
**MEMORANDUM OPINION REGARDING MOTION FOR PARTIAL JUDGMENT ON THE
PLEADINGS FILED BY RESOURCE LAND HOLDINGS, LLC**

Before the Court is Motion for Judgment on the Pleadings ("RLH's Motion") (Doc. 18) filed by Plaintiff/Counter-Defendant Resource Land Holdings, LLC ("RLH") on July 3, 2014. On July 16, 2014, Debtors/Defendants/Counter-Claimants D & L Energy, Inc. and Petroflow, Inc. ("Debtors") filed Response to Motion for Judgment on the Pleadings ("Debtors' Response") (Doc. 31). RLH filed Reply in Further Support of its Motion for Judgment on the Pleadings ("RLH's Reply") (Doc. 36) on July 28, 2014.

By way of background, on May 30, 2014, RLH filed Complaint for Declaratory Judgment (Doc. 1), which commenced this adversary proceeding. On June 16, 2014, the Debtors filed Answer to Complaint (Doc. 7) and Counterclaim Against Plaintiff Resource Land Holdings, LLC ("Debtors' Counterclaim") (Doc. 9). On July 7, 2014, RLH filed Amended Reply to Counterclaim (Doc. 19).

In RLH's Motion, RLH seeks partial judgment on the pleadings with respect to two requests for declaratory judgment contained in the Debtors' Counterclaim: (i) the Debtors' contention that the price reduction formula in Schedule 3.1.6 of the APA¹ is an invalid liquidated damages provision; and (ii) the Debtors' contention

¹ APA is defined *infra* at 4.

that the liquidated damages provision in Section 4.5.2 of the APA² applies only if the Debtors elect to retain the Deposit Amount³ in lieu of exercising their legal rights. For the reasons set forth herein, the Court will grant RLH's Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BACKGROUND

A. Main Case

The Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code on April 16, 2013.⁴ On September 18, 2013, the Debtors filed (i) a motion seeking approval of bid procedures for an auction sale of substantially all of their assets (Main Case, Doc. 203); and (ii) a motion seeking authority to sell substantially all of their assets to the highest and best bidder (Main Case, Doc. 204). A proposed asset purchase agreement was

² Unless stated otherwise, all references to "Section" refer to the APA.

³ All capitalized terms not defined herein are defined in the APA.

⁴ The Debtors' bankruptcy cases are being jointly administered as Case No. 13-40813 ("Main Case").

attached to the bid procedures motion as Exhibit A. Following the October 15, 2013 hearing on the bid procedures motion, the Court approved the bid procedures motion (Main Case, Doc. 270). On November 19, 2013, the Debtors filed a proposed order granting the sale motion (Main Case, Doc. 451). Attached to the proposed order granting the sale motion were: (i) Exhibit A – a clean copy of the proposed asset purchase agreement between the Debtors and RLH; and (ii) Exhibit B – a redline copy of the proposed asset purchase agreement.

At the November 19, 2013 hearing on the sale motion, the Court granted the sale motion subject to its review of a final asset purchase agreement and, in doing so, approved the sale of substantially all of the Debtors' assets to RLH. On December 9, 2013, the Court signed an order approving the sale motion ("Sale Order") (Main Case, Doc. 568). Exhibit A to the Sale Order is the Asset Purchase Agreement executed by the Debtors and RLH ("APA").⁵ Subject to adjustments, the APA Purchase Price is \$20.7 million. (APA § 2.1.)

B. RLH's Complaint

In the Complaint, RLH asserts that it permissibly terminated the APA following the Debtors' material breaches thereof. In its first claim for relief, RLH seeks monetary damages resulting from

⁵ The APA is also attached to RLH's Complaint as Exhibit A.

the Debtors' alleged breaches of the APA "in an amount that is not less than \$1.050,000 [sic]." (Compl. ¶ 133.) In its second claim for relief, RLH requests the Court to enter the following five declaratory judgments:

(a) RLH timely and properly identified and notified [the Debtors] of the existence and specific nature of Defects as Section 3.1.6 of the APA defines that term;

(b) RLH timely and properly identified and notified [the Debtors] of the existence of their breaches of their representations and warranties made in the APA, as well as their breaches of certain other provisions of the APA;

(c) The APA provides RLH with two principal, but not mutually exclusive, remedies that, in turn, afford RLH three paths down which it can proceed: (i) for the limited category of Acquired Assets specifically listed on Schedule 3.1.6, RLH can acquire the asset subject to a price reduction as set forth in the formulae contained in that Schedule; (ii) for those of the Acquired Assets specifically listed on Schedule 3.1.6, and for matters not specifically identified as a Defect, RLH has the remedies for [the Debtors'] breaches of representations and warranties, or material breaches of other provisions of the APA, up to and including termination; and (iii) for those of the Acquired Assets not specifically listed on Schedule 3.1.6, RLH has the remedies for breaches of representations and warranties, or material breaches of other provisions of the APA, up to and including termination;

(d) RLH properly terminated the APA; and

(e) RLH is entitled to the return of the Deposit Amount and the North Lima DW 4 Deposit in the combined amount of \$2,470,000, both without setoff or deduction of any kind.⁶

(*Id.* ¶ 142.)

C. Debtors' Counterclaim

In the Counterclaim, in addition to seeking specific performance of the APA or alternative relief in the form of monetary damages, the Debtors include five requests for declaratory judgment. RLH contends that it is entitled to judgment as a matter of law with respect to the Debtors' second and fourth requests for declaratory judgment, which state:

2. Alternatively, if, and only if, the Court determines that Section 3.1.6 of the APA is to be read in isolation from Section 3.1.5 of the APA so that RLH can require an asset to be transferred at Closing and may claim a price reductions [sic] set forth in Schedule 3.1.6, that the price reductions set forth in Schedule 3.1.6 are liquidated damages provisions that are void as a penalty under Ohio law because they do not fairly estimate RLH's damages for receipt of an asset with the "defects" specified in Schedule 3.1.6;

* * *

4. That to the extent Section 4.5.2 of the APA applies to limit RLH's liability for damages under the APA to Debtors retaining the \$2,070,000 deposit, such liquidated damages are triggered only if Debtors elect to retain the deposit in lieu of pursuing their damages at law. The Debtors have not made such an election[.]

⁶ Of the \$2.47 million RLH deposited with the Deposit Agent, (i) \$2.07 million is the Deposit Amount; and (ii) \$400,000 is a good faith earnest money deposit toward the purchase of the Debtors' interest in North Lima Disposal Well # 4, LLC ("North Lima DW 4") pursuant to an asset purchase agreement that was to be separately negotiated. (APA at 1-2.)

(Debtors' Countercl. at 26-27.)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c), which is incorporated by Federal Rule of Bankruptcy Procedure 7012(b), states, "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c) (West 2014). A motion for judgment on the pleadings is reviewed under the same standard used to review a Rule 12(b)(6) motion to dismiss. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001)). A court should grant judgment on the pleadings "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (quoting *Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (quoting *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008)). However, a court "need not accept as true a legal conclusion couched as a factual allegation." *Hensley Mfg., Inc.*

v. *ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (citations and quotation marks omitted).

III. ARGUMENTS OF THE PARTIES & ANALYSIS

Although styled as a motion for judgment on the pleadings, RLH only requests partial judgment on the pleadings with respect to the Debtors' second and fourth requests for declaratory judgment: (i) the Debtors' contention that the price reduction formula in Section 3.1.6, if interpreted as RLH alleges, is an unenforceable liquidated damages provision; and (ii) the Debtors' contention that the liquidated damages provision in Section 4.5.2 applies only if the Debtors elect to retain RLH's deposits in lieu of exercising other legal rights.

A. Section 3.1.6 & Debtors' Second Request for Declaratory Judgment

Although Section 3.1.6 is at issue in RLH's Motion, the Debtors contend that Section 3.1.6 must be read in conjunction with Section 3.1.5. Those Sections state⁷:

3.1.5 Results of Examination. Buyer may, at any time following the Effective Date and through the date of Closing, exclude any one or more of the Acquired Assets listed on Schedule 1.1(a), or any one or more of the contracts identified on Schedule 1.1(b), all in Buyer's sole discretion, based on the results of the due diligence authorized in Section 3.1.

3.1.6 Reduction in Purchase Price. If Buyer during its Due Diligence Period determines there to be a Defect, as defined in Schedule 3.1.6, with any of the Acquired Assets listed on Schedule 3.1.6 it shall have the right to reduce the Purchase Price by the Purchase Price

⁷ The APA defines RLH as "Buyer" and the Debtors as "Sellers." (APA at 1.)

Reduction Amount, as defined on Schedule 3.1.6. The Buyer shall deliver written notice of any Defect to the Sellers and the Sellers shall have five (5) days thereafter in which to notify Buyer of Sellers' intent to cure. Sellers shall have a right to cure any defect within one hundred twenty (120) days after receipt of Buyer's notice of defect, unless Buyer agrees in writing to an extension which shall in no event exceed ninety (90) days. Any request of Sellers to Buyer for an extension of time to cure a Defect shall not be unreasonably withheld. The Sellers shall not be permitted to cure any Defect through tender or payment of a cash payment. Sellers' obligation to cure a Defect as to which they provided timely notice shall survive the Closing. The aggregate Purchase Price Reduction Amount, for any Defect which is not cured by the Sellers, must exceed five percent (5%) of the Purchase Price for any purchase price reduction to be provided to Buyer. In the event the Purchase Price reduction exceeds five percent (5%) of the Purchase Price, then Buyer shall be credited with the full aggregate Purchase Price Reduction Amount under Schedule 3.1.6, up to fifty percent (50%) of the Purchase Price. Should the Purchase Price Reduction Amount exceed fifty percent (50%) of the Purchase Price, then Buyer shall have, in its sole discretion, the right to terminate the Agreement and receive a complete and full refund of the Two Million Seventy Thousand Dollars (\$2,070,000) Deposit Amount without setoff or deduction.

(APA §§ 3.1.5, 3.1.6.)

1. Debtors' Counterclaim

In their Counterclaim, the Debtors interpret Sections 3.1.5 and 3.1.6 as follows:

Although, pursuant to [Section] 3.1.5, RLH is entitled to exclude any asset it wishes from Closing according to its due diligence findings, it is entitled to a reduction in the purchase price of \$20,700,000 in connection with the excluded asset only if the asset has an uncured defect as provided in Section 3.1.6, as further defined in Schedule 3.1.6.

Reading Paragraphs 3.1.5 and 3.1.6 of the APA in tandem, and the APA as a whole, the reciprocal is also true under the APA – RLH is not entitled to a price reduction concerning an asset unless it chooses to exclude that asset from transfer at Closing.

(Debtors' Countercl. ¶¶ 20-21.) The Debtors support this argument by noting that the total Purchase Price Reduction Amounts in Schedule 3.1.6 are nearly \$20.9 million, which exceeds the Purchase Price. The Debtors contend that the approximation of the total Purchase Price Reduction Amounts in Schedule 3.1.6 and the Purchase Price "demonstrates that Section 3.1 of the APA, when read as a whole, does not permit RLH to require the transfer of an asset, while at the same time demanding a purchase price reduction that is equivalent to the total value of that asset." (*Id.* ¶ 23.) The Debtors further assert that "[t]he majority of the 'defects' listed in Schedule 3.1.6 are not the types of conditions that would render the asset valueless if transferred at Closing, and in many cases do not even materially diminish the value of the asset." (*Id.*)

In their first request for declaratory judgment, the Debtors seek an order stating that the Purchase Price Reduction Amounts in Schedule 3.1.6 apply only if RLH chooses to exclude the asset from transfer at Closing. However, if the Court concludes that Sections 3.1.5 and 3.1.6 are to be read in isolation "so that RLH can require an asset to be transferred at Closing and may claim a price reductions [sic] set forth in Schedule 3.1.6," the Debtors argue that the Purchase Price Reduction Amounts in Schedule 3.1.6 are

"liquidated damages provisions that are void as a penalty under Ohio law because they do not fairly estimate RLH's damages for receipt of an asset with the 'defects' specified in Schedule 3.1.6." (*Id.* at 26.)

2. RLH's Motion

Regarding the Debtors' characterization of the price reduction formula in Schedule 3.1.6 as a liquidated damages provision, RLH points to the Debtors' own description of Schedule 3.1.6 in their Counterclaim: "Section [sic] 3.1.6(1)'s price reduction mechanism was crafted for the very reason that, at the time of execution of the APA, the parties were unable to determine precisely how much net acreage Debtors would be able to transfer to RLH at Closing free of the types of defects specified in Schedule 3.1.6." (RLH's Mot. at 4 (quoting Debtors' Countercl. ¶ 29).) RLH argues that the price reduction provision in Section 3.1.6 and Schedule 3.1.6 cannot be a liquidated damages clause because it is "pegged to what [the Debtors] admit was the parties' uncertainty as to the precise scope and condition of the assets [the Debtors] were to sell, but not to [the Debtors'] breach." (RLH's Mot. at 8 (internal citation omitted).) "The operation of Section 3.1.6 is not tied to, and therefore does not address, much less depend upon, any breach [the Debtors] committed." (*Id.* at 11.)

3. Debtors' Response

In their Response, the crux of the Debtors' argument regarding Section 3.1.6 and Schedule 3.1.6 continues to be:

If, as RLH argues, the APA is ultimately construed to permit RLH to require the transfer of an asset, yet still claim a purchase price reduction equivalent to the total purchase price of that asset, the purchase price reduction is not based on "reasonable compensation" for the alleged defect and would be void as a penalty under Ohio law.

(Debtors' Resp. at 10-11 (citation omitted).) The Debtors state that Ohio law⁸ allows liquidated damages only so long as they constitute "reasonable compensation," regardless of whether the contract is otherwise valid, enforceable and negotiated in good faith. (*Id.* at 12-13 (citation omitted).) The mere fact that the parties did not describe the price adjustments as damages is irrelevant. If RLH's interpretation of Schedule 3.1.6 prevails, "Schedule 3.1.6 has the practical effect of awarding 'damages' to RLH based on non-conformance with the standards set forth in Schedule 3.1.6. Moreover such 'damages', for the most part, have no relation to the actual diminution in value that RLH would reasonably expect to suffer based on the 'defects.'" (*Id.* at 11 (n.3 omitted).) "[I]n almost all instances, [granting a price reduction for a transferred asset would] prove manifestly disproportionate to the damages that could foreseeably result to

⁸ The parties do not dispute that interpretation of the APA is governed by Ohio law. (APA § 12.15 ("This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio").)

RLH from receiving the subject asset with such defect uncured.”
(*Id.* at 18 (citations omitted).)

4. RLH's Reply

In its Reply, RLH again argues, “A contract provision that does not apportion damages upon the event of a breach is not, by definition, a liquidated damages provision.” (RLH’s Reply at 6 (citations and parentheticals omitted).) “The APA does not identify a Defect as a breach, and does not provide a remedy for breach upon the identification of a Defect even where [the Debtors] are unable or unwilling to cure the Defect” (*Id.* at 6-7.) RLH points out that the Debtors “assert that they made no representations and warranties to [sic] any of the assets, such that the various Defects the parties’ identified are not amounts tied to any breaches.” (*Id.* at 8.)

5. Section 3.1.6 Is Not a Liquidated Damages Provision

The Debtors’ second request for declaratory judgment states:

2. Alternatively, if, and only if, the Court determines that Section 3.1.6 of the APA is to be read in isolation from Section 3.1.5 of the APA so that RLH can require an asset to be transferred at Closing and may claim a price reductions [sic] set forth in Schedule 3.1.6, that the price reductions set forth in Schedule 3.1.6 are liquidated damages provisions that are void as a penalty under Ohio law because they do not fairly estimate RLH’s damages for receipt of an asset with the “defects” specified in Schedule 3.1.6[.]

(Debtors’ Countercl. at 26.)

First, the Court needs to be clear about what this Opinion addresses. RLH seeks judgment on the pleadings regarding only the Debtors' second and fourth requests for declaratory judgment. RLH does not request judgment on the pleadings regarding the Debtors' first request for declaratory relief. Thus, whether Sections 3.1.5 and 3.1.6 are to be interpreted in tandem or in isolation is not presently before the Court. As a consequence, this Opinion (i) is not indicative of how the Court would rule on the Debtors' first request for declaratory judgment; and (ii) has no impact on the Debtors' first request for declaratory judgment.

It occurs to the Court that RLH, in seeking judgment on the pleadings with respect to the Debtors' alternative second request for declaratory judgment, may intend such judgment to encompass – by implication – judgment in its favor with respect to the Debtors' preferred relief in the first request for declaratory judgment. To the contrary, the Court expressly states that this Opinion does not encompass any ruling by implication or otherwise concerning the Debtors' first request for declaratory judgment. Indeed, if the Court understood RLH to be seeking a back door ruling on the Debtors' first request for declaratory relief, the Court would deny RLH's Motion with respect to the Debtors' second request for declaratory relief because questions of fact preclude judgment on the pleadings with respect to the Debtors' first request for declaratory relief.

For purposes of this Opinion only, the Court assumes, without finding or ruling, that the APA requires the Debtors to transfer assets with identified Defects subject to the applicable Purchase Price Reduction Amounts in Schedule 3.1.6. No inference can or should be taken from the Court's acceptance, for purposes of this Opinion only, of the assumption underlying the Debtors' second request for declaratory judgment. The issue for which judgment on the pleadings is requested concerns only whether the Purchase Price Reduction Amounts constitute liquidated damages and, if so, whether they are void as a penalty.

Section 3.1.6 states that, if during its Due Diligence Period, RLH determines there to be a Defect in any of the Acquired Assets listed in Schedule 3.1.6, RLH shall have the right to reduce the Purchase Price by the applicable Purchase Price Reduction Amounts, as set forth in Schedule 3.1.6. This Section also provides the Debtors with a 120-day cure period after receipt of a notice of Defect.

By definition, a liquidated damages provision applies to a party's breach of contract. Black's Law Dictionary defines "liquidated damages" as:

An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. • If the parties to a contract have properly agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages.

BLACK'S LAW DICTIONARY 473 (10th ed. 2014) (emphasis added). Case law also consistently requires a link between a breach of contract and the imposition of liquidated damages. "[W]here there is difficulty in assessing the actual damages, and the plain intention of the parties as evidenced by the contract indicates that damages in the amount agreed upon should follow the breach, . . . the amount in question should be construed as liquidated damages and not as a penalty." *Jones v. Stevens*, 146 N.E. 894, 898 (Ohio 1925) (emphasis added); see also *Connour v. Steel*, 2004 Ohio 1162, ¶ 26. (Ohio Ct. App. 2004) (citation omitted) (emphasis added) ("Liquidated damages are an agreed upon amount of money to be paid in lieu of actual damages in the event of a breach of contract").

The Defects defined in Schedule 3.1.6 are not dependent upon a breach of contract by the Debtors. Indeed, pursuant to Section 7.1, the Debtors specifically disclaimed – and RLH specifically acknowledged such disclaimer – any and all “representations or warranties whatsoever, express or implied, with respect to any matter relating to the Acquired Assets.” (APA § 7.1.) Citing Section 7.1, the Debtors argue that they did not warrant that the Acquired Assets were free of Defects. This argument is consistent with Section 3.1.6 and Schedule 3.1.6, which provide for certain Purchase Price Reduction Amounts in the event RLH identifies one or more Defects in the Acquired Assets. Those Defects are not tied to any breach of contract by the Debtors.

As a consequence, the Purchase Price Reduction Amounts are exactly that – reductions to be made to the Purchase Price under certain circumstances. The Purchase Price Reduction Amounts in Schedule 3.1.6 cannot, as a matter of law, be liquidated damages because they are not dependent upon or tied to any breach of the APA by the Debtors. Because the Court finds that the Purchase Price Reduction Amounts do not constitute liquidated damages, it is not necessary for the Court to determine if such liquidated damages constitute a penalty under Ohio law. RHL's motion for partial judgment on the pleadings regarding the Debtors' second request for declaratory judgment is well taken and will be granted.

B. Section 4.5.2 & Debtors' Fourth Request for Declaratory Judgment

Section 4.5.2 states in its entirety:

4.5.2 In the event Buyer fails to perform any of its material obligations under this Agreement for any reason other than default by Sellers or the termination of this Agreement as provided in Section 4.4, Sellers may, following not less than five (5) days' notice to Buyer, terminate this Agreement and receive the Deposit Amount from the Deposit Agent as liquidated damages, as Sellers' exclusive and sole remedy, hereby waiving all other remedies. If Sellers fail to perform any material obligations under this Agreement for any reason other than default by Buyer or the termination of this Agreement as provided in Section 4.4, Buyer may, following not less than ten (10) days' notice to Seller of an uncured default, (a) enforce specific performance of this Agreement against Seller provided that any action must be commenced within 90 days of the uncured default or (b) terminate this Agreement and receive the Deposit Amount from the Deposit Agent without setoff or deduction of any kind. BUYER AND SELLER AGREE THAT BASED UPON THE CIRCUMSTANCES NOW EXISTING, KNOWN AND UNKNOWN, IT WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO

ESTABLISH SELLERS' DAMAGE [sic] BY REASON OF BUYER'S
DEFAULT. ACCORDINGLY, BUYER AND SELLERS AGREE THAT IT
WOULD BE REASONABLE AT SUCH TIME TO AWARD SELLERS
"LIQUIDATED DAMAGES" EQUAL TO THE DEPOSIT AMOUNT.

(APA § 4.5.2 (underline for emphasis added).)

1. Debtors' Counterclaim

The Debtors state that, in response to RLH's notice of termination of the APA, the Debtors "have not elected to accept RLH's \$2,070,000 deposit as liquidated damages in lieu of other remedies as is its option under Section 4.5.2 of the APA at this time." (Debtors' Countercl. ¶ 78.) However, the Debtors "believe it is proper under the terms of the APA for the Deposit Agent to continue to hold the entirety of RLH's good faith earnest money deposit pending a resolution of the issues to be addressed in this Adversary Proceeding." (*Id.*)

In the Counterclaim, the Debtors seek specific performance of the APA or alternative relief in the form of monetary damages. In the fourth request for declaratory relief, the Debtors seek judgment as follows:

That to the extent Section 4.5.2 of the APA applies to limit RLH's liability for damages under the APA to Debtors retaining the \$2,070,000 deposit, such liquidated damages are triggered only if Debtors elect to retain the deposit in lieu of pursuing their damages at law. The Debtors have not made such an election[.]

(*Id.* at 27.)

2. RLH's Motion

Regarding the liquidated damages provision in Section 4.5.2, RLH first argues that the Debtors have elected to retain the deposits as liquidated damages because they continue to hold those funds.⁹ "Accepting and retaining the cash RLH tendered is the necessary 'affirmative action' to invoke this provision." (RLH's Mot. at 13-14 (citation and parenthetical omitted).)

Even if the Court determines that the Debtors have not already elected to retain the deposits as their sole remedy, RLH argues, "The APA does not contain any manner of reservation of some other set of [the Debtors'] rights or remedies." (*Id.* at 15.) "Here, the APA lacks both a carve-out or reservation in the liquidated damages remedy provision that would preserve [the Debtors'] other rights and remedies, and does not have any manner of a more general reservation in a separate clause dealing generally with remedies." (*Id.*) Rather, the Debtors "selected an exclusive remedy and waived all other remedies." (*Id.*)

3. Debtors' Response

The Debtors argue that Section 4.5.2 permits the Debtors to elect whether to accept the Deposit Amount as liquidated damages

⁹ The Debtors argue that they have not elected to accept the Deposit Amount – *i.e.*, \$2.07 million – as liquidated damages. The Debtors do not address the North Lima DW 4 Deposit in the amount of \$400,000. In contrast, RLH argues that the Debtors have retained both the Deposit Amount and the North Lima DW 4 Deposit – *i.e.*, a combined \$2.47 million. In its Motion, RLH states in a parenthetical, "[The Debtors] have not pleaded any claim with respect to the \$400,000 additional earnest money deposit they are also retaining." (RLH's Mot. at 6.)

because Section 4.5.2 states, "In the event Buyer fails to perform any of its material obligations under this Agreement . . . Sellers **may** . . . terminate this Agreement and receive the Deposit Amount . . . as liquidated damages, as Seller's exclusive and sole remedy, hereby waiving all other remedies." (Debtors' Resp. at 4 (quoting APA § 4.5.2) (emphasis added by the Debtors).) The Debtors note that the fifth recital clause of the APA states that the Deposit Amount shall be held as "good faith earnest money." (Debtors' Resp. at 7 (quoting APA at 1).) The Debtors contend that Section 4.5.2 is discretionary and that Ohio courts have interpreted such provisions involving earnest money deposits as permitting the non-breaching party to either (i) elect to accept the earnest money deposit; or (ii) pursue a damages claim. The Debtors state that, pursuant to Ohio law, an earnest money deposit sets forth the minimum, but not the maximum, damages a party may pursue if actual damages exist.

The Debtors also refute RLH's position that the Debtors have taken possession of the Deposit Amount, arguing that the Deposit Amount is held by Debtors' counsel, Roderick Linton Belfance LLP, as the Deposit Agent. The Debtors point out that the Deposit Amount is to be applied to the Purchase Price at Closing and, thus, the Deposit Agent's retention of the Deposit Amount pending the Debtors' request for specific performance is consistent with the terms of the APA.

Finally, the Debtors state that Section 4.4 preserves their right to pursue other remedies in lieu of liquidated damages. Specifically, Section 4.4 states, in part, "Except as may be limited elsewhere in this Agreement, termination of this Agreement shall not in any way terminate, limit or restrict the rights and remedies of any party hereto against any other party that has breached this Agreement prior to the termination hereof." (Debtors' Resp. at 9 (quoting APA § 4.4).)

4. RLH's Reply

RLH states that the phrase "hereby waiving all other remedies" in Section 4.5.2 means that, in agreeing to the APA in its entirety, the Debtors elected receipt of the Deposit Amount as their exclusive remedy if RLH breached the APA. (RLH's Reply at 2-3.) RLH cites numerous Sections of the APA that include the term "hereby" to bolster its argument that the parties used hereby in reference to execution of the APA, rather than a party's election under any specific Section of the APA. (*Id.* at 3.) RLH argues that any other interpretation would require the clause to read: Sellers may . . . terminate this Agreement and receive the Deposit Amount from the Deposit Agent as liquidated damages, as Sellers' exclusive and sole remedy, thereby – rather than hereby – waiving all other remedies. (*Id.*)

RLH further supports its position by identifying three characteristics of the liquidated damages provision in Section

4.5.2. First, the plain text of Section 4.5.2 states that the liquidated damages are the Debtors' "exclusive and sole remedy." (*Id.* at 4.) Second, the APA does not state that the Debtors may elect liquidated damages in lieu of any other remedy. (*Id.* at 4-5.) Finally, the liquidated damages provision does not state that the Debtors may pursue other legal remedies notwithstanding receipt of the Deposit Amount. (*Id.* at 5-6.)

5. The Debtors' Sole Remedy Is Receipt of the Deposit Amount

Three issues need to be addressed to resolve the Debtors' fourth request for declaratory judgment: (i) whether the Debtors have affirmatively elected to accept the Deposit Amount as their exclusive remedy; (ii) whether Section 4.4 expands the remedies granted to the Debtors in Section 4.5.2; and (iii) ultimately, whether Section 4.5.2 grants the Debtors the option to accept the Deposit Amount as liquidated damages or pursue other remedies. The Court will address each of these issues in sequence.

i. The Debtors Did Not Accept the Deposit Amount

RLH cites *Kurtz v. Western Property, LLC*, 2011 Ohio 6726 (Ohio Ct. App. 2011) in support of its argument that the Debtors have affirmatively elected to accept and retain the Deposit Amount as liquidated damages. The Debtors argue that *Kurtz* is distinguishable because the Deposit Amount is held by a third party — *i.e.*, the Deposit Agent.

In *Kurtz*, a purchaser of commercial real estate posted the required security in cash, rather than via a letter of credit or a bond, both of which would have required the seller to "draw" on the security in the event of default. After the purchaser breached the sale contract, the seller argued that the liquidated damages provision was not invoked because he had not drawn on the security. The seller asserted that passive acceptance of the cash security did not constitute the affirmative action necessary to draw on the security. The Ohio Tenth District Court of Appeals disagreed and found that acceptance and retention of the cash constituted an affirmative action to draw on the security, which triggered the liquidated damages provision. "The additional step of drawing upon a bond or letter of credit was obviated by [the purchaser's] delivery of the cash." *Id.* ¶ 17.

This Court agrees with the Debtors that the mere fact that the Deposit Agent continues to hold the Deposit Amount is not relevant to whether the Debtors have accepted the Deposit Amount as liquidated damages. The sellers' acceptance of the cash security in *Kurtz* is distinguishable because, in this proceeding, the Deposit Amount is being held by a third party and the Debtors have not taken any affirmative action to draw on the Deposit Amount as liquidated damages. Accordingly, the Court finds that the Deposit Agent's continued possession of the Deposit Amount has no effect on the Debtors' remedies.

ii. Section 4.4 Does Not Expand the Debtors' Remedies

The Debtors argue that their remedies are not limited to the Deposit Amount because the last sentence in Section 4.4 provides that "termination of this Agreement shall not in any way terminate, limit or restrict the rights and remedies of any party hereto. . . ." (APA § 4.4.) However, this sentence begins, "Except as may be limited elsewhere in this Agreement" (*Id.*) Thus, if Section 4.5.2 limits the Debtors to receipt of the Deposit Amount as their sole and exclusive remedy, the last sentence of Section 4.4 does not and cannot enlarge the Debtors' rights and remedies.

iii. The Deposit Amount Is the Debtors' Exclusive Remedy

The language in Section 4.5.2 pertinent to the Court's analysis is: "In the event Buyer fails to perform any of its material obligations under this Agreement . . . Sellers may . . . terminate this Agreement and receive the Deposit Amount . . . as liquidated damages, as Seller's exclusive and sole remedy, hereby waiving all other remedies." (*Id.* § 4.5.2.) The Debtors rely entirely on the use of "may" in Section 4.5.2 to support their argument that acceptance of the Deposit Amount as liquidated damages is entirely discretionary and must be triggered by an election. The Debtors argue, "Where the language is discretionary, and involves an earnest money deposit, Ohio courts have determined

that the non-breaching party may make an election.” (Debtors’ Resp. at 4.)

In support of this proposition, the Debtors rely on *Arena v. Heather*, No. 6112, 1983 WL 13780, 1983 Ohio App. LEXIS 13426 (Ohio Ct. App. Oct. 17, 1983). The *Arena* court, however, analyzed a materially distinct liquidated damages provision in a contract to purchase real estate. In *Arena*, the purchasers deposited \$10,000 as earnest money, but breached the contract when they could not obtain a loan to make the down payment of \$100,000. The trial court entered judgment for the sellers in the amount of \$53,300 plus interest. On appeal, the purchasers argued that the trial court erred by failing to invoke the liquidated damages provision in the contract, which provided, in the event of the purchasers’ default:

Seller may, in lieu of other remedies available to him, declare this agreement null and void as to buyer, and, at his option, all monies paid on account hereof not in excess of 15% of the agreed purchase price herein shall be forfeited to seller as fixed, stipulated and liquidated damages without proof of loss.

Id. at *3 (emphasis added). Interpreting this provision, the Ohio Fifth District Court of Appeals held:

The [purchasers] claim that this provision contains the exclusive remedy for the [sellers]. We disagree. This provision gives the [sellers] the option of invoking the liquidated damages clause or pursuing their other available remedies. [The sellers] permissibly chose to file a breach of contract action and collect their actual damages.

Id.

Unlike the liquidated damages provision in Section 4.5.2, the liquidated damages provision in *Arena* included the clauses "in lieu of other remedies" and "at his option." Section 4.5.2 simply contains the stand-alone verb "may."

The Debtors also cite *Williams v. Kondziela*, 2004 Ohio 2077 (Ohio Ct. App. 2004) to bolster their argument that the use of "may" in Section 4.5.2 implies the exercise of discretion. This case is also distinguishable. In *Williams*, the purchaser of real estate failed to close the transaction after having deposited the entire purchase price amount into escrow. The trial court found that the purchaser breached the real estate contract and awarded damages and attorney fees. On appeal, the purchaser argued that the trial court erred in failing to apply the liquidated damages clause in the contract, which read as follows:

If Buyer refuses to perform the requirements herein contained on his part to be performed, Seller may, in lieu of other remedies available to him, declare this Agreement null and void as to Buyer, and, at his option, all monies paid on account hereof not in excess of 15% of the agreed purchase price herein shall be forfeited to Seller as fixed, stipulated and liquidated damages without proof of loss

Id. ¶ 14 (emphasis added). The Ohio Eleventh District Court of Appeals disagreed with the buyer's argument that this provision capped the amount of damages in the event of a default and stated:

The liquidated damages provision in question states that the seller *may, in lieu of other remedies available*, accept damages for default in an amount not exceeding fifteen percent of the agreed purchase price. The term "may" implies the exercise of discretion. Consequently, the seller is not required to accept 15% of the agreed purchase price as damages in the event of default. Rather, a seller may use the liquidated damages provision as a mechanism for compensation in the event that he or she does not want to pursue other remedies.

This provision does not foreclose the possibility of the seller pursuing alternate remedies.

Id. ¶ 16.

The *Williams* court correctly analyzed the liquidated damages provision as discretionary because the word "may" was coupled with the phrases "in lieu of other remedies available" and "at his option." Unlike the provisions in the *Arena* and *Williams* cases, Section 4.5.2 is devoid of any language regarding an election of remedies or the invocation of an option. Instead, Section 4.5.2 specifically states that the Debtors "hereby" waive all other remedies.

The Court agrees with RLH's interpretation that the use of "hereby" in Section 4.5.2 refers to the entire APA, rather than just that Section. That is, the liquidated damages provision was invoked upon execution of the APA, not upon the Debtors' election of liquidated damages in the event of RLH's breach. "Hereby" is

defined: "By this document; by these very words <I hereby declare my intention to run for public office>." BLACK'S LAW DICTIONARY 842. By using the phrase "liquidated damages, as Seller's exclusive and sole remedy, hereby waiving all other remedies," the Debtors affirmatively – by those words – waived all other remedies. The liquidated damages are the Debtors' sole remedy in the event RLH fails to perform any of its material obligations under the APA.

In *Kurtz*, discussed *supra* at 22-23, the appellate court offered instructive analysis regarding a similar liquidated damages provision. The court found that "the liquidated damages provision [was] the only remedy available to [the seller]," noting that the provision "provides that the security is [the seller's] 'sole remedy at law and in equity for [the buyer's] failure to close.'" *Kurtz*, 2011 Ohio 6726 at ¶ 18. The court stated, "This 'sole remedy' language is crucial, as another provision of the agreement demonstrates that the parties could have negotiated for alternative remedies beyond liquidated damages." *Id.* ¶ 19. The contrasting provision addressing the earnest money deposit stated:

[I]f for any reason, through no default of Seller, Buyer fails to close on any Phase . . . the Deposit shall be retained by Seller, which retention shall not in any way prejudice the rights of Seller in any action for damages or specific performance.

Id.

Similar to the liquidated damages provision at issue in *Kurtz*, the Debtors agreed to accept the Deposit Amount as their sole

remedy. (APA § 4.5.2 ("In the event Buyer fails to perform any of its material obligations under this Agreement . . . , Sellers may . . . terminate this Agreement and receive the Deposit Amount . . . as liquidated damages, as Sellers' exclusive and sole remedy, hereby waiving all other remedies.")) Notwithstanding the inclusion of the word "may" in Section 4.5.2, the Debtors did not and do not have the discretion to elect to keep the Deposit Amount as liquidated damages. Rather, the use of the word "may" means that a default by RLH does not require termination of the APA, which would be the case if "shall" were used instead. The Debtors have the option of waiving any default by RLH and proceeding to closing. Moreover, the use of "may" in Section 4.5.2 contrasts with the use of "shall terminate" in Section 4.3 in the event the Bankruptcy Court did not enter a final, non-appealable order.

The Debtors' final argument regarding the liquidated damages provision is that (i) the APA defines the Deposit Amount as a good faith earnest money deposit; and (ii) earnest money provisions are interpreted by Ohio courts to permit the non-breaching party to either elect to accept the earnest money deposit or pursue a damages claim. However, the general rule that retention of an earnest money deposit is not a seller's exclusive remedy if the buyer breaches a purchase agreement does not and cannot nullify the express provision in Section 4.5.2 that receipt of the Deposit Amount is the Debtors' sole and exclusive remedy in the event RLH

breaches the APA. The APA merely states that the Deposit Amount is earnest money, whereas in *Kurtz* there was a separate earnest money provision distinct from the liquidated damages provision. Moreover, unlike in the APA, the earnest money provision at issue in *Kurtz* specified that retention of the earnest money did not limit the seller's remedies. Similarly, the earnest money provision at issue in *Gaskins v. Young*, 2004 Ohio 2731 (Ohio Ct. App. 2004), which case the Debtors cite in support of their argument that the Deposit Amount is not liquidated damages, expressly stated that retention of the earnest money deposit did not prejudice the seller's right to pursue actual damages.

Finally, the last two sentences of Section 4.5.2 state:

BUYER AND SELLER AGREE THAT BASED UPON THE CIRCUMSTANCES NOW EXISTING, KNOWN AND UNKNOWN, IT WOULD BE IMPRACTICAL OR EXTREMELY DIFFICULT TO ESTABLISH SELLERS' DAMAGE [sic] BY REASON OF BUYER'S DEFAULT. ACCORDINGLY, BUYER AND SELLERS AGREE THAT IT WOULD BE REASONABLE AT SUCH TIME TO AWARD SELLERS "LIQUIDATED DAMAGES" EQUAL TO THE DEPOSIT AMOUNT.

(*Id.*) This provision, which is one of only three provisions in the APA that is in all capital letters, further evinces the parties' intent to provide for the Deposit Amount as the Debtors' exclusive remedy.

For the reasons set forth above, the Court finds that the liquidated damages set forth in Section 4.5.2 are the Debtors' sole and exclusive remedy in the event RLH breaches the APA. As

a consequence, RLH is entitled to judgment on the pleadings with respect to the Debtors' fourth request for declaratory judgment.

IV. CONCLUSION

RLH seeks partial judgment on the pleadings with respect to two discrete issues: (i) the price reduction formula in Schedule 3.1.6 of the APA is not an invalid liquidated damages provision; and (ii) the liquidated damages provision in Section 4.5.2 is the Debtors' exclusive remedy in the event RLH breaches the APA. First, the Purchase Price Reduction Amounts in Schedule 3.1.6 are not dependent upon or tied to any breach of the APA by the Debtors. Thus, as a matter of law, the purchase price reduction formula in Schedule 3.1.6 is not a liquidated damages provision. Second, the liquidated damages provision in Section 4.5.2, as a matter of law, is the Debtors' "exclusive and sole remedy" in the event RLH breaches the APA. Accordingly, RLH's motion for partial judgment on the pleadings is well taken and will be granted.

An appropriate order will follow.

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ORDER GRANTING MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS
FILED BY RESOURCE LAND HOLDINGS, LLC

Before the Court is Motion for Judgment on the Pleadings ("RLH's Motion") (Doc. 18) filed by Plaintiff/Counter-Defendant Resource Land Holdings, LLC ("RLH") on July 3, 2014. In RLH's Motion, RLH seeks partial judgment on the pleadings with respect to the second and fourth requests for declaratory judgment of Debtors/Defendants/Counter-Claimants D & L Energy, Inc. and Petroflow, Inc. ("Debtors"). On July 16, 2014, the Debtors filed Response to Motion for Judgment on the Pleadings (Doc. 31). RLH filed Reply in Further Support of its Motion for Judgment on the Pleadings (Doc. 36) on July 28, 2014.

By way of background, on May 30, 2014, RLH filed Complaint for Declaratory Judgment (Doc. 1), which commenced this adversary proceeding. On June 16, 2014, the Debtors filed Answer to Complaint (Doc. 7) and Counterclaim Against Plaintiff Resource Land Holdings, LLC ("Debtors' Counterclaim") (Doc. 9). On July 7, 2014, RLH filed Amended Reply to Counterclaim (Doc. 19).

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion for Partial Judgment on the Pleadings Filed by Resource Land Holdings, LLC ("Memorandum Opinion") entered on this date, the Court hereby:

1. Finds that the price reduction formula in Schedule 3.1.6 of the APA is not a liquidated damages provision;

2. Finds that, as limited in the Memorandum Opinion, RLH is entitled to judgment on the pleadings with respect to the Debtors' second request for declaratory judgment;

3. Finds that the liquidated damages provision in Section 4.5.2 of the APA is the Debtors' exclusive and sole remedy in the event RLH breaches the APA;

4. Finds that RLH is entitled to judgment on the pleadings with respect to the Debtors' fourth request for declaratory judgment; and

5. Grants RLH's Motion.

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