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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 II, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; and CASTLE ARCH SMYRNA, LLC,

Bankruptcy No. 11-35082
Bankruptcy No. 11-35237
Bankruptcy No. 11-35240
Bankruptcy No. 11-35242
Bankruptcy No. 11-35243
Bankruptcy No. 11-35246
Bankruptcy No. 11-35241

(Jointly Administered)
(Chapter 11)
Honorable Joel T. Marker

OBJECTIONS OF DOUGLAS CHILD, KIRBY COCHRAN, JEFFREY AUSTIN, WILLIAM GRUNDY, AND KEITH GREEN TO THE JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN TRUSTEE AND WILLIAM WARWICK UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019

Douglas Child, Kirby Cochran, Jeffrey Austin, William Grundy and Keith Green (collectively, the "Objectors") respectfully submit the following objections to the Joint Motion of the Trustee Ray Strong and William Warwick for Approval of Settlement Agreement under Federal Rule of Bankruptcy Procedure 9019 (the "Proposed Settlement"). The Objectors are "non-settling parties" that the Trustee and Mr. Warwick have proposed to bar through the Proposed Settlement from asserting claims against Mr. Warwick, including, but not limited to, claims for contribution and indemnity. All of the Objectors except Mr. Green and Mr. Cochran have filed claims in this proceeding as creditors of the Estate.

The Objectors raise two objections to the Proposed Settlement. *First*, the Court lacks the jurisdiction to enter the bar order initially proposed by the Trustee and Mr. Warwick against the Objectors and other non-settling parties. *Second*, the bar order proposed by the Trustee and Mr. Warwick is deficient as a matter of law.

I. The Court Lacks Jurisdiction To Enter A Bar Order

Under the Private Securities Litigation Reform Act of 1995 (PSLRA), if the Court approves the settlement, it must enter a bar order prohibiting Movants from seeking contribution from Mr. Warwick for any federal securities law claim filed by Trustee (such as those identified in the Draft Complaint). 15 U.S.C. § 78u-4(f)(7)(A). The Trustee and Mr. Warwick filed with the Court an order that would, if granted, extinguish all claims that the Objectors may have against Mr. Warwick under the federal securities laws and also state law. Specifically, the Trustee has provided the Objectors and Mr. Warwick with a draft complaint which asserts, among other things, violations of the antifraud provisions of the Securities and Exchange Act and the rules provided thereunder.

The proposed order would bar all claims–not just contribution claims–against Warwick arising out of, or relating to, claims the Trustee may assert against the "non-settling parties." The provisions of the proposed bar order are as follows:

> 3. Robert Geringer, Kirby Cochran, Robert Clawson, Douglas W. Child, Jeff Austin, William H. Davidson, and Keith Green, and William Grundy (collectively, the "Non-Settling Parties"), or any of their representatives, agents, successors, or assigns are hereby forever barred and enjoined from filing, commencing, instituting, prosecuting or maintaining either directly or indirectly, representatively, or in any other capacity, any claim, counterclaim, cross-claim, third- party claim or other action, including but not limited to claims for contribution and indemnity, against William Warwick ("Warwick") and his heirs, successors and assigns, that arises out of, or relates to, any Claim, Cause of Action, or Individual Claim (as those terms are defined in Sections 1.1 and 6.4 of Second Amended Chapter 11 Trustee's Plan of Liquidation Dated February 25, 2013 [Docket No. 701]) that the Trustee may assert against any of the Non-Settling Parties.
>
> 4. With respect to any Claim, Cause of Action, or Individual Claim that the Trustee may bring or assert against any of the Non-Settling Parties, the Non-Settling Party shall be entitled (i) to have the judge or jury consider the proportion of fault attributable to the conduct of Warwick and (ii) to have any judgment against the Non-Settling Party reduced by the greater of (x) the proportion of fault attributed to Warwick or (y) the amount of the Warwick settlement actually paid to the Trustee.
>
> 5. The procedure set forth in paragraph 4 above shall not be applied to reduce the amount of any settlement reached with any Non-Settling Party.

(Mot. Ex. B at 2-3.)

The Trustee and Mr. Warwick thus proposed that this Court enter an order that adjudicates a dispute between two non-parties to the Estate -- Mr. Warwick and the Objectors -- relating to federal and state law claims that those parties may have against each other. The Trustee and Mr. Warwick have since agreed that the settlement will not be contingent on the Court entering the order, but the Court is obligated under the PSLRA to enter such an order regardless of how the Trustee and Mr. Warwick couch their agreement.

The determination of these third party rights through a bar order is not a core proceeding under Section 157(b)(1) of the Bankruptcy Code since it does not arise under the Bankruptcy Code. *See* U.S.C. § 157. To adjudicate such a dispute the Court must have the consent of the Objectors to its jurisdiction -- and the Objectors do not consent. *See, e.g.*, *Exec. Benefits Ins. Agency v. Arkison*, __ U.S. __, at 7 (Slip Op. June 9, 2014) (bankruptcy courts may not enter final judgment on non-core proceedings absent consent of the parties).

Moreover, a dispute between Mr. Warwick and the Objectors is not a non-core proceeding because it is not "related to" the res of the estate. "The test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Greektown Holdings LLC*, 728 F.3d 567, 577 (6th Cir. 2013) (citation and internal punctuation omitted) (noting split between 5th Circuit and 11th Circuit on whether contributory bar orders are properly the subject of district court jurisdiction). "At the most literal level, it is impossible for the bankrupt debtor's estate to be affected by a post-confirmation dispute because the debtor's estate ceases to exist once confirmation has occurred." *Id.* (citation and internal punctuation omitted). Here, the dispute between Mr. Warwick and the Objectors does not implicate the estate since the plan has already been confirmed. Mr. Warwick and the Trustee cannot create bankruptcy jurisdiction out of whole cloth solely by having Mr. Warwick consent to it. *See id.* at 578 (rejecting approach attempt by "settling defendant to supply the bankruptcy court with subject matter jurisdiction to enjoin other claims simply by deciding to condition its agreement to the settlement upon the entry of an order barring those claims.").

II. The Judgment Credit In The Proposed Order Does Not Comport With Statutory Requirements

A bar order involving claims under the federal securities laws may only be approved by the Court if it preserves the right of the non-settling parties to an appropriate judgment credit. *See, e.g.*, *In re Refco Sec. Litig.*, No. 05 Civ. 8626 (GEL), 2007 WL 57872, at *2-*3 (S.D.N.Y. Jan. 9, 2007). The PSLRA provides that non-settling parties are entitled to a judgment credit provision as follows:

> If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of—
>
> (i) an amount that corresponds to the percentage of responsibility of that covered person; or
>
> (ii) the amount paid to the plaintiff by that covered person.

15 U.S.C. § 78u-4(f)(7)(B).

"The fundamental principle on which the law in this area rests is the 'one satisfaction' rule, which provides that a plaintiff is entitled to only one satisfaction for each injury." *In re Refco Sec. Litig.*, 2007 WL 57872, at *2. This rule "requires that nonsettling defendants receive credit for settling defendants' share of common damages, that is, damages for which both the settling and nonsettling defendants are responsible." *Id.* Further, "[a] judgment credit must give nonsettling defendants credit for at least the amount of the settlement for common damages, because if it did not, plaintiffs could recover from both the settling and nonsettling defendants for the same damages." *Id.*

The judgment credit provisions of the Proposed Settlement, which are Paragraphs 4 and 5 of the Proposed Order, do not provide the required protection of the non-settling parties and raises the possibility that the Trustee will be able to collect the same damages from more than one party.

First, Paragraph 5 bars the Trustee from reducing the amount of any settlement with the Objectors by the judgment credit. ("The procedure set forth in Paragraph 4 above shall not be applied to reduce the amount of any settlement reached with any Non-Settling Party.") This provision makes little sense and in essence *requires* that the Trustee presume that no other settlements have been reached with Mr. Warwick. There is no jurisdictional or logical basis for the Court to issue such an instruction to the Trustee, and it provides cart blanche to the Trustee to obtain more than one satisfaction through settlement. Moreover, it directly contradicts the PSLRA mandate that a judgment credit be provided to the non-settling party for purposes of "the verdict ***or judgment***". 15 U.S.C. § 78u-4(f)(7)(B) (emphasis added). Such a judgment may be provided by a settling party.

Second, Paragraph 4 is unduly vague about the judgment credit actually afforded to the Objectors. For example:

- Paragraph 4 states that the Non-Settling Party "shall be entitled (i) to have the judge or jury consider" the potential fault of Mr. Warwick. By contrast, the PSLRA *requires* that the *percentage* of responsibility of the settling person be determined for the purposes of a judgment credit. *See* 15 U.S.C. § 78u-4(f)(7)(B).

- Paragraph 4 provides that the "judgment" will be reduced, but makes no mention of the "verdict," as required by the PSLRA.

- Paragraph 4 provides a credit the greater of "(x) the proportion of fault attributed to Warwick or (y) the amount of the Warwick settlement actually paid to the Trustee." However, the Proposed Order does not define the term "Warwick settlement" and does not specify whether the credit will be only for the $200,000 paid directly by Warwick to the Trustee or the entire amount that the Trustee is able to recover. (Only the latter is consistent with the one satisfaction rule).

The Court should not enter an order that does not match precisely the terms of the PSLRA, particularly when (as here) those terms directly contradict the plain language of the PSLRA and are at odds with the one satisfaction rule.

III. Conclusion

For the reasons stated herein, respectfully the Court should deny the Motion to Approve the Settlement between the Trustee and Mr. Warwick.

DATED this 26th day of August 2014.

Respectfully submitted,

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

I hereby certify that on August 26, 2014, I electronically filed the foregoing **OBJECTIONS OF DOUGLAS CHILD, KIRBY COCHRAN, JEFFREY AUSTIN, WILLIAM GRUNDY, AND KEITH GREEN TO THE JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN TRUSTEE AND WILLIAM WARWICK UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019**, with the United States Bankruptcy Court for the District of Utah by using the CF/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

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