



**and** )  
 )  
**JOHN HANCOCK LIFE** )  
**INSURANCE COMPANY (USA)** )  
**c/o CSC - LAWYERS** )  
**INCORPORATING SERVICE** )  
**50 W. BROAD STREET, SUITE 1800** )  
**COLUMBUS, OH 43215** )  
 )  
**and** )  
 )  
**IPOFA COLUMBUS WORKS, LLC** )  
**c/o CAPITOL SERVICES, INC.** )  
**614 SOUTH DUPONT HIGHWAY** )  
**DOVER, DE, 19901** )  
 )  
 Defendants )

Now comes Harold A. Corzin, Trustee, the Plaintiff herein and for his causes of action against the Defendants states as follows:

1. This court has jurisdiction over the within adversary proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157 and the claims set forth herein are core proceedings within the meaning of the United States Bankruptcy Code and 28 U.S.C. § 157.

2. The Plaintiff Harold A. Corzin, Trustee, is the Trustee for the Debtors Kelly Gearhart (hereinafter "Gearhart") and Tamara Lowe (hereinafter "Lowe"), a married couple, having been designated Trustee pursuant to designation of the United States Trustee as of February 13, 2009.

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3. Gearhart Development Corp (hereinafter "GDC"). is a California corporation which is and at all relevant times was solely owned by Gearhart.

4. On or before 2003, GDC established a trust called the Gearhart Development Corp. Individual 401k plan (hereinafter "401k plan"). Gearhart and Lowe

serve and at all relevant times served as trustees of the 401k plan. The 401k plan was used to conduct a variety of real estate and business transactions, detailed below, which are not qualified transactions under the Internal Revenue Code.

5. Gearhart and Lowe as trustees conducted transactions with 401k plan assets for their personal account and benefit or the benefit of family members or other disqualified persons rather than as trust assets such that the 401k plan was treated as a personal holding entity rather than as a trust.

6. Contributions to the 401k plan exceeded the maximum allowable contributions for the years in which they were made and these excess contributions are not entitled to an exemption from taxation under applicable provisions of the Internal Revenue Code.

7. Contributions to the 401k plan were made from the proceeds of monies obtained from various investors who were induced by James Miller, Hurst Financial Corp. and the Debtors acting in concert to induce investors to invest in projects under fraudulent pretenses. A large number of these investors have filed suit specifically identifying fraudulent misrepresentations and conduct and the specific allegations of these Complaints are incorporated by reference. These investors are creditors of the Gearhart bankruptcy estate and are hereinafter collectively referred to as the "Hurst investors". In addition to being funded with proceeds of the fraudulently obtained funds, the 401k plan was used as a vehicle for aiding and abetting the fraud perpetrated upon the Hurst investors.

8. The 401k plan assets are **not** in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

9. The Debtors engaged in prohibited transactions which are and were not permitted under ERISA and the current assets of the plan are funded by these prohibited transactions and are subject to disgorgement.

#### **EXCESS CONTRIBUTIONS AND PROHIBITED TRANSACTIONS**

10. On or about April 15, 2004, Gearhart Development Corp. made a 2003 employee contribution for Kelly Gearhart into the Gearhart Development Corp. Individual 401k plan administered by First Regional Bank as custodian in the amount of \$40,000.

11. The April 15, 2004 contribution was made from the proceeds of funds fraudulently received from Hurst Investors. This payment was funded from a transfer on April 14, 2004 from the Graves Creek Development LLC account which was in turn funded by a transfer of the same date from the Deanza Estates LLC account which was in turn funded by a deposit from the proceeds from Hurst Investors on April 12, 2004. The fraud was concealed and not discovered until less than one year prior to the filing of this bankruptcy.

12. On or about December 7, 2004, GDC made a 2004 employee contribution for Kelly Gearhart into the 401k plan account, administered by First Regional Bank as custodian, in the amount of \$40,000.

13. The account from which this contribution was made was overdrawn at the time of the contribution, but the negative balance in this account was funded by deposits on December 28, 2004 from Graves Creek Development LLC and Atascadero All Night RV Park LLC which represented the proceeds of monies fraudulently obtained from the Hurst investors. The fraud was concealed and not discovered until less than one year prior to the filing of this bankruptcy.

14. On or about January 14, 2005, First Regional Bank as custodian of the 401k plan purchased vacant land on Beacon Road for the sum of \$1,000 and sold the same property on or about January 14, 2005 for the sum of \$522,203.75. These were not arms length transactions and the effect of those transactions was to make a contribution to the 401k plan in the amount of \$521,203.75 which was substantially in excess of the maximum contribution permitted by law.

15. On or about February 28, 2005, First Regional Bank as custodian of the 401k plan purchased property on Magdalena Drive, San Miguel, CA for the sum of \$1,000 and sold the same property on or about the same date for the sum of \$656,857.25. These were not arms length transactions and the effect of those transactions was to make a contribution to the 401k Plan in the amount of \$655,857.25 which was substantially in excess of the maximum contribution permitted by law.

16. On or about March 18, 2005, First Regional Bank as custodian of the 401k Plan purchased property known as 5785 Hermosilla Ave. for the purchase price of \$390,000. This property consisted of two lots. One lot (lot 70B Block NC) was transferred on or about June 17, 2005 to Jeffrey Miller, son of Jay Miller owner of Hurst Financial Corp., whose relationship to the Debtors is such that the transaction would be a prohibited transaction. The other parcel (lot 70C Block NC) was transferred to Jeremy Gearhart on or about August 12, 2005 who is the son of Kelly Gearhart and whose relationship to the Debtors is such that the transaction would be a prohibited transaction. These were not arms length transactions and the effect of those transactions was to make a contribution to the 401k plan in the amount of \$182,773.45 which was substantially in excess of the maximum contribution permitted by law.

17. On or about May 18, 2005, First Regional Bank as custodian of the 401k Plan purchased a 3% interest in a Delaware Limited Liability Company known as IPofA Columbus Works, LLC which is the owner of property located at 6200 E. Broad St., Columbus, OH 43213 for a purchase price of \$750,000. This purchase was funded with the proceeds of the funds derived from the contributions in excess of the maximum permitted by law and with the proceeds of funds which were fraudulently obtained from investors.

18. On or about August 18, 2005 First Regional Bank as custodian of the 401k Plan purchased a property known as 8695 San Diego Rd. for \$117,074.22. On or about June 1, 2006, at the request of the Gearharts, First Regional Bank conveyed this property to Kelly and Tamara Gearhart Trustees of the 401k Plan. On or about February 27, 2007, Kelly Gearhart as Trustee of the 401k Plan conveyed this property to Eagle Ranch LLC and he has not accounted for the proceeds of such sale.

19. On or about September 9, 2005, First Regional Bank as custodian of the 401k Plan purchased vacant land APN # 028,322,0001 & 031,121,001 in a non-cash transaction for the stated consideration of \$1,000,000. On the same day, in a non-cash transaction First Regional Bank as custodian of the 401k Plan received a "loan payoff" of \$2,100,000 also shown as a non-cash transaction. The same day First Regional Bank as custodian of the 401k Plan purchased property at 6105 El Camino Real for the stated consideration of \$1,100,000 also shown as a non-cash transaction. These were not arms length transactions and the effect of those transactions was to make a contribution to the 401k Plan in the amount of \$2,100,000 in properties or loan proceeds which was substantially in excess of the maximum contribution permitted by law. These transactions were also prohibited transactions.

20. On or about May 1, 2006, First Regional Bank as custodian of the 401k Plan conveyed the property at 6105 El Camino Real to Kelly and Tamara Gearhart Trustees of the 401k Plan. On or about May 16, 2006 Kelly Gearhart as Trustee of the 401k Plan conveyed this property to David Dean Flagg Trustee and he has not accounted for the proceeds of such sale.

21. On or about September 1, 2005, Kelly Gearhart purchased property known as Lot 1, Block 57 from Martin and Susan Polin. On or about September 23, 2005, Kelly Gearhart conveyed this property into the name of Morro Road Homes LLC an LLC in which Kelly Gearhart was a 95% owner and the other 5% was owned by Jeremy Gearhart, Kelly Gearhart's son. On or about the same day, First Regional Bank as custodian of the 401k Plan purchased this property from Morro Road Homes LLC for \$200,000. This was a prohibited transaction. On or about June 1, 2006, First Regional Bank as custodian of the 401k Plan conveyed this property to Kelly and Tamara Gearhart Trustees of the 401k Plan. On or about August 16, 2006 Kelly Gearhart as Trustee of the 401k Plan conveyed this property to the City of El Paso de Robles and he has not accounted for the proceeds of such sale.

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22. On or about January 28, 2005, Morro Road Homes LLC acquired a vacant lot on Spring Street in Paso Robles, CA from Shybo LLC. On or about September 23, 2005, Morro Road Homes LLC sold this property to First Regional Bank as custodian of the Gearhart Development Corp. Individual 401k plan for \$300,000. On or about May 1, 2006, First Regional Bank as custodian of the 401k Plan conveyed this property to Kelly and Tamara Gearhart Trustees of the 401k Plan. On or about August 22, 2006, Kelly Gearhart as Trustee of the 401k Plan conveyed this property to Marion L. Warner (Kelly's father's

girlfriend). On the same day Marion L. Warner conveyed the property to Morro Road Homes LLC. These are not arms length transactions and are in fact prohibited transactions. Kelly Gearhart has not accounted for the proceeds of these transactions.

23. On or about January 5, 2006, First Regional Bank as custodian of the 401k Plan purchased for the sum of \$45,000 a 11.24% fractional interest in a Deed of Trust administered by Hurst Financial where Morro Road Homes LLC was the obligor on the note. This was a prohibited transaction. On May 31, 2006 First Regional Bank as custodian of the 401k Plan conveyed this fractional interest in the Deed of Trust to Kelly and Tamara Gearhart Trustees of the 401k Plan. Debtors have not accounted for this asset or any proceeds therefrom.

24. On or about January 30, 2006, Gearhart Development Corp. made contributions of \$40,000 each for Kelly and Tamara Gearhart into the 401k plan. These contributions were funded by a deposit of \$400,000 on January 5, 2006 from the account of Atascadero Homeowners, LLC which was in turn funded by a deposit of \$400,000 on the same date from Kelly and Tamara's personal account which was in funded by a deposit of \$400,000 on the same date from the Vista Del Hombre LLC account. These funds represent the proceeds of fraud perpetrated on the Hurst Investors.

25. On March 23, 2006, First Regional Bank as custodian of the 401k Plan purchased for the sum of \$30,000 a 12.5% fractional interest in a Deed of Trust administered by Hurst Financial where Robert Shannon Construction LP was the named obligor on the note. Gearhart had previously assumed the obligations of Robert Shannon Construction LP on this obligation and therefore the transaction was a prohibited transaction. On May 31, 2006, First Regional Bank as custodian of the 401k Plan conveyed this fractional interest in

the Deed of Trust to Kelly and Tamara Gearhart Trustees of the 401k Plan. Debtors have not accounted for this asset or any proceeds therefrom.

26. On June 1, 2006, First Regional Bank as custodian of the 401k Plan transferred the sum of \$122,508.69 to an IRA at Mid-State Bank & Trust, Account # 264834211. The Debtors have not disclosed the existence of this asset, did not declare any income from the withdrawal of these funds on their 2006 or 2007 tax returns, and have not reported a transfer or loss of these funds on their Statement of Financial Affairs.

27. The 401k plan is the owner of an account with **JOHN HANCOCK LIFE INSURANCE COMPANY (USA)** bearing account number [REDACTED]. This account was established through Manulife on or about April 14, 2003 and it is believed that Kelly Gearhart is the sole beneficiary of these funds. A total of \$120,000 in contributions was made from GDC's bank account during the years 2003 and 2004. These contributions, combined with other contributions were in excess of the maximum contributions for the years in question and are not exempt from taxation. These contributions were made from the proceeds of moneys fraudulently obtained from the Hurst Investors. The fraud was not discovered until less than one year prior to the filing of this bankruptcy.

#### COUNT ONE

28. The preceding paragraphs are hereby incorporated as if fully rewritten herein.

29. The Trustee objects to Kelly Gearhart's claimed exemption in his 401k fund.

30. The Trustee is uncertain whether Debtors are claiming their exemptions under California law or Ohio law. However, this determination is immaterial to the Trustee's objection to Debtor's exemption in his 401k plan and the exemption laws in both states are materially the same with respect to the 401k plan exemption.

31. Debtors are both the trustees and the beneficiaries of the 401k Plan.
32. The 401k Plan was established by a corporation wholly owned by Gearhart for the benefit of Gearhart while he was employed by said corporation.
33. The 401k plan is a plan based “on account of age or length of service”.
34. The Debtors caused the 401k Plan to engage in numerous prohibited transactions, including as set forth above.
35. Due to the numerous prohibited transactions and excess contributions set forth above, Debtor’s 401k does not qualify under the Internal Revenue Code.
36. The entirety of the 401k Plan is not exempt under 11 U.S.C. § 522, or the exemption laws of California or Ohio

## COUNT TWO

37. The preceding paragraphs are hereby incorporated as if fully rewritten herein.
38. The contents of the 401k Plan are property of the Estate which the Trustee may liquidate for the benefit of Debtors’ unsecured creditors.
39. As of the drafting of this complaint, the known assets of the 401k Plan are: a 3% fractional interest in property located at 6200 E. Broad St. Columbus, Ohio administered by IPofA Columbus Works, LLC and monies on deposit with John Hancock Life Insurance Company in account number [REDACTED].
40. Upon information and belief, there are further assets of the 401k Plan which ~~the~~ Trustee has been unable to discover at this time.
41. Debtors and John Hancock Life Insurance Co. (USA) have in their possession, custody or control during the case assets of the 401k Plan.
42. Plaintiff seeks a determination that the 3% fractional interest in the property

at 6200 E. Broad St. Columbus, Ohio is property of the estate in this case and subject to administration by the Trustee.

43. The 401k plan assets are not of inconsequential value of benefit to the Estate.

44. Defendants are under a duty to turnover to the Plaintiff herein, said property.

### **COUNT THREE**

45. The preceding paragraphs are hereby incorporated as if fully rewritten herein.

46. The Trustee seeks this Court to disregard the form of the 401k plan.

47. The various transactions, listed above, involving the 401k Plan demonstrate that the plan was not used as a vessel to hold property in trust for the plan beneficiaries subject to the terms of the trust, but rather, the plan was used as a vehicle to conduct various business transactions, similar to a personal holding company or other personal business ventures in violation of the terms of the trust.

48. Gearhart used “straw men” in order to transfer property from the 401k to himself and conceal the fact that he was violating the terms of the 401k plan and conducting personal transactions prohibited by applicable law and to avoid the tax consequences of those transactions.

49. The frequency with which property was transferred in and out of the 401k Plan and the nature of these transactions clearly demonstrates that the 401k Plan was not intended to be a saving vehicle for retirement or to defer income for the retirement of plan beneficiariest. It was established for the purpose of conducting real estate and business transactions for contemporaneous benefit of the Debtors, rather than to increase or maximize assets of the 401k Plan.

50. In substance, the 401k Plan was actually akin to a holding company or business venture of Kelly Gearhart and should be treated as such by the Court for the purpose of this adversary proceeding and any future cause of action which may be discovered by the Chapter 7 Trustee regarding or involving the 401k Plan.

#### **COUNT FOUR**

51. The preceding paragraphs are hereby incorporated as if fully rewritten herein.

52. The 401k plan and Debtors, both individually and in their capacity as trustees of the 401k plan have retained property by way of fraud or inequitable conduct, as set forth above.

53. Under the principles of equity, Debtors should not be allowed to keep this property.

54. The Trustee is entitled to assert a constructive trust on the assets of the 401k plan for the benefit of the creditors of the estate to the extent that the remaining assets are traceable to the proceeds of fraudulently obtained funds which were used to fund plan contributions.

#### **COUNT FIVE**

55. The preceding paragraphs are hereby incorporated as if fully rewritten herein.

56. The Plaintiff is entitled to an accounting from the Debtors and the 401k plan of the transactions whereby plan assets described above were liquidated or encumbered and the proceeds of such transactions and a complete accounting of any assets remaining in the plan.

#### **COUNT SIX**

57. The preceding paragraphs are hereby incorporated as if fully rewritten herein.

58. Any transfer, disposition or encumbrance of property or interest of the 401k Plan is, in effect, a sale of property of the estate.

59. The Trustee has not yet been able to determine whether the three percent interest in IPofA Works Columbus, LLC, which is an asset of the 401k Plan, has any value which may be distributed for the benefit of Debtors' unsecured creditors.

60. The Trustee will be irreparably harmed if property of the 401k plan is transferred or otherwise disposed of or encumbered.

61. Others will not be harmed by granting the injunctive relief sought as the Trustee merely seeks to maintain the status quo on assets under the control of the 401k Plan until such time as a determination can be made as to whether said property is all or in part exempt.

62. The public interest, and the interests of Debtors' unsecured creditors would be served by granting the injunctive relief sought by the Trustee.

63. Plaintiff has no adequate remedy at law to prevent Defendant from disposing of or otherwise placing beyond the reach of Plaintiff said property of Plaintiff's Bankruptcy Estate.

64. This Court should issue an order enjoining Kelly Gearhart and Tamara Lowe individually and in their capacity as trustees of the 401k plan, and the 401k plan from transferring, encumbering or disposing of any property or interest of the 401k plan until such time as a determination can be made as to whether the assets of the 401k plan are property of the estate available to be liquidated by the Chapter 7 Trustee for the benefit of unsecured creditors of the bankruptcy estate. The Trustee further requests that the court enjoin John Hancock Life Insurance Co. (USA) from disbursing any funds held by them in accounts

owned by the Debtors or the 401k plan until further order of this court.

65. The Trustee further asks that the injunctive relief sought be granted on an *ex parte* basis until a final hearing can be held on this matter.

WHEREFORE, the Plaintiff demands that the Court determine that the 401k plan assets are not exempt and constitute property of the estate thereby sustaining the Trustee's objection to the claims of exemption by the Debtors. Plaintiff further demands turnover of the assets of the 401k plan to the Trustee for the purpose of administering those assets for the benefit of creditors. Plaintiff demands an accounting from the Debtors and the 401k plan as to all transfers, encumbrances or distributions of plan assets and the proceeds therefrom. Plaintiff demands that the Court impose a constructive trust on the traceable proceeds of fraudulent conduct for the benefit of the creditors of the estate. Plaintiff demands injunctive relief to preserve the 401k plan assets pending determination of the Plaintiff's claims. Plaintiff demands costs and any other relief which the Court may deem just or equitable.

**GIBSON & LOWRY**

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