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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re: CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC; CAOP MANAGERS, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; CASTLE ARCH SMYRNA, LLC; CASTLE ARCH STAR VALLEY, LLC; *and* CASTLE ARCH OPPORTUNITY PARTNERS I, LLC; CASTLE ARCH OPPORTUNITY PARTNERS II, LLC, Debtors.	Case Nos. 11-35082, 11-35237, 11-35243, 11-35242 and 11-35246 (Substantively Consolidated) Case Nos. 11-35241 and 11-35240 (Jointly Administered) (Chapter 11) The Honorable Joel T. Marker ☐ Affects All Debtors ☒ Affects only the Substantively Consolidated Debtors ☐ Affects only Castle Arch Opportunity Partners I, LLC ☐ Affects only Castle Arch Opportunity Partners II, LLC

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRUSTEE'S OBJECTION TO AMENDED PROOF OF CLAIM NO. 27-2 (ROBERT GERINGER) FILED AGAINST CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC

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On February 28 and March 1, 2013, this Court held an evidentiary hearing on the *Objection to Amended Proof of Claim No. 27-2 (Robert Geringer) Filed Against Castle Arch Real Estate Investment Company, LLC* ("Claim Objection"),[1] filed by D. Ray Strong, the Chapter 11 Trustee ("Trustee") for Castle Arch Real Estate Investment Company, LLC *et al.* ("CAREIC"). Peggy Hunt and Chris Martinez of Dorsey & Whitney LLP appeared on behalf of the Trustee, and George Hoffman and Victor Copeland of Parsons Kinghorn Harris, P.C. appeared on behalf of Robert D. Geringer ("Geringer").

At the hearing, the Court admitted into evidence the Trustee's Exhibits 1 through 30, 32 through 33, and 35 through 58 ("T. Exhs") and Geringer's Exhibits 1 through 10, 12, 15-30, 35 through 61[2], 63 through 69, and 73 through 156 ("G. Exhs"). The Court has considered the Proofs of Claim [27-1 and 27-2], the Claim Objection, the Addendum to the Claim Objection,[3] the Response to the Claim Objection ("Response"),[4] the Reply to the Response ("Reply"),[5] the evidence presented and received at the hearing, including the Exhibits, the representations and arguments of counsel and applicable law. Based thereon, and for good cause appearing, the Court hereby enters the following Findings of Fact and Conclusions of Law.

I. JURISDICTION

1. On October 17, 2011, CAREIC filed a petition seeking relief under Chapter 11 of the Bankruptcy Code (the "Petition Date").

2. This Court has subject matter jurisdiction over the Claim Objection pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b).

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[1] Dkt. 585, Supplementing *Objection to Proof of Claim No. 27* [Dkt. 307].
[2] Ex. 36 consists of two e-mails, only the top e-mail was admitted.
[3] Dkt. 586.
[4] Dkt. 604.
[5] Dkt. 612.

3. This Court has personal jurisdiction over Geringer, and Geringer has consented to the jurisdiction of this Court by filing his Proofs of Claim.

II. GERINGER'S PROOFS OF CLAIM

4. On February 17, 2012, Geringer filed a Proof of Claim asserting a general unsecured claim against CAREIC in the amount of $8,550,891.72 ("Initial POC"),[6] which was amended on January 11, 2013, reducing the claimed amount to $7,775,019.64 ("Amended POC").[7]

5. The Amended POC is comprised of four components: (a) a claim in the total amount of $7,229,655.82, including pre-petition interest in the amount of $71,063.38, and legal fees in the amount of $162,704.00 relating to an alleged oral indemnity agreement between him and CAREIC ("Indemnity Claim");[8] (b) a claim in the amount of $363,696.82, including $63,696.82 of pre-petition interest, relating to the payment of certain rents ("Rent Claim");[9] and (c) a claim in the amount of $181,667.00, including $41,667.00 of pre-petition interest, for alleged unpaid wages, and an additional $16,479.13, including $3,072.29 of pre-petition interest, for unreimbursed expenses ("Wage Claim").[10]

III. FINDINGS OF FACT

A. BACKGROUND

6. CAREIC is a California company that was organized in 2004, as a real estate land development company.[11] Its "principal place of business" and headquarters are "9595

[6] CAREIC Claims Dkt. 27-1; 6. Exh 15.
[7] CAREIC Claims Dkt. 27-2; 6 Exh. 16.
[8] G. Exh. 16 (Amended POC), at 9-11.
[9] *Id.* at 4 and 8.
[10] *Id.* at 4, 7-8.
[11] T. Exh. 43 (Form 10-KSB as of 12/31/08, p. 20); G. Exh. 23 (Op. Agreement dated 5/1/04).

Wilshire, Penthouse 1000, Beverly Hills, CA, 90212 . . . ."[12] Geringer also maintained his personal office at this address.[13] Prior to the Petition Date, CAREIC generated little revenue from operations. Operating costs (including significant executive compensation and expenses) were funded by monies raised from the sale of securities to investors.[14]

7. Geringer, a California resident,[15] was CAREIC's President and a member of its Board of Directors from the company's inception in 2004 until July 15, 2009, when he resigned,[16] and at all times relevant he held between approximately 15 to 21% of the CAREIC's membership units in addition to preferred stock.[17] Aside from Chief Executive Officer Kirby D. Cochran ("Cochran"), Geringer held the largest percentage of ownership interests in the company.[18]

8. Geringer is a tax attorney, holding a J.D. and an LLM, and an experienced real estate developer.[19] Geringer has significant experience in real estate development.[20]

9. When CAREIC was formed Geringer and Cochran "agreed that [they] would be equal in authority."[21] Later, it was decided that Cochran would be CEO, and that Geringer would handle the real estate.

10. Cochran gave Geringer complete authority to acquire, dispose of, or encumber real property,[22] and claims, based this delegation of authority, that he did not get involved in the details of the real estate transactions. He relied on Geringer.[23]

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[12] G. Exh. 23 (Op.Agreement dated 5/1/04, p.1); T. Exh. 46 (Form 10-KSB, p. 7 (administrative offices in California)); T. Exh. 43 (same (2008), pp. 9, 42 (referring to office as "headquarters")); Trns. (Geringer), at 56.
[13] Trns. (Geringer), at 41, 56-59.
[14] *Id*., at 156-158; T. Exh. 43 (Form 10-KSB (2008), p. 11).
[15] *Id.*, at 40, 56-59; T. Exh. 43 (Form 10-KSB as of 12/31/08, at p.44 (Geringer's California office address)); G. Exh. 47 (Coalinga Guaranty), at 4 (California address of Geringer's home).
[16] Trns. (Geringer), at 42-43; T. Exh. 43 (Form 10-KSB (2008), p. 33 of 41); G. Exh. 30 (resignation letters).
[17] T. Exh. 10 (Am. Op. Agreement dated 2/16/07); T. Exh. 46 (Form 10-KSB (2005), p. 28).
[18] *Id.; see also* Trns. (Geringer), at 55; T. Exh. 43 (Form 10-KSB (2008), p. 42) (showing relative salaries).
[19] Trns. at 40, 41; T. Exh. 46 (Form 10-KSB (2005), p. 21); T. Exh. 45 (same (2006), pp. 15-16); T. Exh. 44 (same (2007), pp. 33-34).
[20] Trns. (Geringer), at 40-41.
[21] *Id*. at 47.

11. Indeed, Geringer was the CAREIC officer responsible for the company's real estate transactions and prospects.[24] The company relied on Geringer's expertise in this area, with the company's "business purpose [being] based on that expertise."[25] According to Geringer, "nobody else in the company . . . had real estate experience[,]" and . . . he engaged in "[f]inding properties, identifying them, doing due diligence, putting together the transaction, working with governmental entities to entitle the property . . . and then interfacing with builders . . . ."[26]

12. On behalf of CAREIC, Geringer entered transactions involving rights to real property located in Coalinga, California ("Coalinga Property") and Firebaugh, California ("Firebaugh Property") (collectively, "Properties"). Other officers of the company relied on Geringer to inform them of the nature and extent of these transactions.[27]

13. In the transactions at issue in the Claim Objection, Geringer used a significant amount of investor cash to acquire rights on the Properties for which the estate ultimately received little or no benefit. Moreover, the transactions were handled in a way that, from CAREIC's perspective, made no sense. Having acquired the rights, Geringer transferred them to his business partner Brent Baillio ("Baillio") in exchange for Baillio's naked unsecured promise to pay CAREIC $10.5 million. The reason for this transfer was that CAREIC did not have funds to close the purchase. Having transferred the rights to Baillio, Geringer promptly sought to obtain financing for Baillio Development, Inc. (defined below as "BDI"), not CAREIC or Baillio, to close the purchase of the Properties. During all of this time, CAREIC continued to

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[22] G. Exh. 1 (2004 Letter).
[23] Trns. (Geringer), at 339-340 (Geringer handled real estate transactions and made recommendations to Board).
[24] *Id.* at 45-47, 182, 183; Trns. (Child), at 265-266; Trns. (Cochran), at 332-334, 337; Trns. (Davidson) at 381-382.
[25] Trns. (Child), at 265.
[26] Trns. (Geringer), at 45.
[27] Trns. (Child) at 303;Trns. (Cochran) at 332-334, 337, 339, 342, 343;Trns. (Davidson) at 381-382, 384-385; *see* G. Exh 38 (1/25/06 Board Minutes (Geringer providing update on Coalinga and Firebaugh properties)).

using investor cash to support the Properties in hopes of enabling capitalizing on the profit interest it thought it had. In reality, CAREIC had no profit interest. Instead, CAREIC got (a) rights against someone who did not own the Properties and who had no rights from the owner to obtain a share of the Properties' profits; (b) absolutely no rights in or against the Properties; (c) absolutely no rights against the entity who did own the Properties; (d) absolutely no rights to profits from the sale of the Properties from any person. Also, according to Geringer, CAREIC undertook a $15 million contingent liability to indemnify Geringer for his guarantees of loans made to BDI. CAREIC was never repaid any of the monies invested in the Properties, it never sued Baillio, and Geringer and BDI ended up with the Properties.[28]

B. INDEMNIFICATION CLAIMS

1. STATUTE OF LIMITATIONS

14. Geringer's Indemnity Claim is for an alleged promise by Cochran to indemnify Geringer on personal guarantees that he issued in conjunction with financing obtained by BDI to purchase the Properties, defined in further detail below as the "Coalinga Guaranty," and the "Firebaugh Guaranty," collectively the "Guarantees."

15. Geringer's Indemnity Claim arose in California: Geringer resides in California; CAREIC is a California company, headquartered and doing business in California; Geringer operated his business for CAREIC out of a Beverly Hills office;[29] the loans in question related to the Properties in California and Geringer endorsed the Guarantees in California; [30] Geringer pledged his personal residence in California as additional security for the Coalinga Guaranty;[31]

[28] *See infra* ¶¶29-37. To the extent that the Court finds that an indemnification contract exists and is enforceable, the Trustee has reserved the right to avoid it as a fraudulent transfer. *See* Objection [Dkt. 307 & 585].
[29] *See* ¶ 6 *supra*.
[30] G. Exh. 47 (Coalinga Guaranty), at 4 and 5.
[31] *Id*., at 4.

the Guarantees specifically reference requirements of California law;[32] BDI and the entities from whom BDI borrowed money are California entities;[33] any payments made on the Properties were made to Geringer in California where he maintained an office and conducted business;[34] and a lawsuit giving rise to his alleged indemnity right was filed in California.[35]

16. Geringer contends he and CAREIC had an *oral* agreement under which CAREIC promised to indemnify him for "any amounts he paid or losses he would sustain" under personal guarantees he executed in connection with financing transactions related to the Properties.[36]

17. At trial, Geringer testified that the indemnity agreement was an oral agreement. For instance, in response to his counsel's question, "Was the promise made to you in writing?" Geringer responded,

> It was not made to me in writing. Mr. Cochran and I talked on the phone most of the time and I don't think that there was – I know there was never a formal indemnification agreement signed; however, it was acknowledged in front of other people, and they made payments on it and then just stopped.[37]

In fact, Geringer testified that he never asked Cochran to reduce this promise to a writing.[38]

18. There are other documents in the record which may bear upon Geringer's alleged indemnity contract. Geringer identified the following: (1) e-mails sent by him to Cochran and others; (2) the minutes of CAREIC's Board; (3) CAREIC's SEC filings; and (4) "payments that Castle Arch made in part performance of its obligations to indemnify."[39]

19. In 2008, at least two years after the alleged indemnity promise was made, Geringer wrote and sent three e-mails to CAREIC officers or employees in which he references

[32] *Id.*, at 2 and 3; G. Exh. 55 (Firebaugh Guaranty, at ¶ 11).
[33] G. Exh. 47 (Coalinga Guaranty), at 1; G. Exh. 55 (Firebaugh Guaranty, at 1).
[34] Trns. (Geringer), at 124-125 (testifying that he asked CAREIC to "send a check"); at 143 (payments were made by Geringer to the California bank and then CAREIC was asked to write Geringer "a check").
[35] T. Exh. 54 (OneWest Bank Complaint).
[36] G. Exh. 15 (Initial POC), at 3.
[37] Trns. (Geringer), at 121: 8-15; *see generally id.*, at 120-127.
[38] *Id.*, at 197:19-22.
[39] Trns. at 419; Response, at 31.

the alleged promise to indemnity him.[40] None of the recipients of these e-mails responded to Geringer or acknowledged the alleged indemnity promise.[41]

20. The only minutes of CAREIC Board meetings that were received as evidence are from meetings held on January 25, 2006 and January 26, 2009.[42] These minutes do not memorialize any agreement by CAREIC to indemnify Geringer; while the Properties are discussed at the 2006 meeting, there is no mention of the purported indemnity agreement.[43]

21. The Court received into evidence the Forms 10-KSB filed by CAREIC for the years 2005- 2008 ("SEC Filings").[44] The SEC Filings contain specific sections for the disclosure of "Commitments and Contingencies" and "Related Party Transactions."[45] The Guaranties are not disclosed or even discussed in these, or any other sections, and, while the Properties are discussed, CAREIC's alleged indemnity promise is not disclosed in the SEC Filings. [46]

22. Geringer testified that in 2007 and 2008, CAREIC would "send a check" to him after he made a payment on the Coalinga or Firebaugh Loans.[47] None of these "checks" or other documentary evidence of payments were offered by Geringer or received in evidence.

23. On March 7, 2007, Geringer first made a payment on the "Coalinga Loan" (defined below), and thereafter through 2008, Geringer made other payments on the Coalinga

[40] G. Exhs. 8, 9, and 10 (2008 e-mails written by Geringer).
[41] *Id.*
[42] G. Exh. 38 (1/25/06 Board minutes); G. Exh. 48 (1/26/09 Board minutes). Geringer also submitted handwritten notes of D. Child. *See* G. Exhs. 39-43. While one note mentions a guaranty, these notes never mention any purported promise to indemnity Geringer. *Id*.
[43] G. Exh. 38 (1/25/06 Board minutes); *see* G. Exh. 48 (1/26/09 Board minutes).
[44] T. Exh. 43 (Form 10-KSB for 2008); T. Exh. 44 (Form 10-KSB for 2007); T. Exh. 45 (Form 10-KSB for 2006); T. Exh. 46 (Form 10-KSB for 2005).
[45] T. Exh. 43 (Form 10-KSB for 2008, at pp. 28 and 29); T. Exh. 44 (Form 10-KSB for 2007, at p. F-15); T. Exh. 45 (Form 10-KSB for 2006, at p. F-14); T. Exh. 46 (Form 10-KSB for 2005, at p. F-14).
[46] T. Exh. 43 (Form 10-KSB for 2008, at p. 29 and generally); T. Exh. 44 (Form 10-KSB for 2007, at p. F-15 and generally); T. Exh. 45 (Form 10-KSB for 2006, at p. F-14 and generally); T. Exh. 46 (Form 10-KSB for 2005, at p. F-14 and generally).
[47] Trns. (Geringer), at 124-125, 142-143.

Loan. CAREIC sent payments from time to time, but CAREIC did not reimburse Geringer for each payment he made.[48]

24. In 2008, CAREIC stopped making any payments to Geringer related to the Properties,[49] and the Board met and informed Geringer that it would not pay any additional money for any reason on the Properties.[50] Geringer confirmed that CAREIC had informed him that he would receive no more payments from CAREIC.[51]

25. The last payment Geringer received from CAREIC related to the Properties was on March 5, 2008.[52] Geringer made payments throughout 2008 and up until September 28, 2009, none of which were reimbursed by CAREIC.[53] From March 7, 2007 through September 28, 2009, Geringer made total payments on the Coalinga Loan totaling $725,874.57, for which he was not reimbursed by CAREIC.[54] Similarly, Geringer made a payment on the "Firebaugh Loan" on May 14, 2008, which was not reimbursed.[55]

26. Geringer negotiated the purported indemnification agreement with Cochran.[56] Geringer testified that he did not sign the Guarantees until CAREIC committed to him that he "would not suffer" as a result.[57]

[48] G. Exh. 16 (Amended POC), at 9.
[49] Trns. (Geringer) at 143; G. Exh. 16 (Amended POC), at 9.
[50] Trns (Child) at 280-281. 304-305; T. Exh. 43 (Form 10;KSB (2008), at 9 (indicating that CAREIC's board of directors elected to include the expenses it incurred on Coalinga and Firebaugh as "costs of terminated projects")).
[51] G. Exh. 10 (10/31/08 e-mail from Geringer to Child) ("I was told [CAREIC] was out and fend for myself").
[52] G. Exh. 16 (Amended POC), at 9.
[53] *Id*.
[54] *Id*.
[55] *Id.*
[56] Trns. (Geringer), at 120-124.
[57] G. Exh. 10 (10/31/08 e-mail from Geringer to D. Child); Trns. (Geringer), at 121-24.

2. CAREIC OPERATING AGREEMENT

27. CAREIC's original Operating Agreement was signed by Cochran on May 1, 2004, and was amended on May 12, 2005, and signed by Cochran and a majority of the Members on May 12, 2005 and again on January 29, 2007.[58]

28. On February 27, 2007, the Operating Agreement was again amended, and was signed by Geringer and a majority of the Members.[59]

3. ANY ALLEGED INDEMNITY AGREEMENT WAS PROCURED BY GERINGER'S FRAUD

29. In September 2004, Baillio entered into an agreement giving him the right to purchase the Coalinga Property for $3,838,350, and an agreement giving him the right to purchase the Firebaugh Property for approximately $7,890,900 (collectively, the "Purchase Right Agreements").[60] These rights were then assigned to CAREIC in exchange for a cash payment to Baillio and a profit sharing interest.[61]

30. Geringer maintains that as the closing date of the Purchase Right Agreements neared CAREIC did not have the money to close, and Baillio demanded that Geringer re-assign the rights to purchase the Properties to him.[62]

31. Geringer, on behalf of CAREIC, did so, entering into two agreements dated June 8, 2005, assigning all of CAREIC's rights to purchase the Properties back to Baillio (the "Reassignment Agreements"). He executed these even though he knew or should have known that Baillio did not have the monies to close the purchase of the Properties. He also knew or should have known that CAREIC would not receive (a) any contemporaneous cash consideration for the Reassignment Agreements, or reimbursement of the cash it had paid or the value that it

[58] G. Exh. 23 (5/1/04 Op. Agreement).G. Exh. 24 (5/12/05 Op. Agreement); T. Exh. 11 (Written Consents, p.2).
[59] G. Exh. 25 (2/1/6/07 Amended Op. Agreement, at p. 36); Trns. (Geringer), at 125-126 ("I did sign it").
[60] G. Exh. 17 (Chevron Assignment Agreement); G. Exh. 20 (Baillio-Lorenzetti Assignment Agreement).
[61] Trns. (Geringer), at 75, 81; G. Exhs. 18 & 21 (Assignment Agreements, at §§ 2).
[62] Trns. (Geringer), at 86-87, 107.

had added to the Properties, (b) any residual interest in the Properties, or (c) any profit rights from the sale of the Properties. Rather, in exchange for reassigning the Properties, Geringer accepted Baillio's unsecured promise to pay CAREIC some $10.5 million. [63]

32. After The Reassignment Agreements were executed Geringer began to help Baillio to obtain financing to purchase the Properties. Like CAREIC, Baillio did not have the money to perform.[64] Geringer also agreed that CAREIC would provide $1 million toward the purchase of the Firebaugh Property, but did not require that it be given for any rights for repayment upon any transfer or refinancing obtained.

33. In the end, Baillio did not purchase the Properties. Rather, Baillio Development, Inc. ("BDI") -- a company affiliated with Baillio and Geringer -- purchased the Properties.[65] The purchase was financed with two loans: (a) Robhana, Inc. lent BDI $3,500,000 (the "Coalinga Loan") to purchase the Coalinga Property in June 2005; and (b) Palm Finance Corporation lent BDI $8,200,000 (the "Firebaugh Loan") to purchase the Firebaugh Property in January 2006.[66] None of the loan proceeds were paid to CAREIC.[67]

34. There is no evidence that BDI agreed to pay Baillio anything from its sale of the Properties to allow Baillio to meet his unconditional debts to CAREIC under the Reassignment Agreements. Thus, the deals Geringer arranged provided CAREIC no rights against the actual

[63] T. Exhs. 2 & 3 (Reassignment Agreements); Trns. (Geringer), at 107-112.
[64] *Id*. Geringer never explained why he would use his connections to provide a purchase opportunity for his colleague Baillio, as opposed to CAREIC. It is especially curious given the oversecured nature of any loans that would be obtained and Baillio did not have the money to close. Trns. (Geringer), at 131. Further, in the Reassignment Agreements, Baillio represented and warranted that he had the "wherewithal to perform the buyer's obligations as set forth in the" Purchase Right Agreements. T. Exhs. 2 & 3 (Reassignment Agreements, § 4). Baillio did not have the money. Trns. (Geringer), at p. 107.
[65] Trns. (Geringer), at 192-193; Trns. (Baillio), at 377. There is no evidence that BDI had any obligation to CAREIC as a result of its purchase of the Properties, or of any agreement between BDI and Baillio requiring BDI to pay Baillio in the event of a sale of the Properties to finance Baillio's obligations to CAREIC under the Reassignment Agreements.
[66] G. Exhs. 46 and 52 (Loan Agreements between BDI and RobHana, Inc. and BDI and Palm Finance Corp.).
[67] Baillio Deposition Transcript, at pp. 27-28, and 63.

purchaser of the Properties, BDI, or against the Properties or the profits derived from the Properties.[68]

35. On the basis of Geringer's representations to them, the other officers of CAREIC believed that CAREIC had a profit participation agreement or a joint ownership in the underlying Properties. That CAREIC's officers so understood these deals is evidenced by, among other things, the following:

- All other officers testifying at the hearing stated that, although unsure about the exact nature of the transactions, they thought there was a profit participation or ownership interest.[69]

- In 2005 SEC Filings, signed by CAREIC's CEO and CFO, the company describes its interest in the Properties after the Reassignment Agreements as a profits interest, stating the company has the right "to receive future proceeds contingent upon the acquisition and sale of the underlying properties."[70] Later the company explains that it "will further assist with sale efforts" in order to "realize its proportionate share of the sale proceeds."[71]

- At a 2008 Board, the Board informed Geringer that it would no longer make payments associated with the Properties, "and Geringer's response was, 'Well, than you realize that you're going to give up not only just the rights to the profits interest, but everything that you've invested in the property so far, your ability to recover that?'" Geringer basically said CAREIC was cut out of the deal.[72]

36. Geringer knew or should have known from the Reassignment Agreements that this was not the case.

37. The Coalinga Loan and the Firebaugh Loan, were conditioned on Geringer executing personal guarantees and pledging personal assets, which resulted in the guarantees

[68] T. Exhs. 2 & 3 (Reassignment Agreements); Trns. (Geringer), at 200, 201.
[69] Trns. (Child), at 272-274; 332-333, 335, 341 (Cochran); pp. 384-385, 394-395 (Davidson); *see also* G. Exh. 38 (1/25/06 Board minutes).
[70] T. Exh. 46 (Form 10-KSB (2005), at F-13).
[71] *Id*., at F-17; *see* also T. Exh. 45 (SEC Form 10-KSB (2006), pp. 8-10 (while recognizing the Reassignment Agreements, stating CAREIC's "ability to profit from the resale of the properties to which we have ownership rights" had been hindered as a result of a softening real estate market, and that it was considering the "benefits of participating in the development of the land beyond entitlements in order to maximize our profits from the investment." CAREIC also states that it believed that it could sue Baillio and foreclose on the Properties).
[72] Trns. (Child), at 305.

referred to herein as the "Coalinga Guaranty" and the "Firebaugh Guaranty," respectively (collectively, the "Guarantees").[73]

4. THERE ARE SERIOUS QUESTIONS ABOUT GERINGER'S CREDIBILITY

38. Upon a review of the entire record, the Court finds that there are serious concerns about Geringer's credibility:

(a) Conflicts with his testimony in the California Action

39. Onewest Bank ("Bank") sued Geringer on his Coalinga Guaranty in California Superior Court on January 28, 2010.[74] In that case, the Bank sought to attach Geringer's property in aid of recovery. In opposing the Bank, Geringer offered testimony about key aspects of the Coalinga Guaranty that contradict testimony he provided before this Court:

- Did the guarantee benefit CastleArch? In this Court, Geringer argued that he "signed these guarantees to preserve the ability of Castle Arch to realize millions of dollars of profits on the resale of these properties . . .", [75] and so that "Castle Arch could be in a position to benefit from the payments under the reassignment."[76] But in the California action he testified directly opposite, saying that "while [OneWest] has argued that the loan somehow directly benefited Castle Arch Real Estate Development Company (and myself indirectly as a Castle Arch Stockholder), *the argument is incorrect*."[77]

- Was Geringer acting for CAREIC? In this Court, Geringer's counsel argued that Geringer signed the Guarantees in his "capacity, as an officer, as the president of Castle Arch,"[78] and Geringer testified that the Guaranties "were clearly obligations that I

[73] G. Exhs. 47 and 55 (Guarantees); Trns. (Geringer), at 119-120.
[74] T. Exh. 54 (Complaint).
[75] Trns.(Opening Argument), at 7.
[76] Trns. (Geringer), at 121.
[77] T. Exh. 58 (Geringer Supplemental Declaration, at p. 4, ¶ 3) (emphasis added). On redirect, Geringer explained that this Supplemental Declaration was submitted to rebut the Bank's argument that BDI needed the loan from the Bank to develop the raw land and sell the property. *See* Trns. at 247-249. But, Geringer's testimony fails to account for the fact that the Bank specifically argued that Geringer signed the Guaranty in order to increase the likelihood of CAREIC recovering the consideration Baillio owed it. *See* G. Exh. 156 (OneWest Reply Memorandum in Support of Motion to Attach, at 4:21-5:1). And Geringer specifically testified that this argument made by the Bank was "incorrect." *See* T. Exh. 58 (Supplemental Declaration, at p. 4, ¶ 3). Geringer also testified that ultimately the Bank found the Coalinga Guaranty was related to his business, trade, or professional relationship with CAREIC. Aside from the fact that Geringer had not wanted to include CAREIC in litigation related to the Bank, Trns. (Geringer), at 161,162, this is irrelevant. The point is that Geringer's testimony changes to accommodate whatever position he is taking at the moment.
[78] Trns. (Opening Argument) at 19.

undertook on behalf of [CAREIC]."[79] In the California action, however, Geringer testified that the Coalinga Guaranty "was not given in connection with [his] trade, business or profession,"[80] and that any "suggestion" that he delivered it as part of his trade, business, or profession was "nothing more than **wishful thinking** on the Bank's part."[81]

- Why did Geringer sign the Guarantees? In California, Geringer testified that the **only** reasons he signed the Coalinga Guaranty were because he and Baillio were friends, and since the Coalinga Loan was secured by real property he did not see any risk in signing the Guaranty.[82] But in this Court, Geringer testifies that the reason he signed the Guarantees was because: "I was told by Mr. Cochran that I would be indemnified the full faith and credit, I guess, of Castle Arch behind any exposure that I might suffer on these guarantees and because it allowed the transactions to close so that Castle Arch could be in a position to benefit from the payments under the reassignment."[83]

(b) Proof of Claim Inaccuracy

40. On February 17, 2012, Geringer submitted his Initial POC, asserting under penalty of perjury, a claim in the amount of $8,550,891.72. This claim did not account to the Court for the impending $1 million sale of the Firebaugh Property.[84] Before the claim was submitted, Geringer knew that the Firebaugh Property would be sold for $1 million.[85] The agreement to sell the Firebaugh Property, which Geringer testified he reviewed prior to its execution, is dated February 14, 2012 and was signed by Baillio on February 16, 2012.[86] Geringer persisted in his failure of candor, by failing to amend his claim to disclose the sale, in response to Trustee's September 2012 Objection.[87] It was only after the Trustee had learned of

[79] Trns. (Geringer) at 126.
[80] T. Exh. 57 (Geringer Declaration), at p. 9, ¶ 5.
[81] *Id.* (Geringer Opposition), at p. 5:8-10.
[82] *Id.*, at pp 8-9, ¶¶ 2 and 5.
[83] Trns. (Geringer), at 121. Notably, Baillio's testimony is consistent with Geringer's testimony in California State Court in which Geringer denied that Guarantees had anything to do with CAREIC or with his trade, business or profession,[83] and instead were made only because "Mr. Baillio and I have been close personal friends for nearly 20 years, repayment of the Loan was to be secured by real property, and I did not perceive that Guaranty to pose any material risk to me." T. Exh. 57 (Declaration, at p. 8, ¶ 2). It was not uncommon for Geringer to issue personal guarantees for his projects with Baillio. *See* T. Exhs. 21, 23 (Geringer's guarantees of Contour Development loans).
[84] G. Exh. 15 (Initial POC).
[85] Trns. (Geringer), at 160, 167; G. Exh. 65 (Purchase Agreement); s*ee* G. Exh. 66 (Final Closing Statement, dated March 12, 2012, for sale of Firebaugh Property).
[86] *Id*.
[87] G. Exh. 16 (Amended POC filed 1/11/13).

the sale in discovery by examining Baillio, that Geringer accounted to the Court for the sale,[88] after the end of fact discovery. [89]

(c) False Turnover Declaration

41. Geringer also executed and provided to the Trustee false and inaccurate Declarations in response to the Trustee's demands for turn over of all documents related to CAREIC.[90] In May 2012, Geringer signed a declaration swearing that he had turned over to the Trustee all documents in his possession.[91] Contrary to his Declaration, Geringer had not turned over (i) documents related to the $1 million sale of the Firebaugh Property,[92] (ii) documents related to the Properties, which Geringer now argues are expressly related to CARIEC, (iii) e-mails, [93] or (iv) electronic files on a server. In fact, he did not produce thousands of e-mails in his possession until the Trustee specifically demanded, again, that he turn over those e-mails.[94] In addition, as part of discovery related to this matter, Geringer was required to produce all documents from the California Action,[95] yet Trustee's Exhibits 57 and 58, Geringer's Declarations in that Action discussed above, were notably absent from that production.[96]

42. In addition, based on this testimony, Geringer would have the Court believe that he was the sole officer raising concerns about management, and he raised them early and often.[97]

[88] G. Exh. 16 (Amended POC). It should also be noted, that Geringer's Rent Claim shows he is entitled to $15,000 a month for rent. *See id*., p. 8. He has testified that that rent was actually $10,000 a month. Trns. (Geringer), at 61, 188; *see infra* at ¶¶ 43-48 (discussing Rent Claim).
[89] Scheduling Order, Docket 559, at ¶ 1 (stating discovery ends Dec. 21, 2012).
[90] T. Exh. 30 (5/25/12 Letter from Trustee to Geringer).
[91] T. Exh. 32 (Geringer Declaration Regarding Trustee's Request for Turnover).
[92] Trns. (Geringer), at 211. The Trustee learned of this sale from Baillio.
[93] Trns. (Geringer), at 212. *See* T. Exhs. 39 and 40 (July 25 and July 31, 2012 e-mails with Trustee).
[94] *Id.*
[95] *See* T. Exh. 33 (Responses to Trustee's Interrogatories and Requests for Production of Documents).
[96] Trns. (Geringer), at 234 (Geringer's counsel stating that the declaration "was never disclosed").
[97] *Id.*, at 157-164.

Despite this fact, Geringer, a tax attorney, executed a Management Representation Letter dated March 2008, in which he represented that CAREIC was managed effectively and properly. [98]

C. RENT CLAIM

43. CAREIC's "Consulting Agreement" with Geringer dated October 8, 2004 states, in relevant part, as follows:[99]

> 2. Term. The term of Officer's consulting relationship hereunder shall commence on the date of this Agreement and shall extend for a continuous period *ending last day of consulting relationship* of the Officer irrespective of the reason for termination and whether voluntary or involuntary on the part of the Consultant (the "Term").
>
> . . . .
>
> 4.02. Expenses. Officer shall receive $2,000 per month to cover office expenses. In addition in accordance with Castle Arch's normal policies for expense reimbursement, Castle Arch will reimburse Officer for all reasonable and necessary expenses beyond the base office expenses, incurred by Officer *in the performance of Officer's duties under this Agreement,* subject to the presentment of receipts or other documentation acceptable to Castle Arch
>
> . . . .
>
> 6.02. Amendments. No amendment or modification of this Agreement shall be deemed effective unless made *in writing* and signed by Officer and Castle Arch. [100]

44. No written amendments or modifications were made to the Consulting Agreement relevant to the Rent Claim at any time.[101]

45. Geringer received rent reimbursement from CAREIC under § 4.02 of the Consulting Agreement for part of the rent paid for an office located in Beverly Hills, California

[98] T. Exh. 42 (Management Representation Letter (including no fraud, suspicions of fraud, no financial reporting or internal control issues)).

[99] Geringer seeks prejudgment interest on all of his claims The Court should disallow any claim to prejudgment interest. An award of prejudgment interest is within the Court's discretion. *See, e.g., Morrison Knudsen Corp. v. Ground Improvement Techs., Inc.*, 532 F.3d 1063, 1073 (10th Cir. 2008); *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1255 n. 43 (10th Cir. 1988) (applying an abuse of discretion standard of review to determine the award of prejudgment interest based on *Utah law* and federal statutes). Here, an award of prejudgment interest would be inequitable given that Geringer waited years to assert claims against CAREIC, a 10 % interest rate is a windfall in today's economy, and Geringer received hundreds of thousands of dollars of investor money during all relevant periods for use in an enterprise that did not comport with what was represented to creditors and investors in a case where there is a possibility that investors will receive little, if any, return on their investment.

[100] T. Exh. 47 (Consulting Agreement, §§ 2, 4.02 and 6.02) (emphasis added).

[101] Trns. (Geringer) at 53-54; G. Exh. 26 (Consulting Agreement & Addenda).

(the "Office") through 2007. In 2007, Geringer renegotiated the Office lease and entered into a new five-year lease (the "2007 Lease"). CAREIC is not a party to the 2007 Lease. [102]

46. Thereafter, CAREIC paid Geringer $10,000 a month, with some exceptions, to reimburse him for rent under the 2007 Lease in accordance with §4.02 of the Consulting Agreement.[103]

47. CAREIC did not reimburse Geringer for rent in December 2008, January 2009, May or June 2009, and it made no payments to Geringer for rent after he resigned from CAREIC on July 15, 2009.[104]

48. Geringer did not seek any rent reimbursement from CAREIC until he filed his Proof of Claim in 2012.

D. WAGE CLAIMS

49. CAREIC agreed to pay Geringer $25,000 per month in salary, plus certain expenses, pursuant to the Consulting Agreement, an Addendum dated February 16, 2005, and a second Addendum dated March 18, 2005.[105]

50. In 2008 and 2009, Geringer and other CAREIC officers determined that CAREIC could not pay them hundreds of thousands of dollars each.[106] In January 2009, CAREIC's board reduced all salaries, including Geringer's salary by fifty per cent (50%) commencing in February 2009.[107] CAREIC's board and CEO then confirmed this reduction with Geringer, and Geringer

[102] G. Exh. 77 *(*Standard Form Office Lease). This 2007 Lease was amended in 2010. Geringer seeks payment only through the date of the amendment. *See* G. Exh. 16 (Amended POC, pp. 8 & 51).
[103] G. Exh. 16 (Amended POC, p. 8 ("Payment Received" with notation of $10,000 in March, April and May 2009)). While the Amended POC seeks reimbursement of $15,000 per month for rent, *see id.*, Geringer testified that the rent reimbursement was only $10,000. *See* Trns. (Geringer), at 179 & 188*; see also id*., p. 61 (testifying to $20,000).
[104] G. Exh. 16 (Amended POC) at 8.
[105] Geringer Exh. 26 (Consulting Agreement and addenda).
[106] Trns. (Geringer), at 183-184. Geringer had previously offered to reduce his salary to zero. *Id.*; *see also* Trns. (Child), at 293.
[107] T. Exh 48 (January 26, 2009 Minutes of Meeting of the Board of Directors); T. Exh 53 (Amended POC), at p. 9; Trns. (Geringer), at 186; Trns. (Cochran), at 365.

did not affirmatively refuse to reduce his salary.[108] Geringer accepted payments of $12,500 in February, March, April, and May of 2009.[109]

51. In May 2009, CAREIC's CEO proposed that all officers forego their salary. Geringer did not object to this proposal.[110] However, he insisted that all other officers of CAREIC expressly confirm their agreement to this proposal.[111]

52. Geringer resigned from CAREIC on July 15, 2009,[112] and never demanded that he be paid further salary or expenses until he filed his Proof of Claim in February 2012, in which he seeks a total of $140,000 in salary (not including interest) and $13,406.84 in unreimbursed expenses (not including rent).[113]

IV. CONCLUSIONS OF LAW

Based on the above findings of fact, the Court enters the following Conclusions of Law.

A. APPLICABLE BANKRUPTCY LAW

53. Section 502(a) of the Bankruptcy Code states that a "claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party is interest . . . objects."[114] Section 502(b) further states that except for certain exceptions not relevant here, once an objection to a claim is made, "the court, after notice and a hearing, shall determine the amount of the claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—(1) such claim is unenforceable against the debtor and property of the debtor. . . ."[115] Creditors have the burden of proof regarding the allowance of

[108] W. Davidson Deposition Transcript, pp. 78-79; T. Exh 50 (March 5, 2009 E-mail between W. Davidson and D. Child).
[109] T. Exh 53 (Amended POC), at p. 9.
[110] Trns. (Geringer) at 189-191; T. Exh 51 (5/22/09 e-mail between Cochran and Geringer).
[111] *Id.*
[112] Geringer Exh. 30 (Form 8-KA, with Geringer's Resignation Letters included).
[113] T. Exh 53 (Amended POC), at p. 9; G. Exh 15 (POC), at p. 15.
[114] 11 U.S.C. § 502(a).
[115] *Id*. § 502(b).

their claims, and to meet his burden, the claim must be sufficiently substantiated.[116]

B. INDEMNIFICATION CLAIMS

1. STATUTE OF LIMITATIONS

(a) Choice of Law.

54. On the parties' initial dispute is what law the Court should apply. The Trustee contends that California law applies because "a cause of action for breach of contract generally arises where the contract is to be performed." Reply, at 13. Geringer, on the other hand, argues that Utah follows the rule of lex fori, which "requires that matters of procedure be governed by the law of the forum, regardless of the parties' domicile, the law of the state in which the wrong was committed, or where the contract was breached." *See Fi. Bancorp, Inc., v. Pingree and Dahle, Inc.*, 880 P.2d 14, 16 (Utah Ct. App. 1994).

55. But, Geringer acknowledges that even if *Financial Bancorp* applies, this Court would be required to analyze whether Utah Code Ann. § 78B-2-103 would nonetheless bar Geringer's action. Section § 78B-2-103 provides:

> A cause of action which arises in another jurisdiction, and which is not actionable in the other jurisdiction by reason of the lapse of time, may not be pursued in this state, unless the cause of action is held by a citizen of this state who has held the cause of action from the time it accrued.

57. The Court concludes Geringer's claim arose in California. Findings of Fact ("FOF"), ¶15.

58. Since Geringer's claim for indemnity arose in California, this Court concludes that § 78B-2-103 requires it to determine whether Geringer's cause of action is time-barred under California law.

[116] *See Caplan v. B-Line, LLC (In re Kirkland*), 572 F.3d 838, 840 (10th Cir. 2009).

(b) Applicable Limitations Period Under California Law.

59. There are two limitations provisions in the California Code of Civil Procedure that are potentially relevant to Geringer's claim for breach of an indemnification contract: (1) section 337, which provides a four-year period for "an action upon any contract, obligation or liability *founded upon an instrument in writing*"; and (2) section 339, which provides a two-year period for "an action upon a contract, obligation, or liability *not founded upon an instrument of writing*." Cal. Civ. Pro. Code §§ 337, 339 (emphasis added).

60. Geringer's alleged indemnity agreement is an oral one. FOF ¶¶ 16-17.

61. Based on Geringer's Proof of Claim, and the evidence, the Trustee asserts that Geringer's indemnity claim is subject to the two-year limitation of section 339. However, notwithstanding his testimony and Proof of Claim, Geringer contends that his oral indemnity agreement, is nonetheless "founded upon an instrument in writing." *See* Response, at 31.

62. Geringer argues that there are numerous documents which "dovetail" into one agreement. These included, (a) emails from Kirby Cochran, Jad Howell and others, and (b) the minutes of Castle Arch's advisory board, (c) CAREIC's SEC filings, and (d) "payments that Castle Arch made in part performance of its obligations to indemnify." Response, at 31; Trns. at 419. Geringer also maintains that the CAREIC Operating Agreement provides an independent written basis for his claim. Trns. (Geringer) at 126.

63. The Court concludes that these documents do not bring Geringer's oral contract within the scope of section 337. It is clear under California law that for an action to be founded on an underlying written instrument,

> the writing had to "contain a contract to do the thing for the nonperformance of which the action is brought." [citation omitted]. In other words, the writing must contain the terms of the contract. It cannot be only remotely or indirectly connected with the transaction or only a link in the chain establishing the cause of action.

E.O.C. Ord, Inc., v. Kovakovich, 200 Cal. App.3d 1194, (Cal. Ct. App. 1988); *see also Meyers v. Guardian Life Ins.*, 66 P.2d 753, 754 (1937)("A suit is not upon a contract in writing unless the obligation which it is sought to enforce is found in the written agreement."); *McCarthy v. Mount Tecarte Land & Water Co.*, 111 Cal. 328, 340, (Cal. 1896)(the statute "refers to contracts, obligations or liabilities resting in or growing out of written instruments, not remotely or ultimately, but ***immediately***"); *Simmons v. Birge Co.*, 52 F. Supp. 629, 634 (S.D. Cal. 1943) (promise must be "one arising directly from the writing itself, and included in its terms").

64. None of Geringer's claimed writings, separately or together, can satisfy the requirements of California law.

(i) E-mails

65. At trial, Geringer offered three e-mails which he contends support his claimed indemnity agreement. *See* G. Exhs. 8, 9 & 10. Exhibits 8 and 9 are emails ***from*** Geringer to officers of CAREIC, asserting that CAREIC has an obligation to indemnify him in connection with the Coalinga and Firebaugh properties. Exhibit 10 is an e-mail from Doug Child in which Geringer has similarly interlineated his responses paragraph by paragraph.

66. The Court concludes the though these Exhibits may very well shed evidentiary light on the existence or not of Geringer's claimed indemnity agreement, they simply cannot be the "written instrument" upon which his claim is founded for purposes of Section 337. First, all of the e-mails were created in 2008.[117] This is two years ***after*** the date Geringer claims he and CAREIC entered the indemnity contract. While these e-mails may be "a link in the chain of evidence establishing the cause of action," they cannot be the writing itself upon which the contract is founded. *McCarthy*, 111 Cal. at 340. They were created after the fact, and do not contain the contract.

[117] See Exhs. 8, 9, and 10.

67. Second, all of these e-mails are "writings by the Plaintiff, and not writings prepared by defendant. Therefore, they cannot be used to show an 'acceptance' by Defendant." *James De Nicholas Assoc. Inc. v. Heritage Constr. Corp.*, 5 Cal. App.3d 421, 425 (Cal. Ct. App. 1970). These documents provide no "tangible written indication of defendant's acceptance of the terms of the writing. . . ." *Id*.

(ii) Minutes

68. Geringer also suggested that certain minutes of CARIEC's "advisory board" were documents upon which his indemnity contract claim was founded. *See* Response, at 31. At trial, Geringer offered seven exhibits that might fall within this description. *See* G. Exhs. 38 through 44. These Exhibits are all hand-written or official minutes of meetings of the CAREIC Board. The earliest is from January 25, 2006.

69. As with the e-mails, the Court concludes that these documents cannot be the "written instrument" upon which Geringer's claim is founded. Like the e-mails, the minutes were prepared long after the purported agreement was entered. They may provide evidence of the oral agreement, but they cannot be the written instrument upon which the agreement is founded. More to the point, while the minutes discuss the Firebaugh and Coalinga projects, they do not contain any discussion of the purported indemnification agreement. Even if they had, they would still not bring Geringer's claim within section 337. The California Supreme Court long ago held that entries in corporate minutes do not constitute an instrument in writing for purposes of the limitation statutes. *See Todd v. Board of Ed.*, 102 Cal. 106 (1898).

(iii) SEC Filings

70. In his closing argument, Geringer's counsel also referred to CAREIC's "SEC filings" as writings upon which his indemnification agreement was founded. Geringer offered

two SEC filings as exhibits at trial: Exhibit 7 (12/31/2005 Form 10-KSB) and Exhibit 29 (12/31/2006 Form 10-KSB).

71. For the same reasons discussed above, the Court concludes that these documents cannot be "written instruments" upon which Geringer's claim is founded. Both documents were created long after the purported agreement was entered and neither purports to memorialize the agreement. Indeed, while they discuss the Firebaugh and Coalinga projects, neither mentions Geringer's personal guarantee, much less any indemnification agreement between Geringer and CAREIC. Nor do any other earlier SEC Filings.

(iv) Payments

72. Finally, Geringer argues that the payments CAREIC made to First Federal/OneWest Bank (on the Coalinga loan(s)) and to Tag Opportunity Fund, LLC and ANB Venture LLC (on the Firebaugh loan(s)), were "in part performance of its obligations to indemnify," and help establish that the indemnification contract is founded upon an instrument in writing.

73. The Court concludes that whatever evidentiary significance these payments may have, they do not establish that Geringer's claim is based on an instrument in writing. An argument very similar to Geringer's argument was presented to, and rejected by, the California Court of Appeals in *James De Nicholas Assoc. Inc. v. Heritage Construction Corp.*, 5 Cal. App.3d 42, (Cal. Ct. App. 1970). There, the plaintiff argued that "part payment is an assent to the agreement." *Id*. At 426. The court rejected this contention. It held that

> a part payment may serve to extend the limitation period and make it run from the last payment. *But we know of no authority for the proposition that a part payment changes the statute applicable to the debt*. The most that the part payment herein alleged could do would be to make the two-year statute run from [the date of the last part payment.] *Id*. (emphasis added).

74. In sum, the Court concludes that Geringer's indemnification agreement claims are not founded upon an instrument in writing, and as such, under California law they are subject to the two-year limitations period established by section 339 of the California Code of Civil Procedure.

(c) Accrual Date.

75. Under California law, "[a]s a general rule, a cause of action accrues and a statute of limitations begins to run when a controversy is ripe – that is, when all of the elements of a cause of action have occurred and a suit may be maintained." *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App.4th 1375, 11 Cal. Rptr.3d 412, 422 (2004).

76. In this case Geringer contends that under section 2778 of the California Civil Code "a cause of action for indemnity of losses and liabilities accrues only after the person indemnified actually pays the loss." Response, at 32. Geringer reads section 2778 to provide a new accrual date for his indemnity claim each time he was forced to make a payment or incur an expense in connection with his guarantees. *Id*. (citing *ExxonMobil Oil Corp. v. Nicoletti Oil*, 713 F.Supp.2d 1105, 1113 (E.D. Cal. 2010)).

77. The Court concludes that Geringer is incorrect about the effect of section 2778 on the accrual rules under California law. Section 2778 contains two important subsections. Section 2778(1) provides that "[u]pon an indemnity *against liability* . . . the person indemnified is entitled to recover upon *becoming liable*." (Emphasis added). Section 2778(2), by contrast, provides that "[u]pon an indemnity *against claims, or demands, or damages, or costs* . . . the person indemnified is not entitled to recover *without payment thereof*." (Emphasis added).

78. The single case Geringer relies upon for his contention that his claim accrues continuously – *ExxonMobil* – does not establish this principle. Rather, *ExxonMobil* simply rejects the argument that notice of *liability* alone is sufficient to start the statute of limitations on

a cause of action for indemnification against "claims, or demands, or damages, or costs." *Id*. This conclusion is in accord with the plain language of Section 2778(2). But the language of 2778(2) does not establish a "continued accrual" rule for indemnity claims, and no California cases have so held.

79. Rather, the California courts are clear that "[w]hether a statute of limitations continues to accrue depends on whether the contract is 'entire' or 'severable.' If the contract is entire, the statute of limitations will accrue upon a material breach even before the date for final performance by the defendant." *Hanelin v. Hanelin*, 2011 WL 5179186 (Cal. App. Nov. 2, 2011), at *7 (citing *Armstrong Petroleum Corp.*, 116 Cal. App.4th at 1389, 11 Cal. Rptr.3d 412).

80. The test to determine whether a contract is "entire" or "severable" "is that if the consideration is single, the contract is entire, but if the consideration is apportioned, the contract may be regarded as severable." *Id*. (citing *Hayutin v. Weintraub*, 207 Cal. App.2d 497, 509 (1962); *World Sav. & Loan Assn. v. Kurtz Co.*, 183 Cal. App.2d 319, 328 (1960); *Gold Min. & Water Co. v. Swinerton*, 23 Cal.2d 19, 30 (1943) (mineral lease requiring lessee to pay monthly royalties was an entire obligation)). Said another way, under California law a contract is divisible, and subject to the continuous accrual rule, *only* when "the performance of each part by one party is the agreed exchange for a corresponding part by the other party." *Id*. (citing *Jozovich v. Central California Berry Growers Assn.*, 183 Cal. App.2d 216, 223 (1960)). But if the non-breaching party's performance under the contract is complete, "the statute of limitations will accrue upon a material breach even before the date for final performance by the defendant." *Id*.

81. Under these precedents, the Court concludes that the oral indemnity agreement asserted in this case was "entire." According to Geringer, he agreed to execute the Guarantees in

connection with financing on the Properties, in exchange for CAREIC's promise to "indemnify [him] for any expenses or losses [he] incurred because of that guarantee." Trns. at 123. As Geringer has described it, his performance was complete almost immediately. Once he had executed the personal Guarantees no further performance was required of him. The fact that he suffered expenses and losses over an extended period of time as a result of CAREIC's alleged breach makes no difference.

82. Moreover, California courts have also recognized that "a partial breach followed by a repudiation [of the contract]" makes the breach "total." *Fox v. Dehn*, 42 Cal. App.3d 165, 116 Cal. Rptr. 786, 791 (1974). In such cases, a cause of action for damages arises immediately. *Id*.; *see also Armstrong Petroleum Corp.*, 116 Cal. App.4th at 1375; *Lubin v. Lubin*, 144 Cal. App.2d 781, 791, (Cal. Ct. App.1956); *Brewer v. Simpson*, 53 Cal.2d 567, 593, (Cal. 1960); *Gold Min. & Water Co.*, 23 Cal.2d at 29.

83. The Court concludes that by no later than October 31, 2008, CAREIC had repudiated and totally breached the oral indemnity agreement. According to Geringer, by that date CAREIC had (1) ceased paying expenses he says it was required to under the indemnification agreement, and (2) unequivocally communicated to him that CAREIC would not honor its commitment to indemnify him. G. Exh. 16 at pp. 9, 11; FOF ¶ 25.

84. Geringer's Proof of Claim reflects that CAREIC's repudiation of the indemnity agreement was preceded by its refusal to indemnify Geringer for payments he had made on the Firebaugh Loan as early as May 14, 2008, and its refusal to indemnify Geringer for payments he had made on the Coalinga Loan as early as April 8, 2008. FOF ¶¶ 19, 25.

85. Accordingly, the Court concludes that Geringer's claims accrued no later than October 31, 2008. As such, his claim expired no later than October 31, 2010. This is nearly a

year before CAREIC filed its bankruptcy petition in this case, and over a year before Geringer asserted his claim in the bankruptcy. Accordingly, the claims are time-barred.[118]

2. THE CAREIC OPERATING AGREEMENT

(a) Indemnification Provisions.

86. Geringer argues that the indemnification article of the CAREIC Operating Agreement provides a basis for Geringer's claim "that is independent from and in addition to" the oral promises he claims Cochran made. Response, at 29. Geringer relies on sections 14.1(a) and 14.1(d) of the CAREIC Operating Agreement.

87. Geringer contends that CAREIC is required to indemnify him under the provisions of Article 14 because "his personal guarantees of the Firebaugh and Coalinga Loans . . . arose directly out of his role at Castle Arch." Response, at 29. As such, he contends that the litigation against him on the Guarantees (and his subsequent liability), is litigation to which he is a party "because [he] is or was a Member or officer or director" within the meaning of section 14.1(a). *Id*.

88. The Court concludes that Geringer's reading of the indemnification provisions of CAREIC's Operating Agreement cannot be sustained because it is contrary to their plain language. Section 14.1(a) offers indemnification only for members, officers or directors who are made parties to a lawsuit "because such individual is or was a Member or officer or director." In other words, it offers indemnification only to individuals who are sued *in their capacities as*

[118] From March 7, 2007 through September 28, 2009, Geringer made total payments on the Coalinga Loan totaling $725,874.57, for which he was not reimbursed by CAREIC. *See* G. Exh. 16 (Amended POC) at 9. At a minimum, this amount is barred by the statute of limitations even as argued by Geringer, because Geringer did not bring a claim by September 28, 2011. Thus, the amount of Geringer's Indemnity Claim should be reduced by this amount.

In addition, Geringer claims that he owes a balloon payment of $2,342.874.01 on March 31, 2013. Geringer has no claim for this unpaid amount and must first present proof of payment of the Court before the Court will allow any claim for this balloon payment.

member, officers or directors, that is, for their representation of the corporation, or for taking action on behalf of the corporation in the classical sense of agency.

89. In executing the *personal* Guarantees, Geringer was clearly acting in his *personal capacity*, and not as an officer, director or other agent of CAREIC. The banks did not sue him "as a member, officer or director" of CAREIC. To the contrary, he was sued as a guarantor of loans made to BDI.

90. The fact that Geringer was acting in his personal capacity in executing the personal Guarantees is confirmed by Geringer's testimony about the indemnity contract. According to Geringer, he executed the personal guarantees *in exchange for* CAREIC's agreement to indemnify him. Had he been acting as CAREIC's agent, this transaction would not have been necessary. Indeed, in the indemnification negotiations, CAREIC and Geringer were adverse.

91. Geringer's position is also inconsistent with other sections of the indemnification Article. Geringer acknowledges that section 14.1(d) requires, as a prerequisite for indemnification, a determination that the party to be indemnified "acted in good faith," and "reasonably believed that his conduct was in or at least not opposed to the Company's best interest." But Geringer completely ignores section 14.1(e) which requires, as a prerequisite to indemnification, that the good-faith determination be made by the chief executive officer, or the Majority-In-Interest, or independent legal counsel. There is no evidence that such a determination was requested, or has been made, in this case.[119]

[119] Section 14.1(h) similarly does not further Geringer's position. Section 14.1(h) merely preserves whatever independent indemnification rights Members may contract for or otherwise have under the law. Although it provides that "[n]othing provided in this Section will limit the ability of the Company to otherwise indemnify or advance expenses to any individual," and that "[i]t is the intent of this Section to provide indemnification to Members and the chief executive officer to the fullest extent now or hereafter permitted by the law consistent with the terms and conditions of this Section," these statements are explicitly limited to "this Section"—Section 14. This section thus does not alter any restrictions on indemnity found in other sections, such as Section 5.4, which limits

(b) Rights and Obligations of CAREIC Members.

92. In counterpoint to Geringer, the Trustee contends that Section 5.4 of the Amended Operating Agreement expressly bars the claim Geringer now asserts, and that Geringer signed the Amended Operating Agreement after executing his personal guarantees, thus waiving any claim he might otherwise have had.

93. Section 5.4 provides that if a member--

> has incurred any indebtedness or obligation prior to the date hereof [February 17, 2007] that relates to or otherwise affects the Company, neither the Company nor any other Member will have any liability or responsibility for or with respect to such indebtedness or obligation *unless the indebtedness or obligation is assumed by the Company pursuant to a written instrument signed by the chief executive officer or approved by the Supermajority-In-Interest*.

Emphasis added.

94. In his Response, and at trial, Geringer argued that the Court should limit application of this section to situations where members seek to hold CAREIC liable for debts they incurred prior to the formation of the company. *See* Trns. at 412. Geringer offered no citation or authority for his reading, and the limitation he proposes does not appear in the plain language of section 5.4. Rather, by its terms, the section applies to "any indebtedness or obligation" incurred "prior to the date hereof," that is any obligation incurred prior to the execution date of the Operating Agreement.

95. It is beyond dispute that the obligation Geringer now seeks to impose on CAREIC and its investors was incurred prior to the date of the effective Operating Agreement [February 17, 2007]. Moreover, it is clear that Geringer himself signed the 2007 Operating Agreement after the purported indemnification, knowing of section 5.4's effect. The Court cannot, without

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the ability of CAREIC to indemnify a Member for any debt incurred prior to the formation of the Operating Agreement.

doing violence to the language of the Operating Agreement, allow Geringer to evade its provisions.

96. Finally, Geringer ignores the second sentence of section 5.4. That sentence applies to "indebtedness or obligation that is hereafter incurred." It squarely disclaims corporate responsibility for such debt, and requires any Member who incurs such debt to "indemnify and hold harmless the Company and the other Members from any liability or obligation they may incur in respect thereof.[120]

3. AGREEMENT PROCURED BY FRAUD

97. Based on its findings of fact, the Court also concludes that even if Geringer had secured an otherwise enforceable oral indemnity agreement from CAREIC, that agreement was induced by material representations Geringer made to CAREIC to obtain the agreement. As such, CAREIC was entitled to rescind the agreement based on Geringer's fraud.[121]

98. An action for promissory fraud exists where a person fraudulently induces another to enter into a contract.[122] The elements of a deceit are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."[123]

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[120] Geringer first attempts to avoid the effect of section 5.4 by arguing that it only refers to Members. Trns., at 412. Geringer signed the Operating Agreement as a member. *Id*. Geringer also argues that section 5.5, which is entitled "Indemnity of a Member" requires CAREIC to indemnify him, to the same extent as section 14.1. *Id*., at 412-413. Geringer's argument renders section 5.4 meaningless. If section 5.5 requires CAREIC to indemnify Geringer for the exact obligations that section 5.4 expressly provides will not be the responsibility of CAREIC, then section 5.4 is a meaningless provision. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *See* Cal. Civ. Code § 1641. The interpretation of the Operating Agreement that gives effect to section 5.4 is that section 5.5 merely provides that CAREIC will indemnity its members for any transaction that is not expressly covered by section 5.4.

[121] *Engalla v. Permanente Med. Group*, 938 P.2d 903, 921 (Cal. 1997) (citing cases).

[122] *Id.*, p. 917.

[123] *Id.* (internal citations omitted); *accord Hinesley v. Oakshade Town Center*,135 Cal. App. 4th 289, 294 (Cal. Ct. App. 2005); *see Daines v. Vincent*, 190 P.3d 1269,1279 (Utah 2008) (stating that to prevail on a claim of fraudulent inducement, a party must prove: (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other

99. Here, to obtain the promise of indemnification, Geringer represented to Cochran and other CAREIC officers that CAREIC had a continuing interest in the Properties after the Reassignment Agreements.[124] But the documents that Geringer negotiated and transacted himself show that, contrary to his representation, the Reassignment Agreements afforded CAREIC no objective means of obtaining any profits from the Properties. Rather, CAREIC's sole legal source of recovery was Baillio.

100. Given Geringer's background and experience as a lawyer and real estate developer, his statements were, at best, reckless given the way that he had structured the deal, or at worst, known fraud (inasmuch as he was telling Baillio and the California Court that the Guarantees were for personal reasons).[125]

101. Being a material misrepresentation, there is a presumption that Cochran relied on this statement.[126] Indeed, Geringer's own testimony was that he signed the Guarantees (and subsequently made payments on this guarantees) because it would ultimately result in payment under the Reassignment Agreement.[127] Others, including officers other than Cochran who Geringer admits have "truthfully" testified that they did not know of the indemnity agreements,[128] and investors, were led to believe that payments were being made to Geringer for the Properties based on a profit sharing or ownership interest which Geringer knew did not exist.

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party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage).

[124] *See supra* ¶ 39 (last bullet point).

[125] *See supra* ¶ 39 (last bullet point) cross reference conflicting testimony); *see Engalla*, 938 P.2d at 917 (recklessness is grounds for false representation).

[126] *See id.* at 919 (presumption for material representations).

[127] Trns. (Geringer), at 146, G. Exh. 8 (e-mail from Geringer)

[128] Geringer Response, pp. 13-14. Indeed, if Geringer pays off OneWest Bank on his Coalinga Guaranty, BDI will own the Coalinga Property. Geringer's claim against CAREIC will not be reduced by the value of that Property.

C. RENT CLAIM.

102. The Rent Claim seeks unreimbursed rent under the 2007 Lease both prior to and after Geringer's resignation. A total of $45,000 in rent remained unpaid prior to Geringer's resignation, and it is not contested that Geringer has an unsecured claim for that rent.[129] The only portion of the Rent Claim contested by the Trustee is attributed to the period after he resigned from CAREIC, totaling $217,500.[130] The request for post-resignation rent is based on Geringer's allegation that when he re-negotiated the 2007 Lease, CAREIC promised to reimburse him $10,000 per month for the entire five-year term of the 2007 Lease, regardless of his employment.[131]

1. STATUTE OF FRAUDS

103. It is undisputed that no written agreement exists requiring CAREIC to reimburse Geringer for the five-year term of the 2007 Lease.[132]

104. California Civil Code § 1624(a)(1) states that any agreement that by "its terms is not to be performed within a year from the making thereof" must be in writing and subscribed by the party to be charged or it is "invalid."[133]

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[129] This sum is calculated as follows: (a) rent of $10,000 per month for the months of December 2008, January 2009, May and June 2009, plus (b) $5,000 for rent for the period July 1, 2009 through July 15, 2009—the date Geringer resigned from CAREIC. *See* G. Exh. 16 (Amended POC, p. 8 (showing schedule of unpaid office rent and payments received from CAREIC)); G. Exh. 30 (resignation as of July 15, 2009)).

[130] The 2007 Lease was amended in 2010, and Geringer seeks payment only through the date of the amendment. *See* G. Exh. 16 (Amended POC, pp. 8 & 51).

[131] Response, pp. 21-22.

[132] Transcript (Vol. 1), at p. 182 (Geringer); G. Exh. 15 (Proof of Claim); G. Exh. 16 (Amended POC).

[133] *See also* Utah Code Ann. § 25-5-4 (stating same rule); *see also* California Civil Code § 1624(a)(3) ("An agreement for the leasing for a longer period than one year . . . ." must be in writing and subscribed by the party to be charged or it is "invalid"); *Abel v. Int'l Bus. Mach. Corp*., 2006 WL 618582 at *3 (N.D. Cal. Mar. 9, 2006) (holding that alleged oral agreement by company not to terminate employee for at least two years was barred by the statute of frauds) (citing *Pfeifer v. U.S. Shoe Corp.*, 676 F. Supp. 969, 975 (C.D. Cal.1987) (holding that oral agreement to employ fifty-five year-old plaintiff to the age of sixty-five is an agreement relating to a fixed date more than one year in the future, and therefore, such oral agreement was barred by the statute of frauds)); *Whipple v. Utah*, 2011 WL 4368568 at *32–33 (D. Utah Aug. 25, 2011) (stating Utah rule and holding that an oral contract was not enforceable because it was not capable of being performed within a year); *Anderson v. Larry H. Miller Comm. Corp*., 2012 WL 2924064 at *6 n.3 (Utah Ct. App. July 19, 2012) (noting that since a contract was supposed to be performed over a three-year period, the agreement needed to be signed under Utah's statute of frauds).

105. The alleged oral agreement that CAREIC would provide Geringer rent reimbursement for the entire five-year term of the 2007 Lease cannot be performed within one year, and therefore, this agreement was required to be reduced to writing under § 1624(a)(1). There is no such writing and, thus, the alleged contract is not enforceable.

106. Geringer maintains that a writing exists based on the 2007 Lease and § 4.02 of the Consulting Agreement.[134] Yet, these documents are not writings memorializing a promise to make payments for the term of the 2007 Lease. They cannot form the basis for such a writing because CAREIC is not a party to the 2007 Lease, and the Consulting Agreement was entered into in 2004, well before the oral promise to reimburse Geringer under the 2007 Lease was allegedly made.

107. Further, the Consulting Agreement is expressly tied to Geringer's employment, terminating upon resignation and applying only to expenses incurred "in the performance of" Geringer's duties thereunder.[135] It is undisputed that no written modification of the Consulting Agreement was made to encompass post-employment expenses as required under its terms[136] and, thus, the Consulting Agreement cannot serve as a writing for the oral promise to reimburse Geringer for the term of the 2007 Lease.

108. The argument that the Consulting Agreement could have been performed within one year and thus is immune from the statute of frauds[137] is without merit because, as discussed, the Consulting Agreement is not a writing obligating CAREIC to pay Geringer for the entire five-year term of the 2007 Lease.[138]

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[134] Geringer Response, pp. 37-38.
[135] *See supra* ¶ 43 (quoting Consulting Agreement).
[136] *See supra* ¶ 44.
[137] Geringer Response, p. 39 (citing *Pasquin v. Pasquin*, 1999 UT App. 245, ¶ 18, for the proposition that the statute of frauds does not apply if the oral contract has any possibility of being performed within one year).
[138] Geringer also maintains that the following documents, taken together, constitute a writing in support of CAREIC's agreement to pay him for the entire five-year term of the 2007 Lease: (a) the Consulting Agreement; (b)

2. STATUTE OF LIMITATIONS

109. Geringer's claim for post-resignation rent based on an oral agreement to reimburse him for rent under the 2007 Lease regardless of his employment also is barred under California Civil Procedure Code § 339(1) because this agreement was breached in July 2009,[139] and thus the 2-year limitations period expired at the latest in July 2011, prior to the Petition Date.

110. California, not Utah law applies. Where the only performance required under a contract is the payment of money and the contract is silent regarding the place of payment, courts "presume payment was to be made where the payee resides or at its place of business."[140] Here, Geringer is a resident of California, CAREIC is a California corporation which has its "principal place of business" in California, the Operating Agreement is governed by California law, and the rent was payable in California.[141] Had he sought to enforce the alleged oral contract, the action would have been brought in California. Utah Code Ann. § 78B-2-103 expressly requires that California law apply.

111. Geringer argues that Utah law applies inasmuch as it arises under the Consulting Agreement which is governed by Utah law.[142] For the reasons discussed above, the Consulting Agreement, which terminated by its terms when Geringer resigned, cannot govern an oral contract to pay Geringer rent for the entire term of the 2007 Lease even after his resignation. Thus, there is no basis for the application of Utah law.

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written communications between Geringer and Castle Arch; (c) the lease documents for the Office; and (d) Castle Arch's governance and public filing documents. Geringer Response, pp. 39, 42. As set forth above, however, none of these documents support a claim for rent reimbursement after Geringer's resignation.

[139] G. Exh. 16 (Amended POC, p. 8).

[140] *Fin. Bancore, Inc. v. Pingree & Dahle, Inc.* 880 P.2d 14, 17 (Uth Ct. App. 1994).

[141] *See supra* ¶ 6; Geringer Exh. 77 (Standard Form Lease Agreement, § 1.15).

[142] Geringer Response, p. 41; T. Exh. 47 (Consulting Agreement, §6.01).

D. WAGE CLAIM.

112. Geringer agreed to a fifty percent reduction of his salary starting in February 2009. Geringer also agreed to forego all salary starting in June 2009 through his July 15th resignation.

113. Accordingly, Geringer is allowed a general unsecured claim in the total amount of $65,000 in salary and $13,406.84 in unreimbursed expenses.[143] Salary is calculated as follows: (a) $75,000 for the period November 2008 through January 2009; (b) plus $50,000 for the period of February 2009 through May 2009; and (c) less $60,000 paid during this period.[144]

----------END OF ORDER----------

[143] *See* Geringer Exh. 15 (Proof of Claim), at p 15.
[144] *See* T. Exh 53 (Amended Proof of Claim), at p. 9.

CERTIFICATE OF SERVICE – BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on March 22, 2013, I electronically filed the foregoing **[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRUSTEE'S OBJECTION TO AMENDED PROOF OF CLAIM NO. 27-2 (ROBERT GERINGER) FILED AGAINST CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF uses and will be served through the CM/ECF system.

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I further certify that on the 22 day of March, 2013, I caused to be served a true and correct copy of the **PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRUSTEE'S OBJECTION TO AMENDED PROOF OF CLAIM NO. 27-2 (ROBERT GERINGER) FILED AGAINST CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC** via e-mail as follows:

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