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Attorneys for Jeff Austin and Austin Capital Solutions

**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,

Plaintiffs,

vs.

KIRBY D. COCHRAN, JEFF AUSTIN,
AUSTIN CAPITAL SOLUTIONS, et al.,

Defendants.

**RESPONSE TO PLAINTIFF’S STATUS
REPORT AND OBJECTION TO
REQUEST FOR STATUS CONFERENCE**

Case No. 2:14-cv-00788-TC-EJF

The Honorable Tena Campbell

Magistrate Judge: Hon. Evelyn J. Furse

Defendants Jeff Austin and Austin Capital Solutions (collectively “Austin”), by and through undersigned counsel, hereby respond to Plaintiff’s Status Report (ECF No. 80) and object to Plaintiff’s request for a status conference (included within ECF No. 80).

INTRODUCTION

Plaintiff’s Status Report fails to fully inform the Court of the facts regarding the arbitration proceeding at issue. Indeed, despite the repeated opportunity, and mandate under

AAA's Commercial Arbitration Rules, to advance all fees necessary to proceed with arbitration, Plaintiff failed to advance such fees. Plaintiff now seeks to punish Austin for Plaintiff's own failure and delay. This Court should not countenance such behavior. Furthermore, Plaintiff's request that "in lieu of the hearing on the Motion to Stay scheduled for January 17, 2017, the Court hold a status conference at that time to discuss the scheduling of" the cases referenced, (ECF No. 80 at 5), should be denied as the request for a status conference is unnecessary, the previously scheduled hearing date does not relate to the instant matter, and Austin was not provided sufficient notice of such hearing. Finally, Counsel for Austin will be in Los Angeles on a prior scheduled matter that cannot be rescheduled, and Counsel for Austin will not be available to attend the requested "status conference" on January 17, 2017. For this reason alone, the request for a status conference on January 17, 2017 should be denied.¹

RELEVANT BACKGROUND DETAILS

On December 19, 2016, the American Arbitration Association ("AAA") dismissed the Arbitration² "due to non-payment of fees". See Letter from AAA attached hereto as Exhibit 1. Contrary to Plaintiff's assertion that "the AAA terminated the Insider Arbitration due to Austin's refusal to pay the required fees," (ECF No. 80 at 2), the AAA made no such statement or assignment of blame.

Indeed, prior to dismissing the Arbitration, the Director of ADR Services for AAA specifically advised all of the parties "[a]s a reminder, *any party may make a payment on behalf of another party in order to prevent this matter from being terminated.*" See Email from Rick

¹ George Hoffman on January 3, 2017 informed Counsel for Austin that his client did not oppose scheduling any status conference on another mutually agreeable date.

² Arbitration was ordered by this Court on August 20, 2015 (ECF No. 55), and Plaintiff commenced such arbitration with the AAA later in 2015.

Zieglowsky dated December 9, 2016, attached hereto as Exhibit 2 (emphasis added). As evidenced by the dismissal of the Arbitration, Plaintiff chose not to pay the required fees.

The Arbitration proceeded based, in part, on the Court's finding of the applicability of the arbitration provision at issue, which stated:

15.16 Disputes. Any dispute or other disagreement arising from or out of this Amended Operating Agreement or the performance of any officer, director or agent on behalf of the Company shall be submitted to arbitration under the rules of the American Arbitration Association. Such arbitration shall be brought in the following venues: Los Angeles County California, or Salt Lake County Utah.

(ECF No. 44 at 3, 7, and 10; ECF No. 13-1 at 85; ECF No. 55.) The quoted arbitration provision does not state that Austin had to pay for any arbitration deposits or fees. Moreover, Rule R-53 of the AAA's Commercial Arbitration Rules states that "[t]he filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award."

Plaintiff's failure to pay the arbitration fees, despite advisement from AAA that Plaintiff should and could do so, resulted in the Arbitration being dismissed and Plaintiff should not now be heard to complain. Plaintiff simply refused to comply with the AAA's rules and advance all required fees.

RESPONSE

I. DISMISSAL OF THE ARBITRATION DUE TO PLAINTIFF'S FAILURE TO PAY THE ARBITRATION FEES IS NOT GROUNDS FOR RE-COMMENCING THE INSTANT LITIGATION.

Pursuant to this Court's Order (ECF No. 55), Plaintiff's claims against Austin are subject to arbitration. Plaintiff's scheming by failing to pay fees to achieve a dismissal (without

prejudice) of the Arbitration does not lift the stay ordered by this Court, and is not grounds for this Court to take back jurisdiction from the AAA.

Under Utah law, payment of the AAA fees is a procedural question for the Arbitration to decide, not this Court. Utah Code §78B-11-107(2) specifically defines the Court's role in deciding important issues of arbitrability as follows: “The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”

The United States Supreme Court in *Howsam v. Dean Witter Reynolds*, 537 US 79 (2002), held that questions of arbitrability do not extend to general matters which should be decided in the arbitration. *Id.* at 83. Instead, those procedural questions “which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide. *Id.* at 84 (emphasis in original; internal quotation marks and citation omitted).

Payment of fees in arbitration is such a procedural question. *Id.* (“issues of procedural arbitrability, i.e., whether prerequisites such as time limits, . . . and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.”). In *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012-13 (9th Cir. 2004), the court recognized that payment of a share of the fees is not an issue for the court to decide or order, and that because the parties’ agreement to arbitrate incorporated the AAA’s rules, it was for the arbitrators to decide how fees should be paid.

Here, the AAA has acted as it has the discretion to do under its own rules. The AAA specifically instructed Plaintiff that it could make the required payment to prevent termination of the Arbitration, but Plaintiff chose not to do so. Plaintiff has now suffered the consequence of its

failure – a consequence that should not be held against Austin and does not require this Court lift the current stay.

Indeed, Plaintiff's failure to act evidences Plaintiff's true intent – to avoid the required, contracted, Court-ordered Arbitration of this matter, and attempt to circumvent the arbitration provision by seeking to consolidate three separate cases and proceed with costly federal litigation (ECF No. 81). Plaintiff has the ability to commence an arbitration as ordered by this Court and proceed with paying the necessary fees in order to begin litigation within the arbitration. Plaintiff has chosen not to do so. Plaintiff should not be rewarded for such actions. The Court should deny Plaintiff's request for a status conference and refuse to lift the current stay until completion of the Arbitration.

CONCLUSION

For the foregoing reasons, Austin objects to Plaintiff's Status Report and Request for Status Conference (ECF No. 80). Austin respectfully requests the Court deny Plaintiff's request for a status conference. If the request is granted, the status conference should be scheduled at a time when Austin's Counsel is in town and available for the hearing.

DATED January 3, 2017.

/s/ Erik A. Christiansen

Erik A. Christiansen

Alissa M. Mellem

PARSONS BEHLE & LATIMER

Attorneys for Jeff Austin and Austin Capital
Solutions

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

- **Sarah E. Goldberg**
goldberg.sarah@dorsey.com,russell.sonya@dorsey.com,debry.leslie@dorsey.com,posada.monica@dorsey.com,armitage.suanna@dorsey.com
- **Mark T. Hiraide**
mhiraide@hiraidelaw.com,kjue@hiraidelaw.com,eganous@hiraidelaw.com
- **George B. Hofmann , IV**
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dhaney@cohnekinghorn.com
- **Peggy Hunt**
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- **Milo Steven Marsden**
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- **Oliver K. Myers**
myersok1@gmail.com
- **Nathan S. Seim**
seim.nathan@dorsey.com

and I hereby certify that I have mailed the document by United States Mail, first-class postage prepaid, to the following non-CM/ECF participants:

(No manual recipients)

/s/ Erik A. Christiansen

Exhibit 1



AMERICAN
ARBITRATION
ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

Michael Powell
Vice President
2415 E. Camelback, Suite 700
Phoenix, AZ 85016
Telephone: (602) 734-9333
Fax: (855) 433-3046

December 19, 2016

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Case Number: 01-15-0005-5087

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

-vs-

Jeff Austin and Austin Capital Solutions

-vs-

William H. Davidson

-vs-

Child Van Wagoner & Associate,
PLLC fka Child, Sullivan &
Associates, fka Child, Van Wagoner
& Associates, LLC fka Child Van
Wagoner & Bradshaw, PLLC

-vs-

Robert Clawson and Hybrid Advisor Group

-vs-

Robert Geringer

Dear Parties:

This will confirm that the above matter has been dismissed due to non-payment of fees, and therefore we are closing our file. In the normal course of our administration, the AAA may maintain certain documents in our electronic records system. Such electronic records are not routinely destroyed and do not constitute a complete case file.

A financial reconciliation has been conducted, and if a party had any unused compensation deposits, we have issued a refund check that should arrive in the mail shortly. Both Party 2, Jeff Austin and Austin Capital Solutions and Party 4, Child Van Wagoner & Associates PLLC have balances outstanding that are due upon receipt of this letter. Each party will receive an invoice/statement each month until the balance is paid. Invoice/statements will only reflect credits made as of the date of mailing. You may register, view your balance and make payments on our website at www.adr.org.

As always, please let me know if there are questions.

Sincerely,

Rick Zieglowsky
Director
Direct Dial: (602) 734-9333
Email: RickZieglowsky@adr.org
Fax: (855) 433-3046

cc:

Peggy Hunt, Esq.
Jeff Austin
Nathan S. Seim, Esq.
Sarah Goldberg, Esq.
Oliver K. Myers, Esq.

Kerry C. Fowler, Esq.

Giovanni M. Ruscitti, Esq.
James R. Holbrook, Esq.
Hon. Michael D. Zimmerman

Exhibit 2

From: AAA Rick Ziegrowsky [mailto:RickZiegrowsky@adr.org]

Sent: Friday, December 09, 2016 10:21 AM

To: seim.nathan@dorsey.com; brett@eklawpc.com; marsden.steve@dorsey.com; mth@msk.com; ausjeff@aol.com; hunt.peggy@dorsey.com; goldberg.sarah@dorsey.com; Erik A. Christiansen <EChristiansen@parsonsbehle.com>; myersok1@gmail.com; lweiss@rqn.com; kcfowler@jonesday.com; ghofmann@cohnekinghorn.com; jkorb@rqn.com; jeff@pacificoreconstruction.com

Cc: James.Holbrook@law.utah.edu; mzimmerman@zjbappeals.com; gmr@bhgrlaw.com; Debbie J. Martin <djm@bhgrlaw.com>; Julie J. Nelson <jnelson@zjbappeals.com>

Subject: FW: D. Ray Strong, as Liquidating Trustee of the V. Jeff Austin and Austin Capital Solutions - Case 01-15-0005-5087

All:

This matter was suspended on November 11, 2016 due to nonpayment of the arbitrators' compensation deposits. The parties were given until December 7, 2016 to cure the overdue amounts. As of this date, payment has not been received.

As such, the panel of arbitrators has determined that unless the outstanding deposit amounts are paid on or before December 13, 2016, this matter will be terminated due to nonpayment.

As a reminder, any party may make a payment on behalf of another party in order to prevent this matter from being terminated. Please let me know if there are questions.

Rick



Rick Zieglowsky
Director of ADR Services

American Arbitration Association
2415 East Camelback Road, Suite 700, Phoenix, AZ 85016
T: 602 734 9333 F: 855 433 3046 E: RickZieglowsky@adr.org

The information in this transmittal (including attachments, if any) is privileged and/or confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

From: RickZieglowsky@adr.org [<mailto:RickZieglowsky@adr.org>]

Sent: Monday, November 21, 2016 1:25 PM

To: seim.nathan@dorsey.com; brett@eklawpc.com; marsden.steve@dorsey.com; mth@msk.com; ausjeff@aol.com; hunt.peggy@dorsey.com; goldberg.sarah@dorsey.com; echristiansen@parsonsbehle.com; myersok1@gmail.com; James.Holbrook@law.utah.edu; mzimmerman@zjbappeals.com; lweiss@rqn.com; kcfowler@jonesday.com; ghofmann@cohnkinghorn.com; jkorb@rqn.com; jeff@pacificoreconstruction.com; gmr@bhgrlaw.com

Subject: D. Ray Strong, as Liquidating Trustee of the V. Jeff Austin and Austin Capital Solutions - Case 01-15-0005-5087

Hello,

Please review the attached correspondence regarding the above-referenced case.

Feel free to contact me with any questions, comments or concerns you have related to this matter.

Thank you.

AAA Rick Zieglowsky
Director of ADR Services

T: 602 734 9333 F: 855 433 3046 E: RickZieglowsky@adr.org
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November 21, 2016

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Case Number: 01-15-0005-5087

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
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-vs-

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-vs-

William H. Davidson

-vs-

Child Van Wagoner & Associate,
PLLC fka Child, Sullivan &
Associates, fka Child, Van Wagoner
& Associates, LLC fka Child Van
Wagoner & Bradshaw, PLLC

-vs-

Robert Clawson and Hybrid Advisor Group

-vs-

Robert Geringer

Dear Parties:

Please be advised the Arbitrators are suspending administration of this matter as the full deposits have not been paid pursuant to the Commercial Arbitration Rules. The following parties have outstanding deposits in the amount of \$3,800.00:

Jeff Austin and Austin Capital Solutions
and
Child Van Wagoner & Associate,
PLLC fka Child, Sullivan &
Associates, fka Child, Van Wagoner
& Associates, LLC fka Child Van
Wagoner & Bradshaw, PLLC

These outstanding deposits are due December 7, 2016. The Arbitrators are being copied on this letter

Upon receipt, we will advise the Arbitrators that the parties have paid all necessary deposits. Upon determination by the Arbitrators to proceed, we will advise the parties accordingly.

In the event the deposits have not been received by the above referenced due date the Arbitrators will be advised and determine how to proceed, which may include termination of this matter.

To make a payment, please login to AAA WebFile at www.adr.org and select File and Manage a Case. Please note registration is required to use AAA WebFile.

If payment has been made and our records may be incorrect, please contact the undersigned as soon as possible.

Sincerely,

/s/
Rick Zieglowsky
Director
Direct Dial: (602) 734-9333
Email: RickZieglowsky@adr.org
Fax: (855) 433-3046

RZ/glo

cc: Peggy Hunt, Esq.
Jeff Austin
Nathan S. Seim, Esq.
Sarah Goldberg, Esq.
Oliver K. Myers, Esq.
Kerry C. Fowler, Esq.
Jennifer R. Korb, Esq.
Giovanni M. Ruscitti, Esq.
James R. Holbrook, Esq.
Hon. Michael D. Zimmerman