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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC, Debtor.	Bankruptcy Case No. 11-35082 JTM (Chapter 11) **PRINCE YEATES' RESPONSE TO OBJECTIONS TO APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND COSTS**

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Prince, Yeates & Geldzahler ("**Prince Yeates**") hereby responds to the objections filed by Chapter 11 Trustee, D. Ray Strong (the "**Trustee**") and the Official Unsecured Creditors Committee (the "**Committee**") to its application for allowance of fees and costs.

SUMMARY

Prince Yeates has filed an application requesting allowance of $234,781 in fees and $9,170.38 in costs incurred in representing chapter 11 debtor, Castle Arch Real Estate Investment Company, Inc. ("**CAREIC**"). Prince Yeates has further requested authorization to apply a $100,000 retainer to amounts that are allowed.

Before, and after, Prince Yeates filed its application, the Trustee (later joined by the Committee) demanded that Prince Yeates turn over the retainer so that he could use it to pay other administrative expenses and priority claims—including the Trustee's and the Committee's professional fees. Prince Yeates declined, explaining its understanding that it was permitted to hold the retainer, which had been authorized by the Court, as security for payment of its allowed fees and costs.

"[D]isappointed"[1] with Prince Yeates' response, the Trustee, along with the Committee, now ask the Court to force the issue. They assert the retainer must be turned over because it is "property of the estate" in which Prince Yeates has no special claim or right. They further assert that Prince Yeates' use of the retainer would be at "odds with

[1] Trustee's Objection at 6 ¶ 16.

the intent of the Bankruptcy Code"[2] because (1) the Trustee has now filed a plan, and he needs the retainer to pay the administrative expenses and priority claims of other claimants (which, as condition of confirmation, must be paid in full on the effective date) and (2) allowing Prince Yeates to use the retainer to pay its fees would be unfair to the Trustee's and the Committee's professionals who have volunteered to defer payment of their fees and costs until after confirmation.

Revealing more than his mere "disappointment," the Trustee (with the Committee's joinder) accuses Prince Yeates of (1) acting in "contravention of applicable law,"[3] (2) "violat[ing] CAREIC's automatic stay,"[4] (3) attempting an "avoidable post-petition transfer,"[5] (4) selfishly attempting to "elevate its administrative claim"[6] and get a "leg up"[7] on other professionals in the case, (5) "sabotag[ing] the Trustee's proposed Chapter 11 plan,"[8] and (6) otherwise acting "questionab[ly]."[9]

Prince Yeates is guilty of none of these charges. The retainer was approved by this Court as part of the terms and conditions of Prince Yeates' employment to be applied when fees and costs were allowed. The Trustee and the Committee are correct that it

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[2] Trustee's Object at 9.

[3] Trustee's Object at 2.

[4] *Id.* at 2 & 8.

[5] *Id.* at 8.

[6] *Id.* at 2.

[7] Committee's Objection at 2.

[8] Trustee's Objection at 2.

[9] *Id.* at 9.

remains "property of the estate" until applied. But by its very nature, a retainer serves as security for fees to be incurred (and in this case allowed) in the future. Possessed of such rights, Prince Yeates is not required to part with the retainer except to the extent it exceeds allowed fees and costs.

Under § 328(a), the Court may revisit the terms and conditions of employment (including retainers) that were authorized and change them retroactively. But such a change is not appropriate unless the party seeking the change shows that the "terms and conditions" were "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."[10] The Trustee and the Committee have not even attempted to meet this burden.

Moreover, even if no such burden existed under the Code, the reasons given by the Trustee and the Committee for return of the retainer are unpersuasive. Giving back the retainer will do nothing to fix a cash shortfall at confirmation because, under 1129(a)(9), the Trustee will still be required to pay Prince Yeates' administrative expense in full on the effective date. And, even if the retainer is disgorged and Prince Yeates must wait until the effective date of the plan for payment, "all other professionals (namely the Trustee's professionals and the Committee's professionals) have agreed to defer payment of their allowed administrative expenses until after confirmation."[11] So the Trustee's and the

[10] 11 U.S.C. § 328(a).

[11] Trustee's Objection at 2.

Committee's professionals have already agreed that it is "fair" that Prince Yeates be paid ahead of them.

Seeking to capitalize on the tone set by the Trustee's accusations relating to the retainer, the Trustee and the Committee further seek disallowance of substantial fees. They assert that services provided by Prince Yeates have not been beneficial to the Trustee in his administration of the case. Part of the reason for this, however, is that the Trustee has decided not to consult with Prince Yeates concerning the work product of its individual lawyers. Moreover, whether the services provided by Prince Yeates have been beneficial to the Trustee is not, however, the appropriate test. The appropriate question is whether, at the time the services were provided, they were reasonably calculated to benefit the estate. They were, and this Court should allow Prince Yeates' fees and costs in full.

ARGUMENT

POINT I:
THE COURT SHOULD AUTHORIZE PAYMENT OF ALLOWED FEES AND COSTS FROM THE RETAINER.

A. Prince Yeates Holds the Retainer as Security for Payment of its Fees.

Attracting competent debtors' counsel and protecting the rights of such counsel to be paid are important policy objectives reflected in several provisions of the Code. Section 328(a) is one of them. It allows courts to authorize "retainers" for professionals as part of the "reasonable terms and conditions of employment."

Outside of bankruptcy, when a client provides his counsel with a retainer, the attorney automatically obtains lien rights under Utah's attorneys' lien statute found at Utah Code Ann. § 38-2-7(2)(b). Additionally, the attorney may rely on common law principles of offset to apply the retainer to fees owed by the client.

The question raised by the Trustee and the Committee is whether bankruptcy counsel enjoy the same or similar rights as their non-bankruptcy counterparts when the court authorizes a post-petition retainer under § 328(a).

Prince Yeates has been unable to find a meaningful discussion of the question in any reported case. Most courts simply take for granted that a security interest arises—under attorneys' lien statutes or otherwise. For example, in *In re Cottrell International, LLC,*[12] the question before the court was whether it should grant a post-petition retainer requested by counsel. As part of its analysis, it agreed with counsel that "if the retainer arrangement is approved by the Court, the attorney will have a lien on property of the estate to be held by the attorney as security for payment of fees."[13]

Authoritative texts, such as *Colliers* also seem to take for granted that retainers (whether given by debtors pre-petition or authorized by courts post-petition) give the attorney the status of a secured creditor to the extent of allowed fees and costs.

> With respect to "secured" retainers, courts generally hold that a professional with such a prepetition retainer is a "secured creditor" and has a security interest in the retainer, noting that the professionals receiving prepetition retainers to insure payment of fees to be earned in the chapter 11

[12] 2000 WESTLAW 1180282 (Bankr. D. Colo.).

[13] *Id.* at *2.

> case (*or postpetition retainers authorized by the court*) become secured creditors by virtue of a possessory interest in cash.[14]

The Trustee and the Committee assert that an attorney receiving an authorized post-petition retainer has no special rights to apply the retainer to fees and costs incurred.[15] But this assertion, if accepted, would make post-petition retainers superfluous. Attorneys would have no reason to ask for them. Courts would have no reason to grant them. Logic and reason dictate that, by authorizing a retainer, a court intends that it be treated as one—namely, that it serve as an enforceable security for payment of fees and costs to be allowed upon further application to the court.

B. There are no Unforseeable Developments that Support Retroactive Modification of the Order Authorizing the Retainer.

Despite the fact that retainers create an enforceable security for payment, courts are permited to retroactively "un-authorize" the retainer itself and, thus, defeat the corresponding security interest. Under § 328(a), a court may revisit a previously-authorized retainer if the terms and conditions are "prov[ed] to have been improvident in

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[14] 16 *Colliers on Bankruptcy* ¶ 328.02[4] (16th ed. 2012) (emphasis added).

[15] The Minnesota bankruptcy court's decision in *In re Brick Hearth Pizza, Inc.*, 302 B.R. 877 (Bankr. D. Minn. 2003), is quoted and cited by the Trustee and the Committee for the proposition that attorneys have no security interest in *pre-petition* retainers after the case is filed. This opinion, however, is in the extreme minority, and this court should reject it. For a case representative of the majority view, *see In re Printcrafters, Inc.*, 233 B.R. 113 (D. Colo. 1999) (holding that chapter 11 debtor's counsel obtained a security interest in a pre-petition retainer "in accordance with state statute, the Code, and the bulk of relevant case law"). Moreover, since the retainer in this case was authorized by the court, it is distinguishable. Pre-petition retainers are appropriately subject to greater scrutiny and should be afforded less deference because they are given without notice and have no judicial oversight.

light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."[16]

By demanding that Prince Yeates forfeit its court-approved retainer, the Trustee and the Committee are, effectively, demanding that the terms and conditions of Prince Yeates' employment be retroactively changed. But they fail to demonstrate how the two supporting bases that they have identified (i.e., the Trustee needs it for confirmation and it is not fair to others) arise from "developments" that "were not being capable of being anticipated" at the time the retainer was approved.

Moreover, there have been no such developments. Appointment of the Committee, appointment of the Trustee, additional administrative expenses for professional fees, CAREIC's poor cash position--all were capable of being anticipated when the Court approved the retainer as part of Prince Yeates' employment. So even without analyzing the bases for return argued by the Trustee and the Committee, their demand should be denied.

C. The Bases Raised by the Trustee and the Committee for Return of the Retainer Lack Substance.

Having failed to address (or even attempt to address) the correct standard for retroactively changing the terms and conditions of employment, there is no need to address the bases for return of the retainer that have been argued by the Trustee and the Committee. The bases, nevertheless, lack real or compelling substance.

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[16] 11 U.S.C. § 326(a).

1. Return of the Retainer Will Not Advance Confirmation.

The Trustee and the Committee assert that return of the retainer is critical to confirmation of the Trustee's recently-filed plan. Specifically, they contend that, without it, the Trustee will be unable to comply with § 1129(a)(a)--which requires that administrative expenses and certain priority claims be paid in cash on the effective date. The retainer (it is argued) will provide the cash necessary to pay these expenses and claims.

Return of the retainer is not, however, the key to confirmation of the Trustee's plan. It will not even help. If returned, Prince Yeates' allowed administrative expense will still have to be paid in full at confirmation. So unless Prince Yeates agrees to defer payment until after the effective date, getting the retainer back will not make the estate "money ahead" for purposes of satisfying other administrative expenses or priority claims at confirmation.[17]

[17] For suggesting that it may not agree to deferment (especially if it is forced to return the retainer), the Trustee and the Committee reprove Prince Yeates for not being a "team player." They fail to acknowledge, however, that Prince Yeates is no longer on the team. At this juncture (assuming allowance of its fees and costs), Prince Yeates is simply the holder of an administrative expense—in other words, a creditor. Moreover, professionals of the Trustee and the Committee have reasons to defer. If the plan is confirmed, the Trustee and his professionals will continue to play a significant role in the post-confirmation administration of CAREIC's estate and the "Legacy Trust" that is to be created under the plan. So they have a financial stake in agreeing to deferment. So too, the Committee's professionals (which continue to accrue fees in this case) have a continuing financial incentive for cooperating with the Trustee and volunteering deferment.

The Trustee and the Committee have further failed to present facts showing how much the Trustee really needs. When the Trustee first informed Prince Yeates that he needed the retainer to pay other administrative expenses and priority claims, Prince Yeates requested an accounting. None was given. And despite further requests for the same information,[18] the Trustee and his counsel have refused to supply it—contending that the information is irrelevant. Without some data—which the Trustee not only refused to give but which is not contained in his objection or in his disclosure statement—the Trustee is asking that the Court rely on the strength of his word alone.[19]

2. Application of the Retainer to Pay Prince Yeates' Allowed Fees and Costs is not Unfair to the Trustee's Professionals or the Committee's Professionals.

Application of the retainer will allow Prince Yeates to receive payment of a portion of its allowed fees and costs now instead of later. The Trustee and the Committee complain that this is not fair. Their complaints, however, should not be taken too seriously.

The CAREIC estate is not administratively insolvent. The concern of the Trustee and the Committee is not, therefore, that use of the retainer to pay Prince Yeates'

[18] *See* October 1, 2012 email attached as Exhibit 2 to the Trustee's Objection.

[19] In footnote 12 of his objection, the Trustee explains that the reason he cannot tell the Court how much is needed is because, due to former management's failure to schedule claims, notice of CAREIC's bankruptcy was not given to all priority claimants. He says that he has now given notice to these creditors but, because they have not yet filed claims, he cannot provide the necessary data. A review of the docket entries in CAREIC's case does not, however, reveal that the Trustee has given any such additional notice. And it is not clear whether the alleged noticing problem was in CAREIC's case or in one or more of the cases of CAREIC's affiliates.

administrative expense will put their professionals at risk of non-payment. They simply do not want Prince Yeates to be paid any portion of its allowed fees and costs before them.

As noted by the Trustee in his objection, however, "all professionals, including himself, his professionals and professionals employed by the Official Unsecured Creditors' Committee, have agreed to deferral of Effective Date distributions so as to obtain confirmation."[20] Having agreed to be paid after the effective date of the plan, the Trustee's professionals and the Committee's professionals have decided that it is in their best interests to defer payment of their fees and costs to the payment of all administrative expenses and priority claims held by others—including, presumably, Prince Yeates. It would seem, therefore, to make little difference to them whether payment to Prince Yeates is made now, out of the retainer, or on the effective date of the plan. They will still get paid second.

3. Prince Yeates is not Responsible for the CAREIC Estate's Poor Cash Condition.

Without saying it directly, the underlying theme of the "fairness" arguments made by the Trustee and the Committee is that Prince Yeates should be held accountable for CAREIC's poor cash condition because it took the retainer. To rectify, Prince Yeates should give it back. The retainer, however, is not the problem. The real reason that the

[20] Trustee's Objection at 2.

estate has no cash is because the Trustee (with the Committee's acquiescence) has balked at pursuing "low-hanging fruit."

The uncontroverted evidence received at the hearing for appointment of a trustee included that, within a year of filing, CAREIC agreed to transfer land and water rights located in Tooele, Utah to CAOP I in satisfaction of a prepetition debt. Unfortunately, the deeds to the land and water were not recorded contemporaneously with the operative agreement. The deed to the land was not recorded until within 90 days of the bankruptcy filing, and the deed to the water was never recorded.

Given CAREIC's insolvency, these facts give rise to two avoidance claims that would lead to recovery of the assets or their value—namely, a preference claim under § 547 for the land and a strong-arm claim under § 544 for the water. In his disclosure statement, the Trustee values the land at approximately $3.5 million and the water at $3.1 million.[21] CAOP I holds these assets and also has significant cash to satisfy a money judgment. But since his appointment as CAREIC's chapter 11 trustee, the Trustee has done nothing to realize on these claims. The reason is not because more investigation is needed or that the claims lack merit. Rather, it is because the Trustee is conflicted.

CAREIC is the manager of CAOP I, as well as all of the other CAREIC affiliates. The Trustee knows that he cannot be involved in an adversary proceeding or contested matter where he must act for CAREIC (as its trustee) and for CAOP I (as its manager) on

[21] Disclosure Statement at 31.

opposite sides of the same issue.[22] Paralyzed by the prospect of taking action that would reveal the conflict, he has done nothing to realize on the simple and substantial avoidance claims that CAREIC has against CAOP I.[23]

Inexplicably, the Committee, which relied, in part, on the existence of intercompany conflicts to oust former management and to obtain the Trustee's appointment, has completely acquiesced to the same conflicts in the hands of the Trustee. The Committee has further acquiesced to the Trustee's complete inaction regarding the prosecution of the avoidance claims against CAOP I—claims which the Committee has already substantially (if not completely) proved in the contested evidentiary hearing on the Committee's motion for appointment of a trustee.

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[22] Admittedly, CAREIC's management was possessed of the same conflicts. But there is no requirement under the Code that management be disinterested. For a trustee and other professionals, on the other hand, there is. *See e.g.*, *In re BH&P, Inc.*, 949 F.2d 1300 (3d Cir. 1991) (trustee disqualified on grounds of lack of disinterestedness where he was trustee in the chapter 7 cases of an entity and two of its principals and there were competing claims between the estates); *see also In re Interwest Business Equipment, Inc*., 23 F.3d 311 (10th Cir. 1994) (single professional prohibited from simultaneously representing multiple, related chapter 11 debtors where the related debtors had "substantial intercompany debts" because, in such circumstance, the Trustee's/debtor's duty to examine and object to claims created an "actual conflict" for the professional who was charged with assisting to fulfill that duty).

[23] In his plan, the Trustee proposes to shift responsibility to resolve his obvious conflicts to a "Conflicts Referee" under "Conflict Resolution Procedures" contained in a trust agreement that was yet to be written. This plan provision is too little and too late. Conflicts must be addressed when they arise—not some convenient time in the future under a plan. Moreover, they must be addressed to the Court—not a third-party referee who is on the estate's (or multiple estates') payroll.

In light of these facts, the Trustee and the Committee cannot be heard to complain that it is not fair to their professionals if Prince Yeates is allowed to apply the retainer approved by this Court to a portion of its allowed fees and costs.

POINT II:
THE FEES REQUESTED WERE REASONABLE AND NECESSARY

A. Fees for Obtaining Authorization of, and Defending, the Retainer.

The Trustee objects that time spent by Prince Yeates to obtain and defend the retainer should not be allowed because "such services were not beneficial to the estate in anyway" and were beneficial "only to PY."[24]

This objection presupposes that "benefit to the estate" is a requirement for allowance under § 330. It is not. The appropriate question under § 330 is whether the fees were "necessary." As explained by Judge Kimball in *In re Ricci*,[25] "necessary fees include, but are not limited to those that benefit the estate."[26]

Even though all matters relating to employment and getting paid can be construed as being for the sole benefit of the professional, courts recognize that, since all matters relating to employment require court approval, they are necessary and, thus, compensable. For example, in *In re CF&I Fabricators of Utah, Inc.*,[27] Judge Boulden, considered fees incurred to prepare a fee application. Although the fee application was

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[24] Trustee's Opposition at 11 & footnote 17.

[25] 217 B.R. 901 (D. Utah 1998).

[26] *Id.* at 906.

[27] 131 B.R. 474 (Bankr. D. Utah 1991).

for the benefit of counsel (so that it could get paid), Judge Boulden recognized that, "[b]ecause the fee application is required by the bankruptcy court, the professional is entitled to the reasonable market rate for the time in fulfilling that requirement."[28]

Fees incurred to become employed and to obtain approval of a retainer as part of the terms and conditions of employment should be treated no differently than fees incurred for drafting a fee application discussed in *CF&I*. Both are required by the Code as part of the court's oversight over employment of, and compensation to, professionals of the estate.

In *CF&I*, Judge Boulden further noted that fees incurred for defending a fee application and responding to objections are also compensable. Even though she acknowledged that it was a "self serving exercise," she noted that "educating the court so that it can make an informed judgment is a valuable service to the estate."[29] The fees incurred by Prince Yeates for researching issues in defense of the Trustee's turnover demand and objection to the retainer (which appear in this memorandum) are, therefore, also properly compensable.

B. Fees Relating to Objections to Claims.

The Trustee asserts that the fees for investigating, researching, and filing the objections to claims filed by Nolan and Kimberly Higa (Adv. No. 12-2115) and Jerry

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[28] *Id.* at 483.

[29] *Id.* at 488. Courts further allow compensation for fees incurred on appeal in defending an objection to a fee application and employment issues. *See, e.g., In re Riverside-Linden Investment Co.*, 945 F.2d 320 (9th Cir. 1991).

Sharko's & Company, Inc. (Adv. No. 12-2111) should be denied because the complaints filed by Prince Yeates on behalf of CAREIC "require significant amendment and have in no way added to the productive resolution of the parties' dispute."[30] He further asserts that the investigation and research done by Prince Yeates in the preparation for filing an objection against the claim filed by Robert Geringer is of no use or benefit because he cannot tell from the files turned over by Prince Yeates what it accomplished.

Again, the Trustee confuses the applicable standards. Whether the work done by Prince Yeates at CAREIC's request is compensable does not depend on whether it has helped the Trustee further his administrative objectives in the case. The question, rather, is whether the services were necessary (i.e., were they calculated to advance the legitimate interests of the estate at the time they were provided). They were, and, therefore, they are compensable.

The Trustee, moreover, does not support his assertion that significant amendments are needed to the Higa and Sharko's complaints with any explanation. Does he think the factual assertions incorrect? Are the legal theories flawed? The Trustee does not say. And, thus, neither Prince Yeates nor this Court can determine what is wrong with them.[31]

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[30] Trustee's Objection at 12.

[31] The Trustee, moreover, has done nothing in the pending cases that shows that he intends to do anything other than prosecute the claims objections as drafted. In the Sharko's adversary proceeding, the Trustee filed a form 35 report of parties planning meeting on October 21, 2012. In it, the parties agreed to a deadline of December 21, 2012 to amend pleadings, but there is nothing in the report to indicate that the parties anticipated "significant amendment" to the complaint. In the Higa adversary proceeding,

Nor does he explain why the objections have in no way added to the "productive resolution of the parties' dispute." Without explaining what this means, Prince Yeates does not know how to respond to this criticism.

The Trustee's complaint that there is nothing that evidences work done on the Geringer objection reveals that the Trustee has not carefully reviewed the time entries. Work on the objection to Geringer's claim was primarily investigative—gathering and reviewing documents, interviewing witnesses, conducting research, and formulating legal theories. The Trustee was appointed before CAREIC could finish its investigation and before an objection was filed. To obtain a benefit from the services provided by Prince Yeates, the Trustee could have asked to consult with Prince Yeates concerning its investigation and research. He also could have asked for a detailed memorandum setting forth summaries of interviews, mental impressions, and legal conclusions. The Trustee, however, did not ask. The Trustee instructions to Prince Yeates in transitioning work to his counsel were that Prince Yeates was to do only what the Trustee requested and no more. The Trustee did not request anything from Prince Yeates relating to the disputed Geringer claim. Accordingly, it is understandable that he feels that Prince Yeate's services to CAREIC have not been beneficial to him. But it is not a basis for denying Prince Yeates' fees.

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the Trustee has responded to an order to show cause indicating his intent to proceed with the complaint as drafted.

C. Fees Relating to Longview.

The Trustee and the Committee have both objected to the fees incurred by Prince Yeates in this billing category raising five distinct complaints. Each complaint is easily addressed.

First, the Trustee complains that, Prince Yeates should not be compensated for time spent attempting to clarify coverage issues relating the D&O policy with Rockhill Insurance Co. because Rockhill ultimately declined to cover the defense costs incurred by CAREIC relating to Longview's claims in the bankruptcy case. The Trustee touts his own success in obtaining a reversal in Rockhill's denial as evidence of the substandard services provided by Prince Yeates.

Prince Yeates is certainly impressed with the Trustee's success. But that does not mean that Prince Yeates's services in this regard were not calculated to benefit the estate. Prince Yeates assisted CAREIC in getting the ball rolling. It helped CAREIC understand the D&O policy and helped it make a claim. The fact that CAREIC was not successful does not mean that Prince Yeates' services were not necessary.

Moreover, Prince Yeates cannot be blamed for Rockhill's denial of coverage. Rockhill's denial came in March 2012. CAREIC intended to go back to Rockhill and seek a reversal of its coverage decision. But other matters (such as the Committee's motion to appoint a trustee) intervened. Who is to say whether CAREIC (with the assistance of Prince Yeates) could have also obtained a reversal of Rockhill's coverage position? The fact that the Trustee was successful does not mean that the services

provided by Prince Yeates to seek a coverage determination in the first place were not worthy of compensation.

Second, the Trustee and the Committee complain that the services provided by Prince Yeates relating to a stipulation for relief from stay was not necessary because it was only beneficial to the individual defendants in the Longview litigation pending in New York. This complaint fails to consider the substantial benefit arising from this stipulation.

Litigation of Longview's claims against CAREIC pending in New York were stayed upon CAREIC's bankruptcy filing. But Longview's claims against former management (including Jeff Austin who was then managing CAREIC in bankruptcy) was not. Most of the claims against these individual defendants were also asserted against CAREIC. So judgment taken against one of them in New York could prejudice CAREIC's ability to defend Longview's claims against CAREIC in the bankruptcy court or in New York (if the litigation against CAREIC ultimately ended up there.)

The individual defendants were, for the most part, impecunious and could not afford the substantial legal fees necessary to pay for defending the claims against them in New York. Prior to CAREIC's bankruptcy, Rockhill covered all defense costs of all parties (including CAREIC). Upon filing, however, Rockhill's refused to continue paying for the defense costs on grounds that to do so would violate the stay—because the D&O policy belonged to CAREIC.

It was in CAREIC's best interest that the individual defendants have resources to defend. So to persuade Rockhill to continue its coverage for the individual defendants (and, thus, protect CAREIC's interests against entry of an adverse judgment that might prejudice its ability to defend the same claims) CAREIC (and all of the CAREIC affiliates) entered into a stipulation for relief from stay with all of the defendants in the Longview case—which was for the sole purpose of ensuring that the individual defendants would have resources from CAREIC's D&O policy to defend.

If the foregoing explanation of the legitimate reasons for obtaining the stipulation were not enough, there are others. Cutting loose funding to pay the defense costs of the individuals was further beneficial to CAREIC because litigation materials and discovery generated from the defense of their claims has been shared with the Trustee. The Trustee, to the understanding of Prince Yeates, has done no formal discovery in the Longview matter. But he has used the information generated by counsel for the individual defendants (whose legal fees were paid by Rockhill pursuant to the stipulation) to assist him in settling Longview's claims against the estate. Moreover, since the settlement is global and includes all individual defendants, the Trustee benefits again from the stipulation—because Rockhill would not settle with any party unless relief from stay was granted.

Third, the Trustee complains that, even though Prince Yeates spent time researching and preparing to respond to Longview's motion for relief from stay, Prince Yeates had not "addressed" or "defended" it. By this complaint, the Trustee (like his

complaint relating to the Geringer claim) demands a finished product to prove that the services provided by Prince Yeates were necessary. Again, however, the Trustee ignores that the response was not due until after he was appointed as Trustee. Prince Yeates researched the issues raised in the motion in preparation to prepare and file a response (including jurisdictional issues under *Stern v. Marshall*, the enforceability of forum selection clauses, and other legal and factual issues). Prince Yeates further formulated and prepared an outline of CAREIC's response which was delivered to the Trustee. Even though Prince Yeates offered to assist the Trustee in responding to Longview's motion, the Trustee declined. It is duplicitous for the Trustee to decline to take advantage of work done by Prince Yeates and then argue that it did him no good and, therefore, should be not compensated.

Fourth, the Trustee complains that Prince Yeates spent time assisting CAREIC to continue with litigation of claims in Utah that CAREIC had against Longview and its principal, Stuart Schultz, that had no apparent purpose. But just because the Trustee cannot discern the purpose does not mean there was none. In fact, there was. One of the last services provided by Prince Yeates was to obtain a judgment against Schultz—who CAREIC understands to be the sole, or majority, owner of Longview Holdings (which, in turn, in the sole owner of Longview Financial). CAREIC's strategy was to collect on this judgment and either get cash (well in excess of the fees incurred to obtain it) or execute on Schultz' interest in Longview--which may have speeded the early resolution of the Longview claims.

The same strategy held with CAREIC's claims against Longview for amounts due under a promissory note. Prince Yeates assisted CAREIC to amend an existing complaint which Prince Yeates and CAREIC believed could quickly proceed to summary judgment. Once obtained, this judgment was intended to be collected for cash, offset against Longview's claim in the bankruptcy, or used execute on Longview's assets—including its claims against CAREIC.

The Trustee says he cannot figure out why prosecution of these claims would benefit the estate. Prince Yeates cannot figure out why the Trustee would even ask such a question. To be sure, the Trustee has benefitted from Prince Yeates' work on these claims because (according to Prince Yeates' understanding of the proposed settlement with Longview) these claims are resolved in the mix.

Fifth, the Trustee asserts that Prince Yeates failed to perform any significant analysis as to the claims asserted against CAREIC in New York. This allegation is simply unfounded. The time entries on the issue prove differently. The Longview claims were the single most important issue to CAREIC in its chapter 11 case. Prince Yeates assisted CAREIC in evaluating the claims and formulating a strategy to deal with them as a prelude to filing and obtaining confirmation of a chapter 11 plan. Ultimately, CAREIC (along with the other CAREIC affiliates) formulated an objection to Longview's claims—which was based upon hours of research and analysis and which boiled the objection down to a couple of basic questions. The complaint prepared by Prince Yeates

(along with counsel for the CAREIC affiliates) objecting to Longview's claims was the product of this effort.

In his disclosure statement, the Trustee agrees with Prince Yeates and states that "Longview's Claims do not appear to have merit."[32] He does not state in his disclosure statement how he came to his opinion, but Prince Yeates cannot believe that its analysis proved as utterly useless to the Trustee as he seems to infer. Again, even if the Trustee chose not to rely on anything that Prince Yeates did, the services were still beneficial to the estate and necessary for CAREIC's administration of the chapter 11 estate.

D. Fees Incurred at the Highest Billing Rate.

The Committee complains that too much time was billed by Prince Yeates' lead counsel, Adam Affleck, whose hourly rate is $330. They complain that certain services should have been pushed down to professionals with lower billing rates.

The Committee objection is not without legal support. But it wrongly assumes that Prince Yeates, and specifically, Affleck, has failed to exercise sufficient judgment regarding when it is more efficient to push work down to others.

First, the Committee complains that Affleck spent too much time doing research. This complaint assumes that the research Affleck did could have been done in the same amount of time by someone with a lesser billing rate. This is not true. Billing rates (at least at Prince Yeates) are not a function of seniority but of efficiency. A research project conducted by a senior attorney with a high billing rate is designed to cost the same as it

[32] Disclosure Statement at 32.

would if conducted by a junior attorney at a low billing rate. Moreover, when research is conducted by a junior attorney, the lead attorney must review and check it. So oftentimes, it is more expensive to push research projects down than to keep them at the top. In the end it is judgment call—which was appropriately made in this case.

Second, the Committee complains about time spent by Affleck helping CAREIC with its schedules. Prince Yeates admits that sometimes schedules can be routine. CAREIC's schedules, however, were not. What preliminary work that could be done by paralegals was done. Only after factual and legal questions became too complicated did Prince Yeates rely on its attorneys and, specifically, Affleck. Moreover, because the schedules were complicated and required careful unraveling of factual and legal questions, Affleck's services were best suited. Moreover, in Affleck's judgment, his intimate familiarity with the schedules was necessary to assist CAREIC in the administration of its case. This intimate familiarity could not be developed simply by reviewing the work of another professional.

Third, the Committee complains that Affleck spent too much time attending management meetings—which included CAREIC's management and the lead counsel of each of the CAREIC affiliates. But, as with the schedules, in Affleck's judgment, it was necessary for him to have complete familiarity with all issues, problems, and scheduling issues in the case. It was in the management meetings where this familiarity was developed. It could not have been developed any other way.

Fourth, the Committee complains that Affleck should not have taken the time to draft minutes of the management meetings. The Committee suggests that someone on the management team or a lower-billing professional should have prepared them. But another professional could have effectively prepared the minutes without also attending the meeting. So to save fees on preparation of the minutes, CAREIC would have had to spend more fees for representation at the management meetings. Also, since the discussions at the management meetings included technical legal issues and allocation of assignments occasioned by the joint administration of CAREIC's case with its affiliates' cases, CAREIC determined (and Affleck agreed) that Affleck's assistance in drafting the minutes would be most efficient for all involved.

CONCLUSION

For the foregoing reasons, the Court should overrule the objections filed by the Trustee and the Committee and allow Prince Yeates' fees and costs in the amounts requested and further allow partial payment from the previously authorized retainer.

DATED this 12th day of November, 2012.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

By: /s/ Adam S. Affleck
Attorneys for Former Debtor-In-Possession
Castle Arch Real Estate Investment
Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2012, I electronically filed the foregoing **PRINCE YEATES' RESPONSE TO OBJECTIONS TO APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND COSTS** with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all parties whose names appear on the electronic mail notice list for this case.

I further certify that on the 14th day of November 2012, I served the foregoing **PRINCE YEATES' RESPONSE TO OBJECTIONS TO APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND COSTS**, by regular first class United States mail, postage fully pre-paid, to the following:

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Salt Lake City, Utah 84111-3400

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Dorsey & Whitney
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Lon A. Jenkins
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/s/ Adam S. Affleck

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