Milo Steven Marsden (Utah State Bar No. 4879)
Peggy Hunt (Utah State Bar No. 6060)
Sarah Goldberg (Utah State Bar No. 13222)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: marsden.steve@dorsey.com
hunt.peggy@dorsey.com
goldberg.sarah@dorsey.com

Attorneys for D. Ray Strong, Liquidating Trustee

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, D. RAY STRONG, as Liquidating Trustee of the Legacy Trust, CAOP I Trust and CAOP II Trust, Intervener.	**LIQUIDATING TRUSTEE'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF A CONTRIBUTION BAR ORDER FOR SETTLEMENT AGREEMENT WITH WILLIAM WARWICK** Civil Case No. 2:14-cv-00244-DAK The Honorable Dale A. Kimball

Intervener D. Ray Strong (the "Liquidating Trustee"), by and through his counsel, hereby submits this *Reply* in support of his *Motion for Entry of a Contribution Bar Order for Settlement Agreement with William Warwick* (the "Motion"). In the *Response of Jeff Austin, Keith Green,*

and William Grundy (the "Response") to the Motion, Defendants Jeff Austin ("Austin"), Keith Green ("Green") and William Grundy ("Grundy," and collectively with Austin and Green, the "Moving Defendants") accuse the Trustee of "gamesmanship" and "attempting to use a contributory bar order to harm the remaining defendants and to obtain multiple recoveries from the same injury." Response at 2. But it is the Moving Defendants who have used gamesmanship to delay the approval of the Warwick Settlement Agreement and the Trustee's recovery under it, and now seek to improperly expand the judgment-reduction credit to include Green and Grundy. The Court should enter the Trustee's proposed contribution bar order, attached hereto as Exhibit A, which is the contribution bar order originally proposed by the Trustee with one modification requested by the Moving Defendants. Such a contribution bar order adequately protects the interests of all covered individuals under the PSLRA and does not, as the Moving Defendants argue, violate the "one satisfaction" rule.

I. ADDITIONAL BACKGROUND

1. Counsel for the Trustee sent the Draft Complaint to all of the defendants in this case, including the Moving Defendants and Warwick in October 2013. The Trustee never filed the Draft Complaint. The Draft Complaint was just that, *a draft*. The Trustee filed a significantly revised complaint against the Defendants in this case minus Green, Grundy, and Warwick, on October 30, 2014. *See* *Strong v. Cochran*, Case No. 14-cv-788-TC (D. Utah) (Campbell, J) [Docket No. 2]. The Trustee filed separate adversary complaints in the Bankruptcy Court against Green and Grundy (the "Adversary Complaints") that same day. *See* *Strong v. Grundy*, Adv. Proc. No. 14-02339 (Bankr. D. Utah); *Strong v. Green*, Adv. Proc. No.

14-02340 (Bankr. D. Utah). The Adversary Complaints do not allege any violations of federal securities laws.

2. On May 6, 2014, the Trustee and Warwick entered a settlement agreement (the "Warwick Settlement Agreement") for a total of $400,000. Pursuant to the Warwick Settlement Agreement, Warwick paid $200,000 to the Trustee and assigned his rights under the Axis Insurance Policy (the "Policy") to the Trustee, meaning that the Trustee could assert Warwick's indemnification rights under the Policy and collect an additional $200,000 from the Policy. This Court entered an Order (the "Settlement Order") approving the Warwick Settlement Agreement on July 20, 2015 [Docket No. 129].

3. In June 2014, shortly after entering into the Warwick Settlement Agreement and filing a Motion to approve the Warwick Settlement Agreement, the Trustee and Warwick filed their *Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds* (the "Distribution Motion" [Docket No. 37]. The Moving Defendants opposed the Distribution Motion and argued that the Trustee, on behalf of Warwick, was not entitled to any money from the Policy. *See Opposition of Jeff Austin, Keith Green, William Grundy, and Douglas Child to Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds and Cross-Motion for Summary Judgment* [Docket No. 144]. The Court held a hearing on the Distribution Motion on November 12, 2015, but has not yet issued an order.

4. On August 20, 2015, Judge Campbell entered an order referring all claims in the *Strong v. Cochran* case to arbitration. *Strong v. Cochran*, Case No. 14-cv-788, Docket No. 55.

II. ARGUMENT

In the Response, the Moving Defendants propose three substantive changes to the Trustee's proposed contribution bar order:

(1) including the related arbitration that has arisen out of the *Strong v. Cochran* case;

(2) broadening the judgment-reduction credit to apply to any verdict, judgment or award "that arises or relates to claims asserted in *Strong v. Cochran*"; and

(3) expanding the amount of the judgment-reduction credit to $400,000 rather than "the amount the Trustee recovers as a result of the Warwick Settlement, but no less than $200,000."

The Trustee does not oppose including language explicitly including the term "arbitration" in the contribution bar order, but it is completely superfluous. On August 20, 2015, Judge Campbell sent the *Strong v. Cochran* case to arbitration. When the arbitration is completed, it will return to Judge Campbell on a motion to confirm or vacate. Thus, the arbitration will be subsumed by *Strong v. Cochran*, not separate from it.

However, the judgment-reduction credit must (A) be limited in scope to the defendants in *Strong v. Cochran*, which are the defendants against whom the Trustee has alleged federal securities law violations, and (B) be limited in amount to the amount the Trustee actually recovers as a result of the Warwick Settlement Agreement. As such, the Trustee proposes this revised language for the contribution bar order:

> No person may file, commence, institute, prosecute or maintain any claim, counterclaim, cross-claim, third-party claim or other action for contribution or indemnification against Warwick arising out of or related to claims asserted in *Strong v. Cochran et al.*, Case No 14-00788 (D. Utah), and the arbitration arising out of that case (collectively, "Strong v. Cochran"). Warwick shall not file, commence, institute, prosecute or maintain, either directly or indirectly, any claim, counterclaim, cross-claim, third-party claim or other action for contribution or indemnification against any

> other person that arises out of or relates to claims asserted in Strong v. Cochran.
>
> Any Verdict or Judgment in favor of the Liquidating Trustee, against the non-settling parties in Strong v. Cochran, shall be reduced by the greater of (i) an amount that corresponds to the percentage of responsibility ascribed to Warwick for such claims; or (ii) the amount the Liquidating Trustee recovers as a result of his settlement with Warwick, but no less than $200,000.

A copy of a proposed order with this revised language is attached hereto as Exhibit A.

A. The Court Should Not Expand the Judgment-Reduction Credit to Include Defendants Other Than Those in Strong v. Austin.

The Moving Defendants seek to add language to the Trustee's proposed judgment-reduction credit that would expand it to apply to a judgment, verdict, or award that "arises out of or relates to claims asserted in *Strong v. Cochran*." This is an improper attempt to include Green and Grundy in the judgment-reduction credit. Such protection for Green and Grundy is not required under the PSLRA because they are not "covered persons." Moreover, the judgment reduction credit should not apply to them because the claims that the Trustee has asserted against Green and Grundy do not involve a common injury as those for which he settled with Warwick.

The PSLRA's proportional liability provision and accompanying requirement for a contribution bar, applies only to "covered persons." 15 U.S.C. § 78u-4(f). A "covered person" is a defendant (a) "in any private action arising under this title [the Securities Exchange Act of 1934]," or (b) "in any private action arising under section [11 of the Securities Act of 1933], who is an outside director of the issuer of the securities that are the subject of the action." 15 U.S.C. § 78u-4(f)(10). The Trustee has only asserted such claims against the defendants in *Strong v. Cochran* and has not asserted any such claims against Green or Grundy. The Moving

Defendants do not assert otherwise.[1] As such, there is no basis for expanding the judgment-reduction credit to include individuals such as Green and Grundy who are not defendants in *Strong v. Cochran*, because they are not "covered persons" under the PSLRA.[2]

The Moving Defendants also contend that any language that does not include Green and Grundy in the judgment-reduction credit would violate the "one satisfaction rule" because it would allow the Trustee to recover multiple times for the same injury—"the allegedly inappropriate sales of securities." Motion at 6. The Moving Defendants characterize the claims settled with Warwick as breach-of-fiduciary duty claims for overseeing and conspiring with others relating to the inappropriate sales of Castle Arch securities. *See id.* But the Moving Defendants mischaracterize the claims that the Trustee has asserted against Green and Grundy and those that he has settled with Warwick. Although the claims may be related, they are separate claims with injuries to separate individuals and entities.

[1] The Moving Defendants acknowledge that the Trustee now asserts only state-law securities claims against Green and Grundy but contends that "nothing prevents the Trustee from amending the [Adversary Complaints] to include federal securities law claims. Response at 4. The omission of Green and Grundy from the Complaint and the form of the Adversary Complaints, demonstrates that the Trustee made a reasoned decision to not include federal securities law claims against Green and Grundy. The Trustee has no plans to amend the Adversary Complaints to include such claims and any attempt to do so would likely be time barred.

[2] The Moving Defendants also contend that under the Trustee's proposed language, "Mr. Warwick receives a windfall, and all other defendants or potential defendants receive nothing." Response at 6. This is not true. Warwick has paid the Trustee $200,000. None of the Moving Defendants have paid the Trustee anything. Moreover, the Moving Defendants are receiving something from Warwick—the right to be free from an action for contribution or indemnification initiated by Warwick. Under their own reasoning, absent such language, Warwick would otherwise be entitled to such contribution. The Moving Defendants thus cannot say that Warwick is receiving a windfall.

First, the adversary complaints against Green and Grundy primarily seek the recovery of fraudulent and preferential transfers made by CAREIC. These are not claims that are related to any wrongdoing by Warwick, and should not be covered by any contribution bar order or judgment-reduction credit. Second, in addition to the fraudulent transfer claims, the Trustee also seeks recovery of amounts paid by investors for the sale of securities by unlicensed broker-dealers under state (not federal) securities laws. These are *investor claims*, not claims of the Corporation or the Liquidating Trust in the first instance. *See* Utah Code Ann. § 61-1-22(b) ("A person described in Subsection (1)(a) is liable to a person . . . buying the security from the person described in Subsection (1)(a)."). The Trustee is prosecuting these claims because investors have assigned them to the Trustee in connection with the Plan of Liquidation. In contrast, the breach of fiduciary duty claims that the Trustee held and settled against Warwick were claims of CAREIC, the company. Although the Trustee now holds all of these claims, they are not for the same injury—the breach of fiduciary duty involved an injury to the company whereas the state-law securities claims asserted in the Adversary Complaints involve injury only to the investors. These are thus not the same injury and although any recovery would go to the Trustee, the claims are brought on behalf of different individuals and entities. Accordingly, the Trustee's proposed language does not violate the alleged "one satisfaction rule."

B. The Judgment-Reduction Credit Should be Limited to the Amount the Trustee Recovers as a Result of the Warwick Settlement Agreement.

Under the Warwick Settlement Agreement, Warwick paid the Trustee $200,000 and assigned his rights under the Policy to the Trustee. In the Distribution Motion, the Trustee is seeking to recover an additional $200,000 from the Policy based on the rights under the Policy that Warwick assigned to him. The Moving Defendants have vigorously opposed the

Distribution Motion. Despite their vigorous opposition, they argue that the judgment credit should be for $400,000—the full amount that the Trustee has requested—not the amount that he actually recovers. *See* Response at 7. As has been their practice, the Moving Defendants seek to have things both ways—limit the Trustee's recovery under the Warwick Settlement Agreement *and* reap the benefit of the maximum amount of the judgment credit, even if the Trustee does not recover the entire amount.

The PSLRA, however, requires that the judgment-reduction credit be reduced only by "the amount paid to the plaintiff," 15 U.S.C. § 78u-4(7)(B), which is exactly what the Trustee has requested. If the Trustee is successful in the Distribution Motion, this amount will equal $400,000. But if he is not, and recovers less than that amount, the Trustee should not be barred from recovering that amount from the other defendants.

III. CONCLUSION

For the reasons expressed herein and in the Motion, the Trustee requests that the Court approve and enter the contribution bar order, attached hereto as Exhibit A.

DATED this 20th day of November, 2015.

DORSEY & WHITNEY LLP

/s/ Milo Steven Marsden
Milo Steven Marsden
Peggy Hunt
Sarah Goldberg
Attorneys for Liquidating Trustee

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

I hereby certify that on November 20, 2015, I electronically filed the foregoing **LIQUIDATING TRUSTEE'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF A CONTRIBUTION BAR ORDER FOR SETTLEMENT AGREEMENT WITH WILLIAM WARWICK** (the "Motion") with the United States Bankruptcy 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 and will be served through the CM/ECF system.

- **Gregory J. Adams**
  gadams@mbt-law.com
- **Adam S. Affleck**
  asa@princeyeates.com,docket@princeyeates.com,debbie@princeyeates.com
- **Troy J. Aramburu**
  taramburu@swlaw.com,rmaxwell@swlaw.com,docket_slc@swlaw.com
- **Jeffrey M. Armington**
  armington.jeff@dorsey.com,ventrello.ashley@dorsey.com,posada.monica@dorsey.com,long.candy@dorsey.com
- **Bankruptcy Clerk's Office**
  UTB_Appeals@utb.uscourts.gov
- **Mona Lyman Burton**
  mburton@hollandhart.com,slclitdocket@hollandhart.com,intaketeam@hollandhart.com
- **Schuyler G. Carroll**
  scarroll@perkinscoie.com
- **Andrew B. Clawson**
  andrew@abclawutah.com
- **Joseph Covey**
  jcovey@parrbrown.com,calendar@parrbrown.com
- **Anna W. Drake**
  drake@millertoone.com
- **Ommid C. Farashahi**
  ofarashahi@batescarey.com
- **Jodi K. Feuerhelm**
  jfeuerhelm@perkinscoie.com
- **Heidi G. Goebel**
  heidi.goebel@chrisjen.com,goebel_heidi@hotmail.com,karen.harwood@chrisjen.com
- **Sarah E. Goldberg**
  goldberg.sarah@dorsey.com,russell.sonya@dorsey.com,posada.monica@dorsey.com,armitage.suanna@dorsey.com
- **David R. Hague**
  dhague@fabianvancott.com,ccarlson@fabianvancott.com
- **Kimberley L. Hansen**
  khansen@cohnekinghorn.com,clarson@cohnekinghorn.com

- **Mark T. Hiraide**
  mhiraide@hiraidelaw.com,kjue@hiraidelaw.com,eganous@hiraidelaw.com
- **Craig M. Hirsch**
  cmhirsch@jonesday.com
- **George B. Hofmann , IV**
  ghofmann@cohnekinghorn.com,dhaney@cohnekinghorn.com
- **Peggy Hunt**
  hunt.peggy@dorsey.com,ventrello.ashley@dorsey.com,posada.monica@dorsey.com,slc.lit@dorsey.com,long.candy@dorsey.com
- **Lon A. Jenkins**
  jenkins.lon@dorsey.com,lalor.carol@dorsey.com
- **Philip G. Jones**
  pgjones4@hotmail.com,PGJonesO@theomphalos.com
- **Penrod W Keith**
  pkeith@djplaw.com,khughes@djplaw.com
- **Jennifer R. Korb**
  jkorb@rqn.com,thansen@rqn.com,docket@rqn.com
- **Michael L. Labertew**
  michael@labertewlaw.com
- **Ralph R. Mabey**
  rmabey@kmclaw.com,lmurray@kmclaw.com
- **Milo Steven Marsden**
  marsden.steve@dorsey.com,posada.monica@dorsey.com,slc.lit@dorsey.com,thompson.vanessa@dorsey.com
- **Christopher J. Martinez**
  martinez.chris@dorsey.com,russell.sonya@dorsey.com,debry.leslie@dorsey.com,posada.monica@dorsey.com,slc.lit@dorsey.com
- **Adelaide Maudsley**
  amaudsley@kmclaw.com,squilter@kmclaw.com
- **Jason P. Minkin**
  jminkin@batescarey.com
- **John T Morgan**
  john.t.morgan@usdoj.gov
- **Jeffrey P. Mortimer**
  jeff@rulontburton.com,ffej65@gmail.com
- **Oliver K. Myers**
  myersok1@gmail.com
- **David F. Olsky**
  dolsky@perkinscoie.com,DOlsky-efile@perkinscoie.com,lapodaca@perkinscoie.com
- **Knute A. Rife**
  karife@rifelegal.com
- **Nathan S. Seim**
  seim.nathan@dorsey.com

- **Jeremy C. Sink**
  jsink@mbt-law.com
- **Michael T. Skoglund**
  mskoglund@batescarey.com,jminkin@batescarey.com,ofarashahi@batescarey.com
- **James A. Sorenson**
  jsorenson@rqn.com,tpahl@rqn.com,docket@rqn.com
- **Gerald H. Suniville**
  gsuniville@fabianvancott.com,nnelson@fabianvancott.com
- **Marca L. Tanner**
  marca.tanner@gmail.com
- **Brian J. Watson**
  bwatson@batescarey.com,jminkin@batescarey.com,ofarashahi@batescarey.com
- **Loren E. Weiss**
  lweiss@rqn.com,rfrodente@rqn.com,docket@rqn.com
- **Richard L. Wynne**
  rlwynne@jonesday.com

/s/ Sarah Goldberg

EXHIBIT A

Milo Steven Marsden (Utah State Bar No. 4879)
Peggy Hunt (Utah State Bar No. 6060)
Sarah Goldberg (Utah State Bar No. 13222)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: marsden.steve@dorsey.com
hunt.peggy@dorsey.com
goldberg.sarah@dorsey.com

Attorneys for D. Ray Strong, Liquidating Trustee

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, D. RAY STRONG, as Liquidating Trustee of the Legacy Trust, CAOP I Trust and CAOP II Trust, Intervener.	**ORDER ENTERING CONTRIBUTION BAR REGARDING WILLIAM WARWICK** Civil Case No. 2:14-cv-00244-DAK The Honorable Dale A. Kimball

The matter before the Court is the *Liquidating Trustee's Motion for Entry of a Contribution Bar Order for Settlement Agreement with William Warwick*, filed by D. Ray Strong, as the Liquidating Trustee for 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 (the "Liquidating Trustee"). The Court has considered the Motion and applicable law. Based thereon, and for good cause appearing,

IT IS HEREBY ORDERED THAT:

1. The Motion is **GRANTED**;

2. As relates to the Liquidating Trustee's Court-approved Settlement Agreement with William Warwick ("Warwick"), as defined in the Motion:

(a) No person may file, commence, institute, prosecute or maintain any claim, counterclaim, cross-claim, third- party claim or other action for contribution or indemnification against Warwick arising out of or relating to claims asserted in *Strong v. Cochran et al.*, Case No. 14-00788 (D. Utah), and the arbitration arising out of that case (collectively "Strong v. Cochran"). Warwick shall not file, commence, institute, prosecute or maintain, either directly or indirectly, any claim, counterclaim, cross-claim, third- party claim or other action for contribution or indemnification against any other person that arises out of or relates to claims asserted in *Strong v. Cochran et al.*, Case No. 14-00788 (D. Utah).

(b) Any Verdict or Judgment in favor of the Liquidating Trustee, against the non-settling parties in *Strong v. Cochran et al.*, Case No. 14-00788 (D. Utah), shall be reduced by the greater of (i) an amount that corresponds to the percentage of responsibility ascribed to Warwick for such claims; or (ii) the amount the Liquidating Trustee recovers as a result of his settlement with Warwick, but no less than $200,000.

End or Order