Anna W. Drake, No. A0909
ANNA W. DRAKE, P.C.
175 South Main Street, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 328-9792
Facsimile: (801) 413-1620
Email: annadrake@att.net
Attorneys for Richard Dance, 1031 ECI LLC, Kenneth Gneuhs, Bill Grundy, Naomi King Trust, Daniel Maga, Pearl Noreen, Fran Pistorio and Ziba Sabour

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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; 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) Honorable Joel T. Marker

OBJECTION TO ADEQUACY OF
DISCLOSURE STATEMENT FOR CHAPTER 11 TRUSTEE'S
PLAN OF LIQUIDATION DATED SEPTEMBER 29, 2012

Richard Dance, 1031 ECI LLC, Kenneth Gneuhs, Bill Grundy, Naomi King Trust, Daniel Maga, Pearl Noreen, Fran Pistorio and Ziba Sabour, (collectively **"Preferred Investors"**),

holders of Preferred Units[1] in Castle Arch Secured Development Fund, LLC (**"CASDF"**), by and through their counsel, Anna W. Drake, objects to the adequacy of the *DISCLOSURE STATEMENT FOR CHAPTER 11 TRUSTEE'S PLAN OF LIQUIDATION DATED SEPTEMBER 29, 2012* (the **"Disclosure Statement"**), and in support thereof, respectfully represent as follows:

INTRODUCTION

The Plan as summarized in the Disclosure Statement purports to be very simple: just consolidate the Legacy Debtors[2] and then treat those Legacy Debtors all equally – without the ability of the individual Preferred Investors to vote on such consolidation in the CASDF case and without an analysis of the effects of consolidation versus non-consolidation. The documentation necessary to determine how Creditors and Interest Holders will be paid is not provided, there is no mention whatsoever of the amount of administrative expenses, no liquidation analysis is provided, and simply, there is no information to assist the Preferred Investors in determining whether to vote for or against the proposed Plan.

OBJECTION

The Preferred Investors allege that the Disclosure Statement fails to contain "adequate information" within the meaning of 11 U.S.C. § 1125(a)(1)[3] for the following reasons:

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[1]These Preferred Investors hold no less than 1,650,079 units of the total 7,303,417 Preferred Units in CASDF (22.59%).

[2]All capitalized terms herein shall correspond to defined terms in the Plan, unless otherwise indicated.

[3]All further references to 11 U.S.C. § 101 *et. seq.* shall be shown as "§ ___."

1. **Consolidation Issues**.

Paragraphs C(1) and C(2) of Article IV of the Disclosure Statement provide for the substantive consolidation of CAREIC, CAK (Kingman), CAOP Managers, CAS (Smyrna), CASDF (Secured Development Fund) and CASV (Star Valley) to be named the "Legacy Debtors." Excluded from this definition are CAOP I and CAOP II. This consolidation is to be "for all purposes under the Plan, including for purposes of voting on the Plan, allowance of Claims or Equity Interests and Distribution through the Plan and, as applicable, the Legacy Trust."

Although the Trustee does outline the factors enumerated in *Fist v. East,* 114. 4.2d 177 (10th Cir. 1940), his analysis contains summaries of his conclusions regarding each of those factors, rather than disclosing the actual facts and numbers supporting those conclusions. For example, the Trustee makes the following statement:

> The Legacy Debtors were operated as a single enterprise, with none of the Legacy Subsidiaries having separate management or an existence outside of CAREIC and the corporate family. As discussed above in Part II, Section (B)(4), management used separate bank accounts of the Legacy Debtors as "piggy banks" for the others, transferring Cash from the accounts to whichever Entity was in need of Cash at the time. In fact, *the Trustee has determined that given the Legacy Debtors' use of Cash and the volume and complexity of intercompany transfers and intercompany Claims involved, attempting to treat the Legacy Debtors as separate Entities would be extremely difficult and, if possible, prohibitively expensive. It also would serve little purpose as any resulting benefit obtained by any one Legacy Debtor would be consumed by the expense and delay involved in achieving that benefit.* [Disclosure Statement at pp. 37 - 38; emphasis added.]

This statement contains a number of conclusions which are meaningless without the supporting information. Substantial information needs to be provided to all parties, including the benefits and burdens upon all parties, as the result of a possible consolidation. It is not enough that the Trustee simply believes that it is too complicated or too expensive to discuss.

Another issue is raised by the Trustee's conclusion that the CAOP Debtors should *not* be included in the consolidation. There appear to be significant assets in these entities, yet the Trustee gives *no* basis whatsoever for why these entities should not be part of the consolidation.

2. **Conflicts of Interests**.

A review of the Schedules filed in each of the Debtors' Cases reflects that there are substantial intercompany claims. Through consolidation, the Trustee seeks to wipe out all of these intercompany claims. The Trustee must disclose that one the major reasons for his efforts to obtain consolidation is that he has a major conflict of interest in pursing these claims. Rather than dealing "head on" with this issue, he simply wipes the slate clean through consolidation. If these cases (other than CAREIC) were still being run as independent cases with separate counsel, those counsel could advise each respective Debtor regarding its claims and defenses regarding secured and unsecured loans between the companies, as well as the effect of possible avoidance actions. The Trustee should be required to discuss all ramifications of his conflicts – including the need to file claims and pursue avoidance actions.

3. **<u>Legacy Trust Issues</u>**.

The crux of the Trustee's Plan (*vis-a-vis* the Preferred Investors) is stated as follows (*see* Disclosure Statement at p. 71):

> To facilitate this [Legacy Voting Options] election, Ballots distributed to holders of Allowed Legacy Preferred Interests will require each holder voting on the Plan to choose between the Legacy Liquidation Option or the Legacy Investment Option. A majority vote of all valid Ballots distributed to holders of Allowed legacy Preferred Interests who actually vote will determine which of the Legacy Voting Options applies, regardless of any one holder's vote to accept or reject either of the Legacy Voting Options. The Ballot will expressly state, consistent with Article V, Sections 5.1.5 of the Plan, that regardless of an election of the Legacy Investment Option, the Legacy Liquidation Option will apply if the Net Legacy Liquidation Proceeds, less costs determined by the Legacy Trustee in his sole discretion to be necessary for administration of the Legacy Trust during the investment under the Legacy-Blackstar Agreement, are in an amount less than the "<u>Minimum Investment</u>" required under the Legacy-Blackstar Agreement.

In addition to the complexity of this arrangement, *none* of the information needed by the Preferred Investors to decide whether to vote for or again the Plan on this issue is presently contained in the Disclosure Statement.

(a) The "Plan Documents Supplement" and "Legacy Trust Agreements" will not be provided to any parties in interest until ten (10) days prior to the Confirmation Hearing (conceivably *after* voting has ceased). These documents contain the most important provisions of the Plan and govern how the assets will be administered and how the Plan will be administered, including the issue of administrative expenses. This

information *must* be provided as part of the Disclosure Statement and all parties in interest should be allowed to review this information *prior* to approval of the Disclosure Statement. The Trustee's failure to include this information as part of the Disclosure Statement process is unfair and violates the spirit of § 1125. This information *is* the Plan and must be vetted prior to approval of the Disclosure Statement.

(b) The Management fee schedule, Blackstar Agreement and Blackstar Disclosure documents will apparently not be filed until three (3) days prior to the Disclosure Statement hearing. As indicated above, this information would normally be included in the Disclosure Statement in advance of the time to object to the Disclosure Statement. Furthermore, providing that information three (3) days prior to the Disclosure Statement hearing is useless since the hearing is scheduled for Monday, December 3, 2012. These documents must be included within the Disclosure Statement *now* so that all parties can review this essential information which is an integral part of the treatment for the Preferred Investors.

(c) Treatment of secured tax claims and secured claims provides for surrender, payment or sale – but at whose discretion, on what timetable, etc? This information likely would be included in the D/S if it were not included in the Legacy Trust documents which no one will even see until 10 days prior to confirmation hearing.

. The following information is not contained within the Disclosure Statement or Plan:

4. **Claims**. Despite the passing of the claims bar date on February 21, 2012, there is no summary or analysis of Claims filed to date. Many of the Claims were filed by creditors who were listed by the various Debtors as "disputed, contingent or unliquidated."

5. **Classifications**. The Trustee has not provided an analysis of specifically which creditors are included in each class nor why each secured creditor is not classified separately as required by § 1123(a)(4). Furthermore, the treatment of secured tax claims and secured claims provides for surrender, payment or sale – but at whose discretion, on what timetable, under what terms? This information likely would be included in the Disclosure Statement if it were not included in the Legacy Trust documents (which no one will even see until ten (10) days prior to confirmation hearing.

6. **Administrative Expenses**. The Trustee does not disclose the amount of approved, pending or anticipated administrative expenses through confirmation and makes no attempt to quantify anticipated expenses post-confirmation. Dorsey & Whitney has been employed by the Trustee since June 14, 2012, but the Disclosure Statement contains no information regarding those fees or the fees of the Trustee incurred to date. The most recent Monthly Operating Report filed by CARIEC for the month ending September 30, 2012, reflects total professional fees of $1,039,676.30. Furthermore, is the Trustee's coverage under the D&O Policy going to result in a payment to the Estate to offset costs and expenses incurred (*see* Disclosure Statement at p. 33). The administrative expense burden on this Estate is significant,

and the Preferred Investors do not have the "ability to obtain such information from sources other than the disclosure statement" as required by § 1125(a)(2)(C).

7. **Assets and Liabilities**. The format of the Plan and Disclosure Statement make it very difficult to determine assets and liabilities in each case. There is no chart or other summary setting forth this information in a format that makes clear the relationship of assets and liabilities in each Case. No balance sheets, income statements, tax returns, or any other financial information regarding assets or liabilities is included.

8. **Liquidation Analysis**. The Trustee has not included a liquidation analysis to show what each creditor or interest holder would receive in each individual Case if the Cases were not consolidated as provided by the Trustee.

9. **Intercompany Claims**. There is no analysis of actual amount/value of intercompany claims and possible offsets. This information is critical for voting purposes. In addition, the Trustee does not mention that no intercompany claims have yet been filed and that the time for doing so has been extended. Since the Trustee is effectively the manager in each of the Cases, there is no way to know whether or not those Claim will actually be timely filed and in what amounts.

10. **Avoidance Actions**. The Trustee has not set forth nor analyzed possible preference claims and other avoidance actions, costs to pursue, or collectability if the Trustee is successful. Rather, he "punts" this duty to a Conflicts Referee who will make this analysis.

Unfortunately, by the time that has occurred, the Plan will be confirmed and the Preferred Investors will not have had that information before voting.

11. **Preference Claim v. CAOP Managers**. Other than indicating that the Conflicts Referee will look at preferential transfers (obviously due to the conflict of the Trustee in analyzing this information), the Trustee give no justification for not yet pursuing the preference claim against CAOP.

12. **Payments to Insiders**. There is no analysis of any payments made to insiders within the year prior to the Petition Date.

13. **Monthly Financial Reports**. There is no summary of the Monthly Financial Reports filed to date.

14. **Liquidation Time Line**. The Trustee has not given a time line or time table for the liquidation of assets.

15. **Recoveries for Creditors and Interest Holders**. No attempt has been made to indicate possible recoveries for creditors or Preferred Interest Holders.

16. **CAREIC Guaranty of Kingman Debt**. On page 16 of the Disclosure Statement, the Trustee indicates that CASDF "asserts it obtained Liens from CAK, and a guarantee of approximately $10 million in debt from CAREIC." The Preferred Investors agree that CASDF obtained Liens on property owned by CAREIC and/or CAK to secure a claim in the sum of approximately $11,300,000; they further assert that CAREIC guaranteed $10,000,000 of that debt. The Trustee then states: "Based on his investigation to date, the Trustee has determined

that the Liens and the guarantee are likely unenforceable because, in many instances, CAK did not hold title to purported Collateral, and CAREIC's guarantee was not the subject of any written agreement." There is no further disclosure regarding this issue.

The Trustee fails to disclose that (a) CAREIC approved a written resolution as of February 1, 2008, providing for the guarantee of up to Ten Million Dollars; (b) the resolution was in the best interests of CAREIC "because it will increase the Fund's ability to attract and maintain capital which in turn can increase value to the Company;" (c) the Notes to the Consolidated Financial Statements dated December 31, 2008, disclosed the existence of the resolution and the guarantee; and (d) the "Confidential Private Offering Memorandum for Accredited Investors Only - Castle Arch Secured Development Fund, L.L,C." stated:

> **Security.** The Fund intends to invest in projects collateralized by a senior lien on the real property that is the subject of the investment. Additionally, CAREIC will further back the Fund investor's investment and interest. These measures will increase the Fund's ability to deliver highly favorable returns on its invested capital to its investors. Notwithstanding the foregoing, the preferred units sold in this offering are not guaranteed or secured, nor is the Fund, its investors or investments insured or guaranteed by any government agency.

It appears that the Trustee needs to make significant disclosures regarding his investigation of these issues, including the ramifications if the guarantee and security were deemed valid.

17. **Longview Settlement**. The Disclosure Statement must be updated to include an analysis of the effect of the Longview Settlement upon the Plan (December 3, 2012, objection

deadline, and December 10, 2012 hearing). If approved, this settlement will remove significant claims against the various estates and may make the intercompany issues less complex.

FEASIBILITY ISSUES

In addition to the issues regarding lack of information in the Disclosure Statement, the Disclosure Statement fails to contain information which would defeat Plan feasibility issues.

A. Consolidation Must be Considered on a Case-by-Case Basis after Notice and a Presentation of All Relevant Evidence.

The Trustee is the manager of each of the Debtors herein. He has made the decision that the Cases should be consolidated for all purposes. Normally, consolidation would be achieved prior to confirmation after notice and a hearing. The Trustee is effectively attempting to bootstrap consolidation upon all creditors and parties in interest without the necessity of actually setting forth any concrete information why these cases should be consolidated. The consolidation should be treated as a separate and distinct matter from confirmation.

In order to achieve his intended result, the Trustee has provided that no creditors or interest holders will be voting in their individual Cases, but rather to the extent that creditors or interest holders vote, their votes will be counted in the [already] consolidated Legacy Case. The Trustee provides no authority for his right to force this consolidation upon each of the Debtors.

The Trustee states (*see* Disclosure Statement at p. 40): "The Trustee thus has proposed consolidation of the Legacy Debtors because recognizing corporate formalities in this setting *would be unfair and not promote equitable distributions of assets to holders of Allowed Claims and Allowed Equity Interests*." [emphasis added]. There is no discussion in the Disclosure

Statement why failing to consolidate would be "unfair" or "not promote equitable distribution" – in fact, the Preferred Investors believe that consolidation will have negative effect upon CASDF Preferred Investors (specifically relating to the $10,000,000 guaranty and security for the Kingman loan referenced *above*).

The remedy of substantive consolidation was not specifically provided for in the Bankruptcy Act of 1898 – rather, a court's ability to order substantive consolidation was implied from the bankruptcy court's general equitable powers ("courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.") (*see Reider v. Federal Deposit Insurance Corp.,* 31 F.3d 1102, 1105 (11th Cir. 1994) (citing *Pepper v. Litton,* 308 U.S. 295, 304 (1939). While substantive consolidation was not codified in the Bankruptcy Reform Acts of 1978 and 1994, it is now allowed under the court's broad equitable powers detailed in § 105(a): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The Tenth Circuit has ruled that substantive consolidation may be employed under appropriate circumstances which are set forth in *Federal Deposit Ins. Corp. v. Hogan (In re Gulfco Invest. Corp.),* 593 F.2d 291 (10th 1979). One of those factors consists of the extent to which one corporation "is a mere instrumentality or alter ego of the bankrupt corporation, with no independent existence of its own." *Gulfco,* 593 F.2d at 928. CASDF was a separate entity. The investors holding Preferred Interests invested $7,303,417 into CASDF – not into CAREIC. They believed that their investments were to be secured by a lien in favor of CAK and a

$10,000,000 guarantee. The Preferred Investors believe that substantive consolidation will be extremely detrimental to their interests if the Lien is allowed and the guarantee acknowledged. The Trustee must *prove* that all of the entities were alter egos, on a case-by-case basis.

Gulfco also requires that the assets of the entities be "hopelessly commingled." *Id.* at 929. The Trustee concludes that all assets are hopelessly commingled. Not a shred of actual evidence has been presented to support this assertion.

In 2007, Judge Thurman ruled that "substantive consolidation should be used sparingly because it is a tool 'vitally affecting substantive rights.'" See *In re George Love Farming, LC,* 366 B.R. 170, 180 (Bankr. Ut. 2007). The Preferred Investors herein submit that treating the Legacy Debtors as consolidated entities is not warranted and that their rights will be "vitally affected" – in a detrimental way. Furthermore, consolidation without including the CAOP Debtors adds further damage to the Preferred Investors.

B. Requiring all Voting to Occur in the Legacy Debtors Cases Violates § 1129.

The Trustee takes all Secured Creditors of the "Legacy Debtors" and places them in one Class. He also places all Unsecured Creditors of those Debtors into one class, and takes all Interest Holders and places them in one Class. These provisions do not comply with Sections 1129(a)(7), (8), and (9), nor do they meet the requirements of §§ 1129(b)(1) and (2).

C. The Appointment of a "Conflicts Referee" does not Solve the Trustee's Conflicts of Interests and Occurs after Consolidation.

The Trustee attempts to acknowledge that he may have conflicts of interest based upon the provision for the appointment of a "Conflicts Referee." The problem with this provision,

however, is that most, if not all, of the conflicts that presently exist will be extinguished through the consolidation. Evidence must be presented showing that the Trustee has the right to simply ignore all intercompany claims and possible avoidance actions.

The Tench Circuit Court of Appeals considered the issue of conflicts of interest by counsel in related cases in *Interwest Business Equipment, Inc., v. United States Trustee (In re Interwest Business Equipment, Inc., et al.,* 23 F.3d 311 (1994). In that case, the Tenth Circuit analyzed the "reasons why counsel to a debtor in possession must meet the high standards of un divided loyalty established in § 327" by quoting from the memorable passage in *In re McKinney Ranch Assoc.,* 62 B.R. 249 (Bankr.C.D.Cal. 1986):

> It is the duty of counsel for the debtor in possession to survey the landscape in search of property of the estate, defenses to claims, preferential transfers, fraudulent conveyances and other causes of action that may yield a recovery to the estate. The jaundiced eye and scowling mien that counsel for the debtor is required to cast upon everyone in sight will likely not fall upon the party with whom he has a potential conflict . . ..

Id. at 254. The Tenth Circuit thereby upheld the Bankruptcy Court's finding that

> The existence of a prepetition debt *from one esate to the other* creates a disqualifying conflict of interest. These interlocking interests can only be served by utilizing separate counsel who can fairly and fully advise each debtor as to its rights and responsibilities.

The Debtors in these cases have separate, independent legal counsel appointed for each of them; however, these attorneys are receiving all direction from the Trustee as the managing member of each entity. This arrangement does *not* provide the protections for the creditors of each estate as contemplated by the Court in *Interwest* and *McKinney.*

D. Extinguishment of Loan Obligations between CAREIC, CAK and CASDF.

As discussed *above* in connection with the Kingman loan made by the Preferred Investors in the CASDF Case, the Trustee intends to ignore the Lien in favor of CAK and ignore the $10,000,000 guarantee (both of which would benefit said investors). These provisions do not comply with §§ 1129(a)(7), (8), and (9), nor do they meet the requirements of §§ 1129(b)(1) and (2).

WHEREFORE, the Preferred Investors pray that approval of the Debtor's Disclosure Statement be denied.

DATED this 26th day of November, 2012.

/s/ Anna W. Drake
Anna W. Drake, No. 0909
ANNA W. DRAKE, P.C.
175 South Main Street, Suite 300
Salt Lake City, Utah 84111
Attorneys for Richard Dance, 1031 ECI LLC, Kenneth Gneuhs, Bill Grundy, Naomi King Trust, Daniel Maga, Pearl Noreen, Fran Pistorio and Ziba Sabour

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Objection via ECF on November 26, 2012, as follows:

Gregory J. Adams: gadams@mbt-law.com
Adam S. Affleck: asa@pyglaw.com, debbie@princeyeates.com;docket@princeyeates.com
Troy J. Aramburu: taramburu@swlaw.com, cmeehan@swlaw.com;docket_slc@swlaw.com
Jeffrey M Armington: armington.jeff@dorsey.com
Julie A. Bryan: julie@crslaw.com, diana@crslaw.com;josh@crslaw.com
Mona Lyman Burton: mburton@hollandhart.com, ckelly@hollandhart.com;
intaketeam@hollandhart.com;slclitdocket@hollandhart.com
Leonard J. Carson: len@pearsonbutler.com, madisyn@pearsonbutler.com;
kylie@pearsonbutler.com; maryann@pearsonbutler.com; geoff@pearsonbutler.com
Andrew B. Clawson: andrew@abclawutah.com, len@pearsonbutler.com;
maryann@pearsonbutler.com; kylie@pearsonbutler.com; madisyn@pearsonbutler.com
Victor P Copeland: vpc@pkhlawyers.com, dh@pkhlawyers.com
T. Edward Cundick: tec@princeyeates.com, nancyw@princeyeates.com;
docket@princeyeates.com
Tammy B. Georgelas: tbg@scmlaw.com, csg@scmlaw.com
David R. Hague: dhague@fabianlaw.com, dromero@fabianlaw.com
George B. Hofmann: gbh@pkhlawyers.com, dh@pkhlawyers.com
Mary Margaret Hunt: hunt.peggy@dorsey.com, long.candy@dorsey.com;
smith.ron@dorsey.com; slc.lit@dorsey.com
Lon A. Jenkins: lajenkins@joneswaldo.com, ecf@joneswaldo.com; jpollard@joneswaldo.com;
hdoherty@joneswaldo.com
Penrod W. Keith: pkeith@djplaw.com, khughes@djplaw.com
Michael L. Labertew: michael@labertewlaw.com

Christopher J Martinez: martinez.chris@dorsey.com

Adelaide Maudsley: maudsley@chapman.com, jemery@chapman.com

John T. Morgan tr: john.t.morgan@usdoj.gov, James.Gee@usdoj.gov;

Lindsey.Huston@usdoj.gov; Rinehart.Peshell@usdoj.gov; Suzanne.Verhaal@usdoj.gov

Oliver K. Myers: myersok@msn.com

David L. Pinkston: bankruptcy_dlp@scmlaw.com

Knute A. Rife: KARife@RifeLegal.com

Nathan Seim: seim.nathan@dorsey.com

Jeremy C. Sink: jeremy@mbt-law.com

James A Sorenson: jsorenson@rqn.com, tpahl@rqn.com;docket@rqn.com

D. Ray Strong tr: rstrong@brg-expert.com

Marca Tanner: marca.tanner@gmail.com

United States Trustee: USTPRegion19.SK.ECF@usdoj.gov

Kim R. Wilson: bankruptcy_krw@scmlaw.com

Brock N. Worthen: bworthen@joneswaldo.com

Berkley Research Group, LLC
181 West Madison St.
Ste 2950
Chicago, IL 60602

Kirby Cochran
692 Cherapple Circle
Orem, UT 84097

Commerce Real Estate
170 South Main Street, Ste 1600
Salt Lake City, UT 84101

Patricia Denison
3486 Waha Road
Kalaheo, HI 96741

Keith Green
27141 Woodbluff Rd.
Laguna Hills, CA 92653

James A. Pope
1 S. 660 Midwest Road
Suite 200
Oakbrook Terrace, IL 60181

Ray Rosato
9575 West Higgins St. 90 L
Rosemont, IL 60018

Barbara M. Smith
Barbara M. Smith Accounting, Inc.
2143 South 225 East
Kaysville, UT 84037

Steven Smith
16092 Jenner St.
Westminister, CA 92683

Trent J. Waddoups
8 East Broadway, Suite 609
Salt Lake City, UT 84111

Xiomara Beach
10120 West Flamingo Rd. Ste 4268
Las Vegas, NV 89147

/s/ Anna W. Drake