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**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.

**MEMORANDUM IN OPPOSITION TO
MOTION TO CONSOLIDATE BREACH
OF CONTRACT CASE**

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

The Honorable Tena Campbell

Plaintiff Robert D. Geringer, through counsel, hereby submits this Memorandum in
Opposition to the Trustee's Motion to Consolidate Cases [Docket No. 81] (the "Motion"), to the
extent the Motion seeks to consolidate Geringer v. Strong, Case No. 2:16-cv-391-TC (the
"Breach of Contract Case").

PRELIMINARY STATEMENT

The Trustee's claims against Mr. Geringer are the subject of an agreement reached between the Trustee and Mr. Geringer at a 2015 mediation. That agreement (the "Agreement") was memorialized in a signed writing, the terms of which were negotiated over the week following the mediation. Later, the Trustee breached the Agreement by failing to send notice of termination of a then-pending contract for the sale of real property in Smyrna, Tennessee within five days, as required by the express terms of the Agreement. The Trustee's breach directly resulted in the failure of the transaction contemplated by the Agreement.

Of course, the Trustee disputes this. But the parties' dispute concerning the breach of the 2015 Agreement has nothing whatsoever in common with the Trustee's breach of fiduciary duty, securities fraud, fraudulent transfer, and related claims which pertain to Mr. Geringer's service as an officer of Castle Arch Real Estate Investment Company ("CAREIC") during 2004-2009.

There are no common issues of law or fact between the two disputes. They involve very different parties, time frames, witnesses, and legal issues. Mr. Geringer's breach of contract case against the Trustee is trial-ready, and that trial should take approximately two days. In contrast, the Trustee's case against CAREIC's former officers and other parties is in its infancy; no party has even answered the Trustee's complaint, and almost no discovery has occurred.

Furthermore, consolidation would result in substantial confusion of the issues and the jury, in part because the same real estate development in Tennessee is central to both disputes, but at very different times and for very different reasons (alleged breach of fiduciary duty in 2006 vs. damages for breach of the Agreement in 2015).

Consolidation is not warranted and this Court should deny it as to Mr. Geringer's breach of contract claims against the Trustee.

FACTUAL BACKGROUND

A. The First Insider Case

1. The Trustee commenced the instant case (the “First Insider Case”) against several former directors and officers of Castle Arch and related entities (but not Mr. Geringer) in October 2014. The complaint in the First Insider Case contains 440 paragraphs of allegations, and nineteen causes of action against eight defendants.

2. The conduct alleged in the complaint in the First Insider Case generally covers the period from 2004 through 2011.

3. The causes of action alleged in the complaint in the First Insider Case are: breach of fiduciary duty, violation of state securities laws, violation of federal securities laws, common law fraud, negligent misrepresentation, civil conspiracy, violation of state RICO laws, avoidance of fraudulent transfers, avoidance of preferential transfers, disallowance of bankruptcy claims, subordination of bankruptcy claims, constructive trust, and unjust enrichment.

4. No party has answered the complaint in the First Insider Case. No discovery has occurred other than limited discovery related to defendant Jeffrey Austin’s motion to compel arbitration.

5. The Trustee estimates that the trial in the First Insider Case will require three weeks. Mr. Geringer believes the Trustee is overly optimistic in this estimate, and that the trial will require substantially more than three weeks to complete, especially given the number of investors involved.

B. Mr. Geringer’s Breach of Contract Case

6. The Trustee asserted claims against Mr. Geringer that were similar to those he had asserted in the First Insider Case. However, those claims were to be resolved by the 2015

Agreement between the Trustee and Mr. Geringer. (A copy of the Agreement is attached as Exhibit A.). Two central features of the Agreement were (a) the sale of certain real property located in Smyrna, Tennessee (the “Smyrna Property”) to Mr. Geringer; and (b) mutual general releases. The Agreement also required Trustee to, within five days, give notice of termination of an existing contract for sale of the Smyrna Property, under which the buyer, DSSIII Holding Co., LLC (“DSSIII”), was then in default.

7. The Trustee admits that he reached a settlement with Mr. Geringer, and admitted that the settlement was memorialized by the Agreement. A copy of the Trustee’s answer in the Breach of Contract case is attached as Exhibit B, and the pertinent admissions are in paragraph 10.

8. The Trustee subsequently breached the Agreement. He was supposed to have provided notice of termination of an existing contract to sell the Smyrna Property to DSSIII (the Trustee at that time had the right to terminate that contract) within five days of execution of the Agreement. The Trustee failed and refused to send the notice of termination, thereby undermining the entire transaction contemplated by the Agreement. DSSIII eventually forced the Trustee to complete the sale.

9. The Trustee claims that an exchange of emails between his counsel and Mr. Geringer’s counsel waived or excused his breach. See Exhibit B at ¶¶ 10, 13, and Exhibit 1 to Exhibit B. The parties to this email exchange are potential witnesses in the trial of the Breach of Contract Case.

10. Mr. Geringer was greatly damaged by the Trustee’s breach in his failing to send the notice of termination of the contract with DSSIII. Not only did Mr. Geringer face litigation with the Trustee over his alleged multi-million dollar breach of fiduciary duty and related claims,

but there was a reason that Mr. Geringer was willing to purchase the Smyrna Property. Mr. Geringer is a real estate professional, and he had intended to develop the Smyrna Property and sell it at a substantial profit. These lost profits are among his damages in the Breach of Contract Case.

11. Mr. Geringer commenced the Breach of Contract Case in the United States District Court for the District of California on November 4, 2015. The complaint in the Breach of Contract Case will soon be amended with this Court's leave. Mr. Geringer filed a motion to amend his complaint in the Breach of Contract Case on December 8, 2016; that motion was not opposed, and a proposed order permitting the amendment has been submitted. As used in this motion, the "Breach of Contract Complaint" refers to the proposed amended complaint filed with the Court on December 8, 2016.

12. There are only two parties in the Breach of Contract Case—Mr. Geringer and the Trustee. The Breach of Contract Complaint includes 31 paragraphs of allegations and two causes of action (breach of contract and breach of the covenant of good faith and fair dealing).

13. All of the conduct involved in the Breach of Contract Complaint occurred during 2015.

14. Mr. Geringer has deposed the Trustee in the Breach of Contract Case. Mr. Geringer does not require any additional discovery, and the case is ready for trial. Mr. Geringer estimates the trial of the Breach of Contract Case will require approximately two days.

C. Strong v. Geringer, et al.

15. After Mr. Geringer filed the Breach of Contract Case, the Trustee commenced his case against Robert Geringer, Robert D. Geringer, P.C., and Fine Arts Entertainment, Inc. (Case No. 2:14-cv-0078-TC) (the "Trustee's Case Against Geringer") in this Court on November 24,

2015. The Complaint in the Trustee's Case Against Geringer contains 389 paragraphs of allegations, and sixteen causes of action.

16. The conduct alleged in the complaint in the Trustee's Case Against Geringer generally covers the period from 2004 through 2011.

17. The causes of action alleged in the Trustee's Case Against Geringer are: breach of fiduciary duty, violation of state securities laws, violation of federal securities laws, common law fraud, negligent misrepresentation, civil conspiracy, violation of state RICO laws, avoidance of fraudulent transfers, disallowance of bankruptcy claims, subordination of bankruptcy claims, constructive trust, and unjust enrichment.

18. No party has answered the complaint in the Trustee's Case Against Geringer. No discovery has occurred in the case.

19. Initially, the Trustee requested arbitration of certain of his claims in the Trustee's Case Against Geringer. Subsequently, he reversed course and has sought to prosecute them in this Court.

20. While it is debatable whether the Trustee's action against Mr. Geringer is properly joined with the First Insider Case,¹ Mr. Geringer is willing to concede the consolidation of the Trustee's Case Against Geringer and the First Insider Case (collectively, the "Insider Cases").

¹ Even if the Trustee had not already settled with Mr. Geringer, the Trustee's Case Against Geringer arguably should be litigated separately from the First Insider Case because Mr. Geringer's role at CAREIC, as well as the underlying conduct alleged against Mr. Geringer, was entirely separate and independent from that of the other CAREIC directors and officers. Specifically, Mr. Geringer tried to have the company focus on its core mission of real estate projects, while other members of management changed the focus to fund raising. Eventually, he was lied to about financial issues, and then systematically excluded from decision making meetings. Towards the end, Mr. Geringer found out that CAREIC had embarked on a new round of fund raising, and was investing in speculative projects other than real estate that were of questionable value. This confluence of unacceptable conduct caused Mr. Geringer to resign in July 2009, due to the significant mismanagement by the other officers and directors. It is for this reason that the Trustee consistently has dealt with Mr. Geringer separately for purposes of settlement negotiations, and indeed, did not initially name Mr. Geringer in the First Insider Action.

ARGUMENT

I. Consolidation of the Breach of Contract Case Would Be Improper Because it Shares No Common Question of Law or Fact With the Insider Cases

Fed. R. Civ. P. 42(a) provides (with emphasis added) that consolidation may be appropriate: “[i]f actions before the court involve a common question of law or fact . . .” There are absolutely no common questions of law or fact between the Breach of Contract Case and the Insider Cases, and thus consolidation is entirely improper as a matter of law.

Significantly, the Trustee “as the party seeking consolidation, has the burden of establishing consolidation is proper.” Phillip M. Adams & Assocs., LLC v. Dell Inc., No. 1:05-cv-64-TS, 2008 WL 203316 at *2 (D. Utah Jan. 23, 2008). The Trustee in fact identified no common questions of law or fact in his Motion. At best, the Motion contends that Mr. Geringer’s claims against the Trustee in the Breach of Contract Case may also be counterclaims in the Insider Cases. Motion at 11.

However, Mr. Geringer’s breach of contract and breach of the implied covenant of good faith and fair dealing claims against the Trustee are not compulsory counterclaims. They do not arise out of the same transactions or occurrences that are the subject matter of the Trustee’s claims in the Insider Cases. See Fed. R. Civ. P. 13(a)(1)(A). They bear absolutely no logical relationship to the Trustee’s claims in the Insider Cases. Accordingly, Mr. Geringer has no obligation to assert his claims against the Trustee as counterclaims in the Insider Cases, and he does not presently intend to do so.

The discrete legal and factual questions presented in the Breach of Contract Case do not resemble the blunderbuss claims leveled by the Trustee through the Insider Cases. In the Breach of Contract case, the Trustee has admitted the existence of the contract (though he claims a failure of conditions precedent) (see Trustee’s Answer (Exhibit B) at ¶ 10); thus the remaining

questions will be Mr. Geringer's performance of the contract, the Trustee's breach of the contract, and damages. In addition, in Mr. Geringer's breach of the covenant of good faith and fair dealing claim, there will be a question whether the Trustee has acted in a manner that would impair Mr. Geringer's right to receive the fruits of the Agreement. The Breach of Contract Case asserts two causes of action through 31 paragraphs of allegations.

In contrast, the Trustee's Complaint Against Geringer is a sprawling document, including sixteen claims over 389 paragraphs. The Trustee's complaint makes no mention whatsoever of the Agreement or indeed any circumstances concerning Mr. Geringer after he resigned from CAREIC's management in July 2009. All of the circumstances relevant to the Breach of Contract Case occurred more than five years later, during 2015. No legal questions concerning Mr. Geringer's breach of contract or breach of fiduciary duty claims are relevant to the Trustee's Case Against Geringer.

In short, there is no overlap whatsoever between the legal or factual questions presented in the Insider Cases and the Breach of Contract Case. The Trustee has not and indeed cannot meet his burden to prove that consolidation of them is appropriate.

II. The Could Should Decline to Consolidate the Breach of Contract Case Because Not One of the Criteria for Consolidation Established by Local Rule Applies

Supplementing the "common question of law or fact" standard in Fed. R. Civ. P. 42(a), this Court's local rules provide additional examples of cases where consolidation may be appropriate. Significantly, not one of these examples support consolidation of the Insider Cases and the Breach of Contract Case.

DUCivR 42-1 provides in relevant part:

Any party may file a motion and proposed order to consolidate two or more cases before a single judge if the party believes that such cases or matters

- (i) arise from substantially the same transaction or event;
- (ii) involve substantially the same parties or property;
- (iii) involve the same patent, trademark, or copyright;
- (iv) call for determination of substantially the same questions of law; or
- (v) for any other reason would entail substantial duplication of labor or unnecessary court costs or delay if heard by different judges.

The Breach of Contract Case and the Insider Cases do not arise from substantially the same transaction or event. Indeed, there is not one common transaction or event between them. The relevant transactions and events occurred at least five years apart. There is no common property or intellectual property rights at issue in the Insider Cases and the Breach of Contract Case. And, the only legal questions presented in the Breach of Contract Case are contract law questions; there are no contract law questions at issue in the Insider Cases.

Finally, while Mr. Geringer and the Trustee are both involved in the Breach of Contract Case and the Trustee's Case Against Geringer, the sheer number of other parties and issues also involved in the Insider Cases defeats any efficiency to be gained by consolidation of the Breach of Contract Case. The additional parties in the Insider Cases include Jeff Austin, Austin Capital Solutions, Robert Clawson, Hybrid Advisor Group, Robert D. Geringer, P.C., and Fine Arts Entertainment, Inc. The additional parties involved in the Insider Cases would prejudice Mr. Geringer's ability to present the straightforward breach of contract claims in the Breach of Contract Case.

III. The Interests of Judicial Efficiency Strongly Weigh Against Consolidation of the Breach of Contract Case

The Trustee has estimated the trial of the First Insider Case to require three weeks. Mr. Geringer believes the Trustee is overly optimistic. Approximately 10,000 investors provided capital to Castle Arch over about seven years through several different securities offerings (several of which Mr. Geringer had nothing to do with). The Trustee will be required to prove

up the 440 paragraphs of allegations in his complaint. Each of the several defendants will then prove up their defenses. The trial of the Insider Cases will be unwieldy at best.

In addition, the Insider Cases are procedurally in their infancy. Defendant Jeffrey Austin has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (docket no. 12 in that case), which has not been resolved. Mr. Geringer intends to bring several dispositive motions, including on grounds that have been indicated to the Court—based upon statutes of limitations and res judicata.

No depositions or discovery of any kind have occurred in the Trustee's Case Against Geringer. The only discovery that has occurred in the First Insider Case is related to the arbitration issue.

In contrast, the discrete contract questions presented in the Breach of Contract case are ready for trial. Mr. Geringer has deposed the Trustee, and requires no additional discovery. Despite the fact the California court expressly allowed discovery to proceed prior to the transfer of the Breach of Contract Case, and the fact that there has been no stay in place for the past eight months following transfer, the Trustee has not requested any discovery. Mr. Geringer estimates that the trial of the case will take approximately two days. Consolidation should be denied where cases are at different stages of preparedness for trial. See, e.g., Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989); Schacht v. Javits, 53 F.R.D. 321, 325 (S.D.N.Y. 1971).

Perhaps most significantly, if Mr. Geringer is correct, but for the Trustee's breach of the Agreement, Mr. Geringer would have received a release of the claims brought against him. Accordingly, by avoiding having Mr. Geringer participate in a three week plus trial, and all of the attendant discovery and associated massive expense, the Trustee can mitigate at least some of the damage caused by his breach. Moreover, the Court would not need to consider Mr.

Geringer's dispositive and other motions in the Insider Cases. It would further simplify the Trustee's trial of the First Insider Case if Mr. Geringer were not involved. Considerations of judicial economy and also the parties' economy would be advanced by the separate trial of the Breach of Contract Case.

IV. Consolidation of the Breach of Contract Case Would Unfairly Prejudice Mr. Geringer and Result in a Confusion of the Issues

Trial of the Insider Cases and the Breach of Contract Case together would be awkward at best, and would greatly prejudice Mr. Geringer's breach of contract claims. The key witnesses at the trial of the Breach of Contract Case would be the parties to the contract—the Trustee and Mr. Geringer. They would also be witnesses in the Insider Cases. But examining them about Mr. Geringer's involvement in CAREIC circa 2004-2009 would be jarringly disconnected from the events six years later when they settled their disputes.

Further, the Trustee's main alleged defense to the Breach of Contract Case appears to be a single email exchange between the Trustee's lawyer, M. Steven Marsden, and Mr. Geringer's counsel, Richard Wynne. The Trustee's argument that Mr. Geringer waived rights through this email exchange is mistaken for a number of reasons. But if this single email is the Trustee's entire justification for failing and refusing to perform his obligations under the Agreement, then the Trustee is intending to make his own lead trial counsel a key witness at trial, and potentially Mr. Geringer's lead trial counsel as well. It would therefore be prudent to keep the cases separate so that only the Breach of Contract Case is impacted.

Mr. Geringer would also suffer prejudice from the confusion of issues between the Insider Case and the Breach of Contract Case that really have nothing to do with one another. For example, in the Trustee's Case Against Geringer, he claims that Mr. Geringer breached his fiduciary duties by investing CAREIC funds in a real estate project in Smyrna, Tennessee. The

trouble is, this same real estate project is absolutely central to the Trustee's subsequent settlement with Mr. Geringer through the Agreement, whereby the Trustee agreed to sell this same real estate to Mr. Geringer.

The allegations in the complaint concerning the Smyrna project are, like the rest of the complaint, overly verbose, and certainly too long to repeat here. But they are found in paragraphs 88-128 of the Complaint in the Trustee's Case Against Geringer, and start with this paragraph summarizing the Trustee's allegations:

88. Geringer breached his fiduciary duties with respect to the real estate project in Smyrna, Tennessee by, among other things: (a) ignoring known land and development issues and proceeding with land purchases and development despite insurmountable obstacles, and failing to disclose such issues to investors; (b) using false and improper data to analyze the project's feasibility and profitability; (c) using false and fraudulent estimates for lot demand, and providing false information to investors; (d) proceeding with lot purchases and development despite insufficient funds and resources; and (e) engaging in self-dealing.

Paragraph 23 of the Breach of Contract Complaint states: "Mr. Geringer has suffered damages as a result of the Trustee's breach of the Agreement, including lost anticipated profits on Mr. Geringer's development and ultimate resale of the Smyrna Property, his attorneys' fees in enforcing the Agreement, his costs related to a subsequent failed mediation, the loss of the release promised under the Agreement, and his fees in bringing this action. Mr. Geringer is thereby entitled to damages in an amount to be determined at trial."

Thus, at trial, the Trustee will try to prove that the Smyrna, Tennessee project was infeasible in 2006, and Mr. Geringer either knew or should have known that. If the cases are consolidated, at the very same trial, Mr. Geringer will prove breach of contract damages against the Trustee, by proving the profits Mr. Geringer would have realized in 2015, had the Trustee fulfilled his promises in the Agreement. The differing proof about the same real estate separated

by nine years in time (and with an intervening real estate market crash) would be extraordinarily complicated and confusing to the jury, and would prejudice Mr. Geringer's breach of contract case.

CONCLUSION

The Trustee cannot meet his burden to consolidate the Insider Cases and the Breach of Contract Case. No common questions of law or fact exist. Judicial efficiency weighs against consolidation. Given this, and the manifest prejudice that Mr. Geringer would suffer were the cases consolidated, the cases must proceed separately.

Dated: February 16, 2017

/s/ George Hofmann
George Hofmann
Adam H. Reiser
Cohne Kinghorn, P.C.

/s/ Richard L. Wynne
Richard L. Wynne
Kerry C. Fowler
Jones Day

Attorneys for Robert Geringer

EXHIBIT A


MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") memorializes the material points of the agreement reached between D. Ray Strong, Liquidating Trustee of the Legacy Debtors Liquidating Trust (and its related liquidating trusts) ("Trustee") and Robert Geringer at a mediation held on May 13, 2015 in front of the Honorable Randall J. Newsome (retired):

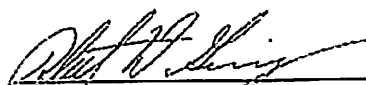
1. The Trustee will sell to Mr. Geringer the approximately 484 acres of raw land outside the city limits of Smyrna, Tennessee ("Smyrna Property") that the Trustee currently owns, for a price of \$2,225,000 to be paid as follows:
 - a) Four hundred seventy five thousand dollars in readily available funds, within 30 days of the date the bankruptcy court enters an order approving the sale outlined in this MOU;
 - b) Five hundred thousand dollars in readily available funds, on a date within 120 days after the date the U.S. Bankruptcy court enters an order approving the sale outlined in this MOU;
 - c) \$1,250,000 no later than 18 months after the date the bankruptcy court approves the MOU.
2. Mr. Geringer's payment obligations will be memorialized in a promissory note in customary form, and secured by a security agreement on the Smyrna Property.
3. The Trustee and Mr. Geringer will exchange mutual general releases of all claims.
4. Mr. Geringer will release and waive his unsecured claim in the CAREIC bankruptcy.
5. Mr. Geringer will withdraw his opposition to the Warwick settlement, and will not otherwise oppose the Warwick settlement.

6. Mr. Geringer will indemnify the Trustee for any damage claims asserted by DSSIII Holding Co., LLC (the current Buyer of the Smyrna property) arising out of the termination of the current contract between the Trustee and DSSIII Holding. Mr. Geringer may defend any such claims as the real party in interest, and will have authority to settle such claims.
7. The Trustee will within 5 days provide notice of termination of the contract to sell the Smyrna to DSSIII and will provide notice of this sale and of the motion to approve this sale to DSSIII Holding Co., LLC.
8. Mr. Geringer has the right to approve the sale motion and order, which right he will reasonably exercise.
9. Mr. Geringer will reasonably cooperate with the Trustee in prosecuting litigation against the CARIEC insiders.
10. This MOU is subject to the approval of the bankruptcy court, and the Trustee's ability to terminate the current purchase contract.
11. In the event that the Court permits a buyer other than Mr. Geringer to bid on purchasing the Smyrna property, Mr. Geringer agrees that his offer to purchase shall remain in place for 45 days after Bankruptcy Court approval as a "back-up buyer" in the event that such overbidder does not close the purchase within 30 days of Bankruptcy Court approval. In the event that any such overbidder is approved by the Bankruptcy Court at a higher price than Mr. Geringer has offered, and closes on the purchase of the Smyrna Property, Mr. Geringer will not be entitled to a break-up fee, however the provisions contained in paragraphs 3, 4, 5 and 9 hereof will remain as binding obligations upon the Trustee and Mr.

Geringer, which will be reflected in the Purchase and Sale Agreement, a mutual general release and related documents.



D. Ray Strong, Liquidating Trustee



Robert Geringer

EXHIBIT B

1 JILL A. GUTIERREZ (SBN 258138)
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 2 DORSEY & WHITNEY LLP
 600 Anton Boulevard, Suite 2000
 3 Costa Mesa, CA 92626
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5 Attorneys for Defendant
 D. Ray Strong, In His Capacity As Liquidating
 6 Trustee For The Consolidated Legacy Debtors, The
 Liquidating Trust For Castle Arch Opportunity
 7 Partners I, LLC, And The Liquidating Trust For
 Castle Arch Opportunity Partners II, LLC,
 8
 9

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION**
 13

14 ROBERT D. GERINGER,

15 Plaintiff,

16 vs.

17 D. RAY STRONG, IN HIS CAPACITY
 AS LIQUIDATING TRUSTEE FOR THE
 18 CONSOLIDATED LEGACY DEBTORS,
 THE LIQUIDATING TRUST FOR
 19 CASTLE ARCH OPPORTUNITY
 PARTNERS I, LLC, AND THE
 20 LIQUIDATING TRUST FOR CASTLE
 ARCH OPPORTUNITY PARTNERS II,
 21 LLC,

22 Defendant.
 23
 24

CASE NO: 2:15-CV-08696-CAS-GJS

**DEFENDANT'S ANSWER TO
 PLAINTIFF'S COMPLAINT**

Action Filed: November 6, 2015
 Trial Date: Not Set

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1 Defendant D. Ray Strong (“Defendant,” or the “Trustee”), as the (i) post-
2 confirmation estate representative of Castle Arch Real Estate Investment Company,
3 LLC (“CAREIC”), CAOP Managers, LLC (“CAOP Managers”), Castle Arch Kingman,
4 LLC (“CAK”), Castle Arch Smyrna, LLC (“CAS”), Castle Arch Secured Development
5 Fund, LLC (“CASDF”), Castle Arch Star Valley, LLC (“CASV”) and Castle Arch
6 Opportunity Partners I, LLC (“CAOP I”) (collectively, the “Debtors”), and (ii)
7 Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust and the
8 Castle Arch Opportunity Partners I, LLC Liquidating Trust (together, the “Trusts”),
9 appointed in such capacities in the bankruptcy case styled as *In re Castle Arch Real*
10 *Estate Investment Company, LLC et al.*, Case No. 11-35082, filed in the United States
11 Bankruptcy Court for the District of Utah, by and through his undersigned counsel,
12 answers the Complaint (the “Complaint”) filed by Plaintiff Robert D. Geringer
13 (“Plaintiff” or “Geringer”) as follows:

14 JURISDICTION AND VENUE

- 15 1. Defendant denies the allegations in paragraph 1.
- 16 2. Defendant denies the allegations in paragraph 2.

17 THE PARTIES

18 3. Defendant admits that Geringer was President of Castle Arch Real Estate
19 Investment Company, LLC (“CAREIC” or the “Company”) until his resignation in
20 July, 2009. Defendant lacks knowledge and information sufficient to form a belief as to
21 the truth of the remaining allegations in paragraph 3 and therefore denies the same.

- 22 4. Defendant admits the allegations in paragraph 4.

23 BACKGROUND

24 5. Defendant admits that CAREIC was formed in April, 2004. Defendant
25 denies the remaining allegations in paragraph 5.

26 6. In response to the allegations in paragraph 6, Defendant admits that
27 Geringer was involved with CAREIC’s real estate activities. Defendant denies the
28 other allegations in paragraph 6.

1 7. In response to the allegations in paragraph 7, Defendant admits that Mr.
2 Geringer resigned his position at CAREIC in July, 2009. Defendant also admits that
3 CAREIC filed a bankruptcy petition on October 17, 2011. Defendant also admits that
4 he was appointed as CAREIC's Chapter 11 Trustee on May, 3, 2012. Defendant denies
5 the remaining allegations in paragraph 7.

6 8. In response to the allegations in paragraph 8, Defendant admits that he
7 made Geringer aware of certain claims that Defendant asserts against Geringer.
8 Defendant also admits that he provided Geringer with a draft complaint. Defendant
9 affirmatively alleges that on November 24, 2015, Defendant commenced a lawsuit
10 against Geringer in the United States District Court for the District of Utah, Central
11 Division, Civil No. 2:15-cv-00837-BSJ. Defendant denies any remaining allegations in
12 paragraph 8.

13 9. Defendant denies the allegations in paragraph 9.

14 10. Defendant admits that he participated in four mediations with Geringer, as
15 well as various other settlement negotiations. Defendant admits that he reached a
16 settlement in principle with Geringer at a mediation held on May 13, 2015. Defendant
17 admits that in May, 2015, Defendant and Geringer executed a Memorandum of
18 Understanding (the "MOU") and that a copy of the MOU is attached as Exhibit A to
19 Geringer's Complaint. Defendant affirmatively alleges that paragraph 10 of the MOU
20 states: "This MOU is subject to approval of the bankruptcy court, and the Trustee's
21 ability to terminate the current purchase contract." Defendant also affirmatively alleges
22 that neither of these conditions precedent occurred, and therefore, the MOU never
23 became effective.

24 11. The allegations in paragraph 11 state various legal conclusions to which no
25 response is required. Further, the MOU speaks for itself. To the extent a response is
26 required, Defendant denies the allegations in paragraph 11.

27 12. In response to the allegations in paragraph 12, the MOU speaks for itself
28 and no further response is required. To the extent further response is required,

1 Defendant denies the allegations in paragraph 12.

2 13. Defendant denies the allegations in paragraph 13. Defendant affirmatively
3 alleges that on May 20, 2015, Defendant's counsel sent an email to Plaintiff's counsel,
4 stating: "Rick – We're working on a written notice of termination to the current buyer
5 and a potential ambiguity came up. We're intending to send it within five days of the
6 time we sign the sales agreement. Is that what you understood? Is that ok?" That same
7 day, Mr. Wynne responded: "That's fine, the sooner the better I would think." A copy
8 of this email exchange is attached hereto as **Exhibit 1**. Defendant also affirmatively
9 alleges that he sent the termination letter to DSSIII on the same day that the sales
10 agreement was signed, as specifically authorized by Geringer's counsel.

11 Defendant also affirmatively alleges that it was Mr. Geringer, not Defendant,
12 who caused the delay in sending the termination notice to DSSIII. For example,
13 Geringer insisted on drafting the sales agreement, but he did not deliver a draft
14 agreement to Defendant until several weeks after the parties executed the MOU. In
15 fact, on May 27th—nearly two weeks after the parties signed the MOU—Defendant's
16 counsel sent an email to Geringer's counsel, stating: "I need to know the eta on getting
17 the purchase agreement. We need to get this done asap so that we can terminate with the
18 current proposed buyer." A copy of this email is attached as **Exhibit 2**.

19 14. The allegations in paragraph 14 state various legal conclusions to which no
20 response is required. To the extent a response is required, Defendant denies the
21 allegations in paragraph 14.

22 15. The allegations in paragraph 15 state a legal conclusion to which no
23 response is required. To the extent a response is required, Defendant denies the
24 allegations in paragraph 15.

25 16. The allegations in paragraph 16 state various legal conclusions to which no
26 response is required. Further, the documents referenced in paragraph 16 speak for
27 themselves. To the extent a response is required, Defendant denies the allegations in
28 paragraph 16.

1 17. Defendant admits that on July 28, 2015, DSSIII filed a *Notice of*
2 *Purchaser's Execution and Delivery of Closing Documents and Tender of Performance*
3 *(Smyrna Property)* with the Utah Bankruptcy Court. Defendant further admits that after
4 several hearings with the Utah Bankruptcy Court relating to the Smyrna Property,
5 Defendant closed the sale of the Smyrna Property to DSSIII on July 30, 2015.
6 Defendant denies any remaining allegations in paragraph 17.

7 18. The allegations in paragraph 18 state various legal conclusions to which no
8 response is required. Further, the MOU speaks for itself. Defendant admits that
9 Geringer withdrew his opposition to the Warwick Settlement Motion, but affirmatively
10 alleges that Geringer's unfounded objection was not a strong impediment in obtaining
11 court approval of the Warwick Settlement Motion. Except as specifically admitted
12 herein, Defendant denies the allegations in paragraph 18.

13 19. Defendant denies the allegations in paragraph 19.

14 20. The allegations in paragraph 20 state various legal conclusions to which no
15 response is required. To the extent a response is required, Defendant denies the
16 allegations in paragraph 20.

17 21. In response to the allegations in paragraph 21, Defendant admits that he
18 entered into multiple tolling agreements with Geringer, which speak for themselves.
19 Defendant therefore denies the allegations in paragraph 21.

20 22. Defendant lacks knowledge and information sufficient to form a belief as
21 to the truth of the allegations in paragraph 22 and therefore denies the same.

22 23. Defendant denies the allegations in paragraph 23.

23 **FIRST CAUSE OF ACTION**

24 24. Defendant incorporates his responses to paragraphs 1-23 of the Complaint.

25 25. The allegations in paragraph 25 call for a legal conclusion to which no
26 response is required. To the extent a response is required, Defendant denies the
27 allegations in paragraph 25.

28 26. Defendant denies the allegations in paragraph 26.

1 27. Defendant denies the allegations in paragraph 27.

2 28. Defendant denies the allegations in paragraph 28.

3 29. Defendant denies the allegations in paragraph 29.

4 30. Defendant denies the allegations in paragraph 30.

5 31. Defendant denies the allegations in paragraph 31.

6 32. Defendant denies the allegations in paragraph 32.

7 **SECOND CAUSE OF ACTION**

8 33. Defendant incorporates his responses to paragraphs 1-32 of the Complaint.

9 34. The allegations in paragraph 34 contain legal conclusions to which no
10 response is required. To the extent a response is required, Defendant denies the
11 allegations in paragraph 34.

12 35. The allegations in paragraph 35 contain legal conclusions to which no
13 response is required. To the extent a response is required, Defendant denies the
14 allegations in paragraph 35.

15 36. The allegations in paragraph 36 contain legal conclusions to which no
16 response is required. To the extent a response is required, Defendant denies the
17 allegations in paragraph 36.

18 37. The allegations in paragraph 37 contain legal conclusions to which no
19 response is required. To the extent a response is required, Defendant denies the
20 allegations in paragraph 37.

21 38. Defendant denies the allegations in paragraph 38.

22 39. Defendant denies the allegations in paragraph 39.

23 40. Defendant denies the allegations in paragraph 40.

24 **THIRD CAUSE OF ACTION**

25 41. Defendant incorporates his responses to paragraphs 1-40 of the Complaint.

26 42. The allegations in paragraph 42 contain legal conclusions to which no
27 response is required. To the extent a response is required, Defendant denies the
28 allegations in paragraph 34.

1 43. In response to the allegations in paragraph 43, Defendant admits that he
2 entered into multiple tolling agreements with Geringer, which speak for themselves.
3 Defendant therefore denies the allegations in paragraph 43.

4 44. Defendant denies the allegations in paragraph 44.

5 45. Defendant states that the various Tolling Agreements and amendments
6 thereto speak for themselves. Defendant denies the allegations in paragraph 45.

7 46. The allegations in paragraph 46 contain legal conclusions to which no
8 response is required. To the extent a response is required, Defendant denies the
9 allegations in paragraph 46.

10 47. The allegations in paragraph 47 contain legal conclusions to which no
11 response is required. To the extent a response is required, Defendant denies the
12 allegations in paragraph 47.

13 48. Defendant lacks knowledge or information sufficient to form a belief as to
14 the truth of the allegations in paragraph 48 and therefore denies the same.

15 49. Defendant denies the allegations in paragraph 49.

16 50. The allegations in paragraph 50 contain legal conclusions to which no
17 response is required. Furthermore, the documents referenced in paragraph 50 speak for
18 themselves. To the extent a response is required, Defendant denies the allegations in
19 paragraph 50.

20 51. Defendant denies the allegations in paragraph 51.

21 52. The allegations in paragraph 52 contain legal conclusions to which no
22 response is required. Furthermore, the documents referenced in paragraph 52 speak for
23 themselves. To the extent a response is required, Defendant denies the allegations in
24 paragraph 52.

25 53. The allegations in paragraph 53 contain legal conclusions to which no
26 response is required. Furthermore, the documents referenced in paragraph 53 speak for
27 themselves. To the extent a response is required, Defendant denies the allegations in
28 paragraph 53.

1 54. Defendant denies the allegations in paragraph 54.

2 55. Defendant denies the allegations in paragraph 55.

3 56. Defendant denies the allegations in paragraph 56.

4 57. The allegations in paragraph 57 contain legal conclusions to which no
5 response is required. Furthermore, the documents referenced in paragraph 57 speak for
6 themselves. To the extent a response is required, Defendant denies the allegations in
7 paragraph 57.

8 58. The allegations in paragraph 58 contain legal conclusions to which no
9 response is required. To the extent a response is required, Defendant denies the
10 allegations in paragraph 58.

11 59. Defendant denies the allegations in paragraph 59.

12 **FOURTH CAUSE OF ACTION**

13 60. Defendant incorporates his responses to paragraphs 1-59 of the Complaint.

14 61. The allegations in paragraph 61 contain legal conclusions to which no
15 response is required. Furthermore, the MOU speaks for itself. To the extent a response
16 is required, Defendant denies the allegations in paragraph 61.

17 62. Defendant denies the allegations in paragraph 62.

18 63. Defendant denies the allegations in paragraph 63.

19 64. Defendant denies the allegations in paragraph 64.

20 65. Defendant denies the allegations in paragraph 65.

21 66. Defendant denies the allegations in paragraph 66.

22 **FIFTH CAUSE OF ACTION**

23 67. Defendant incorporates his responses to paragraphs 1-66 of the Complaint.

24 68. Defendant denies the allegations in paragraph 68.

25 69. Defendant lacks knowledge and information sufficient to form a belief as
26 to the truth of the allegations in paragraph 69 and therefore denies the same.

27 70. Defendant denies the allegations in paragraph 70.

28 71. Defendant denies the allegations in paragraph 71.

1 72. Defendant denies the allegations in paragraph 72.

2 73. Defendant denies the allegations in paragraph 73.

3 **ADDITIONAL DENIALS**

4 Defendant denies each and every allegation in the Complaint not expressly
5 admitted herein.

6 **AFFIRMATIVE DEFENSES**

7 Defendant asserts the following as separate, alternative and affirmative defenses.
8 Defendant reserves the right to supplement, add to or otherwise amend these affirmative
9 defenses as appropriate throughout this litigation.

10 **FIRST AFFIRMATIVE DEFENSE**

11 Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean
12 hands.

13 **SECOND AFFIRMATIVE DEFENSE**

14 Plaintiff's claims are barred, in whole or in part, by the terms of the MOU and
15 the Tolling Agreements.

16 **THIRD AFFIRMATIVE DEFENSE**

17 Plaintiff's claims are barred, in whole or in part, because Plaintiff acted in bad
18 faith.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 Plaintiff's claims are barred, in whole or in part, by the doctrines of laches,
21 waiver and estoppel.

22 **FIFTH AFFIRMATIVE DEFENSE**

23 Plaintiff's claims are barred, in whole or in part, by the parol evidence rule.

24 **SIXTH AFFIRMATIVE DEFENSE**

25 Plaintiff's claims are barred, in whole or in part, because they were caused by the
26 acts or omissions of a non-party.

27 **SEVENTH AFFIRMATIVE DEFENSE**

28 Plaintiff's claims are barred, in whole or in part, for failure to mitigate damages.

EIGHTH AFFIRMATIVE DEFENSE

1
2 Plaintiff's claims are barred, in whole or in part, because he did not suffer any
3 damages.

NINTH AFFIRMATIVE DEFENSE

4
5 Plaintiff's claims are barred, in whole or in part, because even if Defendant
6 breached the MOU (which is denied), the end result would have been the same.

7 WHEREFORE, Defendant prays that Plaintiff's Complaint be dismissed with
8 prejudice in its entirety, and for other and further relief as the Court deems just and
9 proper.

10 DATED: January 12, 2016

DORSEY & WHITNEY LLP

11
12 By: /s/ Jill A. Gutierrez

13 Jill A. Gutierrez
14 Attorneys for Defendant
15 D. Ray Strong, In His Capacity As
16 Liquidating Trustee For The Consolidated
17 Legacy Debtors, The Liquidating Trust For
18 Castle Arch Opportunity Partners I, LLC, And
19 The Liquidating Trust For Castle Arch
20 Opportunity Partners II, LLC
21
22
23
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EXHIBIT 1

From: Richard L Wynne [mailto:rlwynne@JonesDay.com]
Sent: Wednesday, May 20, 2015 11:38 AM
To: Marsden, Steve; rlwynne@JonesDay.com
Cc: Hunt, Peggy; Seim, Nathan; Goldberg, Sarah; gbh@pkhlawyers.com
Subject: RE: Signed MOU

That's fine, the sooner the better I would think. I'm on a conference call, will call you later to understand this ambiguity

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

----- Message from Marsden.Steve@dorsey.com on Wed, 20 May 2015 17:35:19 GMT -----

From: Marsden.Steve@dorsey.com
To: rlwynne@JonesDay.com
CC: hunt.peggy@dorsey.com, seim.nathan@dorsey.com, Goldberg.Sarah@DORSEY.com, gbh@pkhlawyers.com
Subject: RE: Signed MOU

We're working on a written notice of termination to the current buyer and a potential ambiguity came up. We're intending to send it within five days of the time we sign the sales agreement. Is that what you understood? Is that ok?

EXHIBIT 2

From: <hunt.peggy@dorsey.com>
To: <rlwynne@JonesDay.com>
Cc: <Marsden.Steve@dorsey.com>
Date: 05/27/2015 12:00 PM
Subject: RE: timing update

Rick,

I just left a vm on your cell. Your office phone is ringing without picking up.

Two things--I think we can keep the sale motion simple--without the bidding procedures. Also, I need to know the eta on getting the purchase agreement. We need to get this done asap so that we can terminate with the current proposed buyer.

I am presenting at a CLE today, but you can try to get me on my cell--801-913-7443.

Thanks,
Peggy Hunt
Partner

.....
D O R S E Y & W H I T N E Y LLP
Kearns Building
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
'01.933.8947
.....

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Thank you.

Please help reduce paper and ink usage. Print only if necessary.

-----Original Message-----

From: Richard L Wynne [mailto:rlwynne@JonesDay.com]
Sent: Tuesday, May 26, 2015 6:33 PM
To: Hunt, Peggy
Subject: RE: timing update

Peggy
Can we talk tonight we had one thing to go over with you. I'm at 213-243-2548.
Later I'm at 310-729-3054 cell

Sent from my iPhone
Rick Wynne
Office 213-243-2458

CERTIFICATE OF SERVICE

All Case Participants are registered for the USDC CM/ECF System

Robert D. Geringer, V. D. Ray Strong et al
Central District of California Case Number 2:15-cv-08696-CAS-GJS

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

I hereby certify that on January 12, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: /s/ Jill A. Gutierrez
Jill A. Gutierrez

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