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

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

v.

ROBERT D. GERINGER; KIRBY D.
COCHRAN; ROBERT CLAWSON;
DOUGLAS W. CHILD; JEFF AUSTIN;
WILLIAM H. DAVIDSON; WILLIAM K.
WARWICK; WILLIAM GRUNDY; and
KEITH GREEN,

Defendants.

**LIQUIDATING TRUSTEE'S PRE-
HEARING BRIEF**

Civil Case No. 2:14-cv-00244-DAK

The Honorable Dale A. Kimball

D. Ray Strong, as the Liquidating Trustee (the "Trustee") for the Consolidated Legacy Debtors Liquidating Trust (the "Trust"), as appointed in such capacity in the bankruptcy case styled *In re Castle Arch Real Estate Investment Company, LLC et al.*, Case No. 11-35082 (Bankr. D. Utah) (the "Bankruptcy Case"), by and through his counsel, hereby submits this pre-hearing brief addressing certain legal issues pertaining to the Trustee's *Amended Motion for Approval of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of*

Bankruptcy Procedure 9019 (the “Amended Settlement Motion”).¹ The Court has scheduled an evidentiary hearing (the “Evidentiary Hearing”) on the Amended Settlement Motion for July 2, 2015.

BACKGROUND

The Trustee, as liquidating trustee of the Trust and other liquidation trusts, holds numerous claims and causes of action against all of the Insider Defendants in the above-captioned case based on, among other things, mismanagement of, and illegal fundraising activities related to, Castle Arch Real Estate Investment Company, LLC (“CAREIC”) and certain affiliates. On October 30, 2014, the Trustee filed a complaint against all Insider Defendants except for Robert Geringer (“Geringer”) and William Warwick (“Warwick”), asserting these claims and seeking damages against the Insider Defendants.²

The Trustee and Geringer recently reached an agreement in principle that, if approved, will resolve all of the Trustee’s claims against Geringer.

On May 6, 2014, the Trustee entered into a Settlement Agreement (the “Agreement”) with Warwick to settle the Trust’s claims against Warwick as a result of his role as a former CAREIC Board member.³ Pursuant to the Agreement, Warwick has paid the Trustee \$200,000.00 for the benefit of the Trust’s beneficiaries. In addition, the Agreement gives the Trust rights to obtain an additional \$200,000.00 from the Axis D&O insurance policy that is the

¹ [Docket Nos. 83-1 & 98-2](#); [Bankruptcy Court Docket No. 980](#).

² [Strong v. Cochran et al., Case No. 14-cv-788-TC \(D. Utah\), Docket No. 2](#).

³ The Agreement is attached as [Exhibit A to the Settlement Motion](#).

subject of this interpleader action (the “Axis Policy”).⁴ The Agreement was conditioned on the Court’s entry of a contribution bar order (the “Contribution Bar Order”). Agreement ¶ 2 (“This Agreement is further conditioned on and is subject to, the Court’s entry of a Contribution Bar Order barring any other person, party or entity from seeking contribution or indemnity from Warwick in connection with any Claims, Causes of Action, or Individual Claims asserted by the Trustee against others.”).

Pursuant to applicable bankruptcy law, the Trustee and Warwick promptly filed a *Joint Motion for Approval of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of Bankruptcy Procedure 9019, Including Contribution Bar Required Under Settlement Agreement* (the “Settlement Motion”)⁵ in the Bankruptcy Court, seeking approval of the Agreement, and the Trustee served notice of the Settlement Motion on all parties in interest in the CAREIC bankruptcy cases, which includes over 900 creditors and investors of CAREIC and related entities. The Trustee attached a proposed order including a proposed Contribution Bar Order.⁶

The proposed Contribution Bar Order reads 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,

⁴ The Trustee and Warwick have filed a *Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds* in this case to recover the \$200,000 from the Axis Policy. [Docket No. 37](#).

⁵ [Bankruptcy Case Docket No. 925](#).

⁶ [Exhibit B to the Settlement Motion](#).

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 Claims, Causes 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.

Geringer notified the Trustee that he intended to file an objection to the Settlement Motion based on the presence of the Contribution Bar Order.

To alleviate the issues regarding Geringer’s potential objection, the Trustee withdrew the Settlement Motion and, in August 2014, the Trustee and Warwick entered into an amendment to the Agreement (the “Amended Agreement”) that removed the language conditioning the Agreement on the entry of the Contribution Bar Order.⁷ See Amended Agreement ¶ 2.

The Trustee promptly filed the Amended Settlement Motion seeking Bankruptcy Court approval of the Amended Agreement. The Trustee again served notice of the Amended Settlement Motion on all parties in interest in the CAREIC bankruptcy cases.

⁷ The Amended Agreement is attached to the [Amended Settlement Motion as Exhibit A](#).

Two objections to the Amended Settlement Motion were filed: one by Geringer (the “Geringer Objection”)⁸ and a joint objection filed by Defendants Kirby Cochran (“Cochran”), Douglas Child (“Child”), Jeffrey Austin (“Austin”), Keith Green (“Green”), and William Grundy (“Grundy,” collectively with Cochran, Child, Austin, and Green, the “Other Defendants”) (the “Other Defendants’ Objection”).⁹ No non-insider creditors or investors filed objections to the Amended Settlement Motion.

In the Geringer Objection, Geringer objects to the Amended Settlement Motion arguing that the Kopexa Factors discussed in *Kopexa Realty Venture Co.*, 213 B.R. 1020 (B.A.P. 10th Cir. 1997), have not been satisfied, Warwick’s interest in the Axis Policy is not assignable, and the equities do not favor settlement. The Trustee filed a reply to the Geringer Objection (the “Geringer Objection Reply”)¹⁰ addressing these arguments. Based on the recent agreement in principle between the Trustee and Geringer, the Trustee expects Geringer will withdraw the Geringer Objection. Should Geringer do so before the hearing date, the only remaining objection will be from the Other Defendants.

The Other Defendants object to the Amended Settlement Motion on the sole bases that the Contribution Bar Order requirement that was removed from the Agreement by the Amended Agreement is required under the Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C.

⁸ [Docket No. 98-3](#); [Bankruptcy Case Docket No. 996](#).

⁹ [Bankruptcy Case Docket No. 992](#).

¹⁰ [Bankruptcy Case Docket No. 1007](#).

§78u-4(f)(7)(B), and that the proposed Contribution Bar Order attached to the Settlement Motion is insufficient and does not comport with the requirements of the PSLRA.¹¹

ARGUMENT

The Other Defendants' legal arguments are incorrect, immaterial, and do not preclude the Court from granting the Amended Settlement Motion. The Amended Agreement is not conditioned on the entry of a Contribution Bar Order, and the Trustee is indifferent to the Court's entry of a Contribution Bar Order or to alteration of his proposed Contribution Bar Order attached to the Settlement Motion to include language to satisfy the Other Defendants' objections.

Even though the Amended Agreement is not conditioned on the entry of a Contribution Bar Order, the Other Defendants contend that pursuant to the PSLRA, 15 U.S.C. §78u-4(f)(7)(A),¹² the Court must enter a Contribution Bar Order as part of the order approving the

¹¹ The Other Defendants also argued that the Bankruptcy Court lacked jurisdiction to enter a Contribution Bar Order. As such, they also filed a *Motion to Withdraw the Reference* seeking to withdraw the reference to the Bankruptcy Court. [Case No. 14-cv-626-DAK \(D. Utah\)](#), [Docket No. 2](#). The Trustee did not oppose this motion. *See id.* at [Docket No. 6](#). As the Court ultimately withdrew the reference to the Bankruptcy Court and the Amended Settlement Motion is being heard in this Court, that argument is now moot.

¹² 15 U.S.C. §78u-4(f)(7) states:

(A) In general

A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action—

- (i) by any person against the settling covered person; and

Amended Agreement and that the proposed Contribution Bar Order attached to the Settlement Motion is insufficient under the PSLRA. Neither of these arguments precludes the Court from granting the Settlement Approval Motion.

The PSLRA's contribution bar requirement applies to a covered person "who settles any private *action*." 15 U.S.C. § 78u-4(f)(A). At the time of the Amended Agreement, there was not an *action* as required by the PSLRA against any of the Defendants. And, as the Trustee has not filed a complaint against Warwick or Geringer, there is not and has never been such an action against either of those defendants. Thus, the PSLRA does not apply to the Amended Agreement.

Nevertheless, the Trustee does not oppose the entry of a Contribution Bar Order and nothing in the Amended Agreement prevents the Court from entering such an order. *Compare* Agreement ¶ 2 *with* Amended Agreement ¶ 2 (removing language conditioning the Agreement on entry of a Contribution Bar Order). In fact, the only reason the Trustee and Warwick entered into the Amended Agreement and the Trustee filed the Amended Settlement Motion was to alleviate arguments in Geringer's proposed objection to the Settlement Motion that the Bankruptcy Court did not have the authority to enter the Contribution Bar Order. Now that the reference to the Bankruptcy Court has been withdrawn, these concerns have been eliminated. As

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- (ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the covered person.

(B) Reduction

If a covered person enters into a settlement with the plaintiff prior to final verdict of 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.

the Trustee does not oppose the entry of a Contribution Bar Order, any dispute over the existence of a Contribution Bar Order should not preclude the Court from granting the Settlement Approval Motion.

The Other Defendants also contend that the Trustee must use precise language set forth in the PSLRA and that the language set forth in the Trustee's proposed Contribution Bar Order attached to the Settlement Motion is insufficient under the PSLRA and insufficient to protect the Other Defendants' rights. Although the Trustee believes that the proposed Contribution Bar Order is proper and sufficient, he does not oppose the alterations that the Other Defendants contend are required.

The Other Defendants initially suggest that ¶ 5, which states that “[t]he procedures set forth in paragraph 4 above [which provide for reduction in a judgment against a Non-Settling Party] shall not be applied to reduce the amount of any settlement reached with any Non-Settling Party” is improper because it permits the Trustee to obtain more than one satisfaction through settlement. This objection is unfounded. The PSLRA puts no restrictions on amounts or satisfactions that a plaintiff may get through settlement. The PSLRA's Contribution Bar Order requirement is meant to protect *non-settling parties* through a reduction in a judgment against them. These protections are not necessary in settlement as a settling party must necessarily agree to his individual settlement. Moreover, even without this paragraph, paragraph 4 of the proposed Contribution Bar Order cannot be read to apply to settlements. Thus, despite the unfounded nature of the Other Defendants' objection to paragraph 5 of the proposed Contribution Bar Order, the Trustee does not object to the removal of paragraph 5 because it is superfluous.

The Other Defendants next argue that the judgment credit set forth in the proposed Contribution Bar Order is too vague and object to certain language in paragraph 4. They make three arguments regarding the language of the proposed Contribution Bar Order. *First*, they contend that, pursuant to the PSLRA, paragraph 4 should state that the Court *must* determine the percentage of liability of Warwick (it currently states that “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.” The PSLRA does not require such mandatory language. *See* 15 U.S.C. § 78u-4(7)(B)(i) (the judgment or verdict against non-settling parties “shall be reduced by . . . an amount that corresponds to the percentage of responsibility of that covered person”). The Trustee does not believe that such an alteration in the language is necessary but does not object to an alteration of section (i) to reflect that the Other Defendants’ proposed language.

Second, the Other Defendants state that paragraph 4 should refer to judgment *or* verdict in the reduction provision in section (ii) (which currently states the Non-Settling Parties shall be entitled “to have any judgment against the Non-Settling party reduced by the greater of . . .”). Again, the Trustee does not believe that such an alteration is necessary pursuant to the PSLRA, but does not object to that change.

Third, the Other Defendants complain that the term “Warwick settlement” is not defined and that the alternative reduction credit in section (y) must specifically include the “entire amount the Trustee is able to recover” from Warwick and the Axis Policy. The Trustee does not believe that there is any ambiguity as to the language in section (y) or the meaning of the amount of the Warwick settlement actually paid to the Trustee but, as above, does not object to a

clarification in any Contribution Bar Order that section (y) represents the total amount the Trustee receives from Warwick and from the Axis Policy.

Assuming that Geringer withdraws the Geringer Objection, with the Trustee's concession to an order approving the Amended Agreement that either does or does not contain a Contribution Bar Order, and the Trustee's indifference to the alterations to the proposed Contribution Bar Order requested by the Other Defendants, there are no remaining legal issues between the parties. And even if Geringer does not withdraw the Geringer Objection, the Trustee rests on the legal arguments in his Amended Settlement Motion and the Geringer Objection Reply relating to Geringer's challenges to the Amended Settlement Motion.

CONCLUSION

For the reasons expressed herein, in the Amended Settlement Motion, and the Geringer Objection Reply, the Court should grant the Amended Settlement Motion and approve the Amended Agreement between Warwick and the Trustee.

DATED this 18th day of June, 2015.

DORSEY & WHITNEY LLP

 /s/ Milo Steven Marsden
Milo Steven Marsden
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Attorneys for Liquidating Trustee

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2015, I electronically filed the foregoing **LIQUIDATING TRUSTEE'S PRE HEARING BRIEF** (the "Brief") with the United States District 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 users.

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I further certify that on June 18, 2015, I emailed a copy of the Brief to:

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/s/ Sarah Goldberg