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Appearing Specially for Robert D. Geringer,
Robert D. Geringer, P.C., and Fine Arts Entertainment, Inc.

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

D. RAY STRONG, as Liquidating Trustee of
the Consolidated Legacy Debtors Liquidating
Trust, the Castle Arch Opportunity Partners I,
LLC Liquidating Trust and the Castle Arch
Opportunity Partners II, LLC Liquidating
Trust,

Plaintiff

v.

KIRBY D. COCHRAN; JEFF AUSTIN;
AUSTIN CAPITAL SOLUTIONS;
WILLIAM H. DAVIDSON; DOUGLAS W.
CHILD; CHILD, VAN WAGONER &
ASSOCIATES, PLLC, fka CHILD,
SULLIVAN & ASSOCIATES, fka CHILD,
VAN WAGONER & ASSOCIATES, LLC,
fka CHILD VAN WAGONER &
BRADSHAW, PLLC; ROBERT CLAWSON;
HYBRID ADVISOR CROUP; and JOHN
DOES 1-50,

Defendants

**ROBERT D. GERINGER, ROBERT D.
GERINGER, P.C., AND FINE ARTS
ENTERTAINMENT, INC.'S
OBJECTIONS TO REPLY
DECLARATION OF D. RAY STRONG IN
SUPPORT OF PLAINTIFF'S MOTION
TO TRANSFER RELATED CASE
PURSUANT TO DUCIVR 83-2(G), AND
TO COMPEL ARBITRATION**

Case No. 2:14-cv-00788-TC
The Honorable Tena Campbell

Defendants Robert D. Geringer (“Mr. Geringer”), Robert D. Geringer, P.C., and Fine Arts Entertainment, Inc. (collectively, “Defendants”) submit the following evidentiary objections to the Declaration of D. Ray Strong (the “Reply Declaration”) filed in support of the Trustee’s *Reply to Robert D. Geringer’s Objection to Plaintiff’s Motion to Transfer Related Case Pursuant To DUCIVR83-2(G), And To Compel Arbitration* (the “Reply”).

BACKGROUND

On January 7, 2016, Plaintiff D. Ray Strong, as Trustee of the Consolidated Legacy Debtors Liquidating Trust and the Castle Arch Opportunity Partners I, LLC Liquidating Trust (the “Trustee”) filed *Plaintiff’s Motion to Transfer Related Case Pursuant To DUCivR 83-2(g), And To Compel Arbitration* (the “Trustee’s Motion”). The Trustee’s Motion lacked any reference to specific evidence in support of why the Trustee’s case against Defendants should be reassigned,¹ and identified no factual or legal basis for why the Trustee’s claims against Defendants are subject to arbitration. Defendants pointed out these deficiencies in their opposition memorandum.

The Trustee now seeks to introduce entirely new evidence through the Reply Declaration that should have been included with the Trustee’s Motion, and that Defendants should have had an opportunity to respond to in their opposition. Accordingly, pursuant to DUCivR7-1(b)(1)(B),

¹ The Trustee’s Reply claims that Defendants “did not oppose reassignment in any way.” This statement is patently false. Defendants are not parties to the Insider Action, and therefore, did not receive service of the Trustee’s Motion and Declaration through the Court’s CM-ECF system on January 7, 2016 when they were filed. Instead, the Trustee’s counsel emailed copies of the Motion and Declaration the next day, on January 8, 2016. *That very same day*, Defendants attempted to file an emergency objection to the transfer in order to avoid having the Court take action on the transfer request prior to Defendants’ objection being received. Again, because Defendants are not parties to the Insider Action, they had to obtain special permission to file the documents in this case. Accordingly, Defendant’s *Objection to Plaintiff’s Motion to Transfer Related Case and to Compel Arbitration* was formally filed on Monday, January 11, 2016—the earliest possible date that Defendants could have responded. Defendants’ Objection sets forth in careful detail all of the reasons the Trustee’s case against Mr. Geringer should not be reassigned and related to the Insider Action.

Defendants object to the Reply Declaration and the new evidence presented to the Court for the first time on reply.

I. **THE COURT SHOULD DISREGARD THE TRUSTEE'S DECLARATION AND ATTACHED EVIDENCE.**

The Reply Declaration contains fourteen paragraphs of purported evidence, none of which was offered as evidence in support of the Trustee's Motion. The Reply Declaration also attaches seven new exhibits that were not attached to the Trustee's Motion. Even if the evidence included in, and attached to, the Reply Declaration is admissible, which Defendants do not concede, the law is well settled in the Tenth Circuit that a party is prohibited from submitting new evidence for the first time in a reply brief. *See, e.g., Armstrong v. Genesh, Inc.*, 2011 WL 6151416, at *1 (D. Kan. Dec. 12, 2011); *Liebau v. Columbia Cas. Co.*, 176 F. Supp. 2d 1236, 1244 (D. Kan. 2001); *Starkey ex rel. A.B. v. Boulder County Soc. Services*, 569 F.3d 1244, 1259 (10th Cir. 2009).

A reply is intended to give the moving party an opportunity to address arguments raised in the opposition memoranda. A reply may not be used as vehicle to introduce new evidence and new arguments to correct an otherwise deficient motion without providing the nonmoving party an opportunity to respond. *See Beaird v. Seagate Tech.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (“[W]hen a moving party advances in a reply new reasons and evidence in support of its motion for summary judgment, the nonmoving party should be granted an opportunity to respond.”) Here, the Reply Declaration impermissibly attempts to take another bite at the apple by expanding the scope of the Trustee's argument for the first time in reply. The Trustee should not be permitted to salvage a deficient Motion with entirely new information and evidence that were not originally presented and are not rebuttal arguments. For all of these reasons, the Reply

Declaration, the evidence attached thereto, and the arguments in the Reply that depend upon that new evidence should be disregarded. *See Armstrong*, 2011 WL 6151416, at *1.

II. THE COURT SHOULD DISREGARD THE STATEMENTS AND EVIDENCE SUBMITTED TO “DISPROVE” THE TRUSTEE’S BREACH OF THE CA SETTLEMENT AGREEMENT.

Through his Reply and Reply Declaration, the Trustee attempts to argue the merits of Mr. Geringer’s claims for breach of the CA Settlement Agreement that are currently the subject of the lawsuit filed in the Central District of California. *See Reply* at x-xi. This discussion—including the new, incomplete evidence offered in support—should be disregarded on the grounds it is irrelevant and does not tell the whole story.

The merits of Mr. Geringer’s claims against the Trustee in the California litigation have no bearing on the Trustee’s Motion. Moreover, because the purported “facts” and “evidence” submitted by the Trustee are included for the first time on Reply, Defendants are not able to supplement or correct the incomplete record. Defendants will respond, at the appropriate time, and will provide a more complete record of the facts and evidence at issue. However, the Trustee’s Motion is not the proper vehicle for arguing the merits of Mr. Geringer’s claims against the Trustee. These statements, and the supporting evidence, should be disregarded.

DATED: March 7, 2016

COHNE KINGHORN, P.C.

/s/ George Hofmann
George Hofmann
Kimberley L. Hansen

Appearing Specially for Robert D. Geringer, Robert D. Geringer, P.C., and Fine Arts Entertainment, Inc.