. Neither motion
24 shall be granted or denied in full as relief can be fashioned to protect the interests of all.

25 **THEREFORE, IT IS HEREBY ORDERED** granting the Trustee's motion with the
26 following conditions:

- 27 1. As counsel agreed at the hearing, the original Individual Plaintiffs' claims are

1 dismissed.

2 2. The original Individual Plaintiffs remain, however, as parties in their capacity as
3 counterdefendants to the existing counterclaims brought while the case was pending in state court
4 prior to removal.

5 3. The Montage Defendants' objections regarding the timeliness, futility and abatement
6 of the Trustee's motion are overruled.

7 **IT IS FURTHER ORDERED** denying the Montage Defendants' motion to disqualify
8 Special Counsel on the following conditions:

9 1. Special Counsel Leonard, Felker, Altfeld, Greenberg & Battaile, PC may not represent
10 the Estate in connection with any claims brought against the original Individual Plaintiffs by the
11 Debtors in state court. Therefore, if the Trustee elects to pursue these claims, Special Counsel
12 must withdraw as counsel for the Individual Plaintiffs.

13 2. Special Counsel may not represent the Individual Plaintiffs in connection with their
14 prosecution or defense of the Proofs of Claim they have filed.

15 3. Special Counsel may not represent the Individual Plaintiffs in their capacity as counter
16 defendants to the counterclaims brought by the Montage Defendants and shall withdraw in that
17 capacity and new counsel needs to be engaged. These counterclaims assert that the damages that
18 the Individual Plaintiffs accuse the Montage Defendants of were in fact caused by the Individual
19 Plaintiffs themselves. Thus, in defending these claims, Special Counsel's loyalty to the Estate may
20 be compromised as the culpability, or lack thereof, of the Individual Plaintiffs could create a
21 conflict with the interests of the Estate. Special Counsel for the Estate must represent the Estate
22 without regard to the potential liability of third parties.

23 If these conditions are not satisfactory, the Trustee should hire new counsel and Leonard,
24 Felker, Altfeld, Greenberg & Battaile, PC may continue in its representation of the Individual
25 Plaintiffs.

26 So ordered.

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11 Jessen Truste dated December 12, 1993

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