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Attorneys for D. Ray Strong, Chapter 11 Trustee for Castle Arch Real Estate Investment Company, LLC

IN THE UNITED STATES BANKRUPTCY COURT
OR THE DISTRICT OF UTAH

In re: CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC; CAOP MANAGERS, LLC; CASTLE ARCH OPPORTUNITY PARTNERS I, LLC; CASTLE ARCH OPPORTUNITY PARTNERS II, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; *and* CASTLE ARCH SMYRNA, LLC, Debtors.	Bankruptcy Case No. 11-35082 Bankruptcy Case No. 11-35237 Bankruptcy Case No. 11-35240 Bankruptcy Case No. 11-35242 Bankruptcy Case No. 11-35243 Bankruptcy Case No. 11-35246 Bankruptcy Case No. 11-35241 (Jointly Administered) (Chapter 11) The Honorable Joel T. Marker

CHAPTER 11 TRUSTEE'S OBJECTION TO PRINCE, YEATES, & GELDZAHLER'S APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND COSTS AND APPLICATION OF RETAINER

Pursuant to 11 U.S.C. § 330(a) and Federal Rule of Bankruptcy Procedure 2016, D. Ray Strong, the duly appointed Chapter 11 Trustee (the "Trustee") for Castle Arch Real Estate Investment Company, LLC ("CAREIC"), by and through counsel, hereby objects to the *Application for Allowance of Attorney Fees and Costs* [Docket No. 373] (the "Fee Application")

filed by Prince, Yeates & Geldzahler ("PY") in which PY seeks allowance of its fees and expenses incurred as counsel to CAREIC as a debtor in possession, and application of a $100,000.00 "retainer" that it obtained from CAREIC (the "Retained Funds"). The Trustee maintains that the Retained Funds are property of the estate that must be returned to the Trustee, and that some of PY's requested fees are objectionable and must be disallowed. In support hereof, the Trustee states as follows:

INTRODUCTION

Despite the Trustee's repeated requests, PY has refused to turn over Retained Funds that it received from CAREIC as a debtor in possession after filing of these Chapter 11 cases and prior to the Trustee's appointment. Instead, in contravention of applicable law, which unambiguously states that such monies remain property of the estate, and in violation of CAREIC's automatic stay, PY apparently believes that it has a lien and is using the existence of this so-called "lien" in an attempt to elevate its administrative claim above the claims of other professionals in this case – and in the process attempts to sabotage the Trustee's proposed Chapter 11 plan, which the Trustee has made clear to all professionals requires a cash reserve for payment of known and unknown Effective Date distributions and deferral of distributions to "Legacy Debtor" professionals, including PY. At this time, the Trustee is informed that all professionals, including himself, his professionals and professionals employed by the Official Unsecured Creditors' Committee (the "Committee"), have agreed to deferral of Effective Date distributions so as to obtain confirmation of a plan. By filing its Fee Application and by statements made by PY principal Adam S. Affleck ("Affleck"), the PY professional who has billed the overwhelming majority of fees at issue, PY has signaled that it expects to be paid

before all other professionals regardless of what is in the best interest of creditors, investors and the estates, and that such payment should come, at least in part, from the Retained Funds which is cash that may be necessary to fund Effective Date distributions under a plan. Since the filing of the Fee Application, counsel for the Trustee and the Committee have met with PY in an attempt to work out issues related to the Retained Funds and the amount of PY's fees to no avail. PY has given the Trustee no option other than to file the present objection, objecting to PY's proposed use of the Retained Funds and the allowance of a portion of PY's fees.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. § 1334.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

4. Between October 17, 2011 and October 20, 2011 (such time period collectively referred to herein as the "Petition Date"), CAREIC and the other above-captioned debtors (collectively, the "Debtors") filed petitions seeking relief under Chapter 11 of the Bankruptcy Code. The Debtors' respective Chapter 11 cases are being jointly administered.

5. According to Affleck, on November 8, 2011, he was approached by CAREIC's former management to serve as CAREIC's counsel. *Declaration of Adam S. Affleck*, ¶ 3 [Docket No. 14] (the "Affleck Declaration").

6. On November 30, 2011, CAREIC filed an *Ex Parte Application of Debtor in Possession for Order Authorizing Employment of Counsel*, seeking authorization to employ PY as counsel [Docket No. 13] (the "Motion to Employ"). Although not mentioned in the Motion to

Employ, according to the Affleck Declaration filed in support of the Motion to Employ, CAREIC "agreed to fund a retainer in the amount of $150,000 from unencumbered funds of the estate to be drawn upon only upon authorization by the Court." Affleck Declaration ¶ 9.

7. On December 6, 2011, CAREIC, through Affleck, filed a *Motion for Order Authorizing Retainer for Chapter 11 Counsel* [Docket No. 19] (the "Retained Funds Motion"), stating that upon approval of the Motion to Employ, CAREIC would "immediately deposit $150,000 from unencumbered estate cash" apparently with PY as a retainer. Retained Funds Motion ¶ 9. It further stated that the "use of estate cash as proposed . . . is in the best interests of the estate and creditors so that it may assure its representation by counsel in its chapter 11 case[,]" *id.* ¶ 10, and requested that the Court authorize it to use $150,000 in unencumbered cash assets of the estate to fund a retainer . . . ." *Id.* p. 3.

8. On December 20, 2011, Trent J. Waddoups filed an *Objection* to the Motion to Employ and the Retained Funds Motion [Docket No. 30].

9. Also on December 20, 2011, the Court held a hearing on the Motion to Employ and the Retained Funds Motion, and on January 25, 2012, it entered an *Order Authorizing (1) Employment of Special Counsel,*[1] *and (2) Retainer for Chapter 11 Counsel* [Docket No. 46] (the "Employment Order"), overruling the Objection, granting the Motion to Employ, and authorizing the Debtor to "transfer $100,000 in unencumbered cash assets of the estate [to] Prince Yeates as a retainer for chapter 11 counsel to be paid upon further application to this Court." Employment Order, p. 2.

[1] In its Motion to Employ, there was also a reference to "special" counsel. This reference appears to have been a mistake, and PY was employed as general debtor's counsel.

10. For approximately five months, PY represented CAREIC as a debtor in possession, which ultimately resulted in the Court appointing a Chapter 11 trustee on April 30, 2012 [Docket No. 208].

11. On May 3, 2012, the Court entered an *Order* appointing D. Ray Strong as the Chapter 11 trustee of CAREIC [Docket No. 215].

Trustee's Requests for Turnover

12. By e-mail dated June 6, 2012 from the Trustee to Affleck, the Trustee requested that PY turn over the Retained Funds to him for the benefit of the estate. A copy of this e-mail is attached hereto as **Exhibit 1**. Affleck requested a few days to research the issue before determining whether to return the Retained Funds. *See* Exhibit 1. The Trustee did not hear back from PY in response to this request.

13. In the meantime, the Trustee was formulating a plan of liquidation. As part of this process, it became clear to the Trustee that a cash reserve would be necessary to address known and as of yet unknown Effective Date payments. Thus, on September 21, 2012, the Trustee requested a meeting to discuss issues related to a proposed liquidation plan and return of the Retained Funds.

14. The parties met on September 28, 2012, and at the conclusion of that meeting, Affleck indicated that PY would further review and consider returning the Retained Funds. By e-mail to the Trustee and his counsel later that day, however, a copy of which is included as part of **Exhibit 2** hereto, Affleck stated that PY would not return the Retainer, noting that PY "has a strong claim that it has a security interest in its post-petition retainer for fees[.]" Exhibit 2. Affleck further stated:

> As to alternative treatment of Prince Yeates' remaining administrative expense claim, Prince Yeates would agree to a note with a reasonable interest rate and a reasonable maturity date (both to be negotiated) that is secured by trust deed in all of the CARIEC consolidated debtors' property. Only then would future payment be protected against a subsequent bankruptcy filing or a post-confirmation conversion to chapter 7. Prince Yeates would further require that these provisions be approved as part of the plan.
>
> *Id.*

15. On September 29, 2012, the Trustee filed a proposed Disclosure Statement [Docket No. 337] and Plan of Liquidation [Docket No. 338] (the "Proposed Plan"). The Proposed Plan states in relevant part that absent objection, holders of "Allowed Administrative Expense Claims" against the "Legacy Consolidated Estate" that do not receive a distribution on the Effective Date of the Proposed Plan will receive a beneficial interest in the Legacy Trust on account of such Claims and a distribution in accordance with the Proposed Plan and the "Legacy Trust Agreement." Professionals who do not agree to such treatment will be required to be paid any Allowed Administrative Expense Claim from cash on hand on the Effective Date. *See* Proposed Plan at pp. 20-21.

16. By e-mail to Affleck dated October 1, 2012, included as part of **Exhibit 2**, the Trustee provided PY with a copy of the proposed Disclosure Statement and Proposed Plan, indicated his disappointment with PY's decision related to the Retained Funds, and urged cooperation to prevent further expense to the estate related to the matter.

17. Affleck never responded to the Trustee, but rather, on October 17, 2012, PY filed its present Fee Application seeking compensation for professional services rendered as Chapter 11 counsel to CAREIC in the amount of $234,891.00, reimbursement for costs and expenses in the amount of $9,170.38, and authorization from the Court to distribute the $100,000 Retained Funds to it, with the remainder to be allowed and paid as a Chapter 11 administrative expense.

18. On October 31, 2012, counsel for the Trustee and the Committee met with Affleck to attempt to settle this matter. Again, the Trustee demanded return of the Retained Funds, and this demand was supported by the Committee. Affleck left that meeting informing the parties that PY would consider the issues and be in touch. Trustee and Committee counsel made clear that they would need to hear from PY as soon as possible, inasmuch as objection to the Fee Application, including PY's request to use the Retained Funds therein, was set for November 5, 2012.

19. As of this time, neither the Trustee nor the Committee have been contacted by PY related to this matter and, accordingly, the Trustee files this Objection.

OBJECTION

A. PY Should Not Be Allowed To Use the Retained Funds.

Despite its relatively poor cash position on the Petition Date (and going forward, given its primary business of raising funds which essentially had stopped as of the Petition Date), CAREIC transferred $100,000.00 of "unencumbered funds of the estate" to PY.[2] While the Court authorized this transfer, it in no way authorized PY to use the funds or afforded PY any special interest in the funds. Thus, upon his appointment, the Trustee requested that PY turn this property of the estate over to him and patiently waited for PY's response. When it became apparent that a cash reserve was necessary to confirm his Proposed Plan, the Trustee became more insistent that PY return this "estate cash" to him for the benefit of the estate to no avail.[3] Instead, despite 11 U.S.C. §§ 362(a), 542 and 549(a), PY suggests that a secured interest of some

[2] Affleck Declaration ¶ 9; *accord* Retained Funds Motion ¶¶ 10-11 (admitting transfer of unencumbered "estate cash"); *see generally*, 11 U.S.C. § 541(a).

[3] Retained Funds Motion ¶¶ 10-11.

sort arose after the Petition Date in relation to the Retained Funds and, therefore, it is not required to turn them over to the Trustee for the estate's benefit.

The only basis that PY has cited in support of its position are non-binding cases which do not apply to the facts herein.[4] While at first glance, *In re Dick Cepek*[5] and *In re Printcrafters*[6] appear to state that PY may have an interest in the Retained Funds, both deal with *pre-petition retainers* paid by prospective debtors to their counsel prior to any bankruptcy filing. PY's assertion that the same rationale applies to Retained Funds it obtained *post-petition* is misplaced.

First, it is not at all certain what the Retained Funds afforded to PY – it was essentially given the right to hold $100,000 of estate cash in its trust account for possible use to pay any administrative expense allowed. It was not afforded any rights to use or any secured interest in the Retained Funds. Indeed, by asserting that a secured interest has arisen and refusing to turn over the Retained Funds, it appears that PY is violating the automatic stay imposed under 11 U.S.C. § 362(a). Furthermore, any of the acts necessary to perfect any alleged interest violate the stay,[7] and appear to be an avoidable post-petition transfer under 11 U.S.C. § 549(a). If so, any acts to attempt to perfect a lien are void and of no force or effect.[8] Thus, PY does not have any interest in the Retained Funds that would prevent their turnover to the Trustee for the benefit

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4 *See* Fee Application, Exh. C (Invoices re Employment and Fee Applications) (entry on 6/6/12 – states: "Research issues relating to pre-petition retainer and ability of Ch. 11 counsel to keep retainer *as a secured claim* (3.9) (emphasis added)).

5 339 B.R. 730 (9th Cir. BAP 2006), *cited in* Exh. 2.

6 233 B.R. 113 (D. Colo. 1999), *cited in* Exh. 2.

7 *See* Utah Code Ann. § 38-2-7.

8 *See, e.g., Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371 (10th Cir. 1990).

of the estate, and its admission that the Retained Funds are "estate cash" makes its actions questionable.

Second, to the extent PY got a retainer, the retainer that it got post-petition is without question and by its own admission property of the estate that must be turned over to the Trustee.[9] Furthermore, the retainer is clearly a "security retainer" that is property of the estate and must be turned over to the Trustee.[10] Indeed, even in the context of a pre-petition retainer, the money is property of these estate. For example, the District of Minnesota has stated:

> In the context of a Chapter 11 case, this all means that upon the filing of a bankruptcy petition, the balance of a pre-petition retainer passes into the estate, as property subject to administration. As such, it is subject to turnover to the fiduciary in charge of that administration, and may be applied to other expenses of maintaining the estate.[11]

Thus, the Retained Funds remain property of CAREIC's bankruptcy estate and are subject to turnover to the fiduciary in charge of the administration of such estate – the Trustee. PY's refusal to turn over the Retained Funds to the Trustee is unsupported by case law, at odds with the intent of the Bankruptcy Code, and in this case troublesome given the fiduciary duties of the parties involved in providing the Retained Funds, the context in which the Retained Funds were

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9 *See, e.g., In re Woodcraft Studios, Inc.*, 464 B.R. 1, n. 8 (N.D. Ca. 2011) (post-petition funds provided as retainer remain property of the estate); Affleck Declaration & Retained Funds Motion.

10 In general, three types of retainers exist: (1) classic or true retainers; (2) security retainers; and (3) advance payment retainers. *See Cepek*, 339 B.R. at 736. "A security retainer is generally held as security for payment of fees for future services to be rendered by the attorney. The retainer remains property of the client (in this case, the estate) until the attorney applies it to charges for services actually rendered. Any unearned funds are returned to the client. . . . A security retainer is *per se* property of the estate, even when paid pre-petition (to the extent it has not been drawn down), and cannot be used absent a court order approving fees." *Id.* Given §§ 330 and 503, an advance payment retainer cannot apply.

11 *In re Brick Hearth Pizza, Inc.*, 302 B.R. 877, 882 (Bankr. D. Minn. 2003).

paid, and the fact that at this time it appears that a cash reserve is necessary to fund known and unknown Effective Date distributions under the Proposed Plan.[12]

B. A Portion of PY's Fees Must Be Disallowed.

Section 330(a) of the Bankruptcy Code states that the Court may not allow fees for post-petition services unless such fees are "reasonable compensation for actual, necessary services."[13] Section 330(a)(3) outlines the following criteria to determine the reasonableness of a professional's compensation:

> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.[14]

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[12] The full amount of Effective Date claims to be paid is not yet known inasmuch as the Trustee has been required to provide notice of the case to certain taxing entities who did not receive notice of the bankruptcy case from CAREIC prior to his appointment.

[13] 11 U.S.C. § 330(a)(1)(A).

[14] 11 U.S.C. § 330(a)(3).

Section 330(a)(4)(A) prohibits the Court from allowing compensation for duplicative services, or services that were not "necessary to the administration of the case."[15] The professional seeking allowance of its fees under § 330, has the burden to establish allowance of its fees, including their reasonableness and necessity.[16] Here, given the circumstances of the case, the Trustee maintains that a portion of PY's fees are not allowable under § 330.

1. Fee Related to the Retained Funds Are Not Necessary or Beneficial

The Trustee objects to the following fees detailed in invoices included in Exhibit C to the Fee Application:

- 12/02/11 – Draft motion for approval of retainer (2.1). **2.1 hours = $693.00**
- 12/20/11 – Attend hearing on application for employment and approval of retainer (1.0). Conference with John Morgan re modification of retainer agreement (.4). **1.4 hours = $462.00**
- 6/6/12 – Research issues relating to pre-petition retainer and ability of Ch. 11 counsel to keep retainer as a secured claim (3.9). **3.9 hours = $1,287.00**[17]

The Trustee requests that the Court disallows all of the fees related to these services, in the total amount of $2,442.00, inasmuch as such services were not beneficial to the estate in any way. Furthermore, the fees incurred in June 2012, after the Trustee's appointment, were in no way related to services requested by the Trustee and must be disallowed.[18]

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15 *Id.* § 330(a)(4)(A)(ii)(II).

16 *See, e.g., In re Rogers*, 401 B.R. 490 (10th Cir. BAP 2009).

17 Fees charged on this day were incurred after the appointment of the Trustee in response to the Trustee's request for turnover—they are not beneficial to the estate, but only to PY. It is odd that PY refers to Retained Funds here as a "pre-petition" retainer.

18 *See, e.g., In re TS Industries, Inc.*, 125 B.R. 638, 644 (Bankr. D. Utah 1991) (adopting a standard inquiring into the scope of a debtor's attorney's fees after the appointment of a trustee "to ascertain whether or not they were for the benefit of the estate or for some other interest.") (internal quotations omitted)).

2. Fees Related to Preparing Adversary Complaints and Analyzing Claims Were Not Beneficial

In Exhibit E to its Fee Application, PY includes invoices outlining fees for "Claims Analysis and Objections." PY billed 54.80 hours to this matter with total fees in the amount of $17,590.00. The time billed to this matter pertains to the adversary proceedings initiated by PY on behalf of CAREIC against Jerry Sharko's & Company, Inc., Adv. Pro. 12-02111, Nolan and Kimberly Higa, Adv. Pro. 12-02115, and analysis of a proof of claim filed by Robert Geringer, against whom PY did not file a complaint or a claim objection. The Trustee believes that PY's handling of these matters provided minimal value to the estate because the complaints filed against Sharko's and Higa require significant amendment and have in no way added to a productive resolution of the parties' disputes, and based on the files turned over to the Trustee, PY accomplished no substantive work on the Geringer claim. Accordingly, the Trustee requests that the Court disallow fees in the amount of $17,590.00.

3. Fees Related to the Longview Litigation Should be Disallowed

PY billed 182.80 hours to this matter, which are outlined in the invoices attached as Exhibit G to the Fee Application, and it seeks allowance of $54,046.00 in fees relating to services it performed arising out of the claims filed by Longview Financial Group, Inc. and Longview Financial Holdings, Inc. (collectively, "Longview"). The amount of these fees is not reasonable in light of the state of the Longview matter as it existed on the date of the Trustee's appointment. In sum, upon his appointment, the Trustee does not believe that matters with Longveiw had been addressed in any productive way. CAREIC, through former management, had not successfully obtained coverage for costs of defense under a insurance policy that is property of the estate—the costs of defense that PY now asserts will be paid by the insurer. It is

only because of the Trustee's efforts that the costs of defense are being paid under the insurance policy. PY spent considerable time seeking relief to allow non-debtor insiders coverage under the insurance policy in their disputes with Longview, for no apparent benefit to the estate. Longview's motions for relief from stay against each of the Debtors, had not been addressed or, as far as the Trustee could tell, defended. For whatever reason, CAREIC was spending considerable time evaluating options related to pre-petition litigation that it had pursued against Longview in Utah, and based on information available to the Trustee, no significant analysis had been made as to the claims asserted against CAREIC in New York. Since his appointment, the Trustee has (a) engaged in negotiations with the insurer to obtain coverage of costs of defense and successfully obtained such coverage, (b) evaluated the factual and legal basis for the claims asserted in the New York lawsuit so as to allow it to consider the costs of litigation and negotiate a settlement, (c) engaged in considerable settlement negotiations with Longview, (d) defended against Longview's motion for relief from stay, and (e) obtained a global settlement with Longview and the insurer related to the claims that Longview has asserted against the estate. None of these outcomes were as a result of PY's services, and the Trustee does not believe that PY's services were beneficial and, therefore, are not reasonable.

CONCLUSION

For the reasons stated herein, the Trustee requests that the Court enter an Order: (a) directing that PY not use and turnover the Retained Funds,[19] (b) reducing PY's fees as set for the above; and (c) affording parties such other relief as the Court believes is necessary and proper, including costs related to obtaining turn over of the Retained Funds.

DATED this 5th day of November, 2012.

DORSEY & WHITNEY LLP

/s/ Jeffrey M. Armington
Peggy Hunt
Jeffrey M. Armington
Attorneys for D. Ray Strong, Chapter 11 Trustee of Castle Arch Real Estate Investment Company, LLC

[19] The Trustee understands that turnover may not be appropriate absent an adversary proceeding; but, nonetheless requests that the Court order that PY cannot use the Retained Funds.

EXHIBIT 1

From: Adam S. Affleck [mailto:asa@princeyates.com]
Sent: Wednesday, June 06, 2012 11:10 AM
To: Ray Strong; Hunt, Peggy
Subject: RE: Castle Arch - Retainer

Ray,

Obviously, I would like to keep the retainer for payment of allowed fees. I would like to research the issue. Can you give me a few days to respond?

Adam

Adam S. Affleck

Prince, Yeates & Geldzahler

15 West South Temple, Suite 1700

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Phone (801) 524-1000

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Sound Thinking. Sound Solutions.

From: Ray Strong [mailto:RStrong@brg-expert.com]
Sent: Wednesday, June 06, 2012 10:13 AM
To: Adam S. Affleck; hunt.peggy@dorsey.com
Subject: Castle Arch - Retainer

Adam,

Also, I understand that your firm was paid a post-petition retainer of $100,000 in February 2012 from CAREIC. I would request that you return the retainer to me as soon as possible. Thanks.

Ray Strong | Director

Berkeley Research Group, LLC
201 South Main Suite 450 | Salt Lake City, Utah 84111
T 801-321-0074 (Ext. 3338) | M 801-554-7056
RStrong@brg-expert.com | www.brg-expert.com

EXHIBIT 2

From: Ray Strong [mailto:RStrong@brg-expert.com]
Sent: Monday, October 01, 2012 12:15 PM
To: Adam S. Affleck; Hunt, Peggy
Subject: RE: Castle Arch

Adam,

I am very disappointed in your response regarding the retainer. Rather than just sending a demand for the return of the retainer and filing a motion with the Court, I wanted to sit down with you face-to-face to discuss the circumstances of the case, our Plan, and to get your cooperation without further cost to the estate. Our plan, as you will see, is in the best interest of the Debtor cases and parties given the complexity and frankly mess of these estates.

Attached you will find a copy of the Proposed Disclosure Statement and Plan that was filed Saturday for your review. I strongly urge you to reconsider your position after further review of the Disclosure Statement and Plan in an effort of cooperation to get a Plan confirmed.

Regards,

Ray Strong | Director

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RStrong@brg-expert.com | www.brg-expert.com

From: Adam S. Affleck [mailto:asa@princeyeates.com]
Sent: Friday, September 28, 2012 7:34 PM
To: Ray Strong; hunt.peggy@dorsey.com
Subject:

Ray and Peggy,

Since our meeting, I have taken the time to do some research on the question of retainers paid to chapter 11 debtor's counsel.

My research indicates that Prince Yeates has a strong claim that it has a security interest in its post-petition retainer for fees (to be approved by further order of the court). This position appears to be uniformly supported by case law including the 9th Cir. BAP's decision in *In re Dick Cepek*, 339 B.R. 730 (9th Cir. BAP 2006) and the Colorado District Court's decision in *In re Printcrafters*, 233 B.R. 113 (D. Colo. 1999). This position is further described in *Colliers* as the majority position. *See discussion of* § 328.

Based upon this research, Prince Yeates is not inclined at this juncture (especially without further review of the proposed plan and disclosure statement) to waive the retainer.

In our discussions, you indicated your belief that the law would require Prince Yeates to return the retainer. I would like to better understand you legal arguments. If you have cases (or other arguments) please share them with me.

Also, you mentioned that you need the retainer funds to pay certain priority claims. Please tell me what these claims are and how you would propose to use the retainer pay them if given up.

As to alternative treatment of Prince Yeates' remaining administrative expense claim, Prince Yeates would agree to a note with a reasonable interest rate and a reasonable maturity date (both to be negotiated) that is secured by trust deed in all of the CARIEC consolidated debtors' property. Only then would future payment be protected against a subsequent bankruptcy filing or a post-confirmation conversion to chapter 7. Prince Yeates would further require that these provisions be approved as part of the plan.

Sincerely,

Adam

Adam S. Affleck

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