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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.	**SUPPLEMENTAL BRIEF REGARDING THE COURT'S AUTHORITY TO STAY THE UTAH RICO CLAIM** Case No. 2:14-cv-00788-TC Judge Tena Campbell

Pursuant to the Court's instructions at the April 3, 2015 hearing in this matter, Plaintiff D. Ray Strong, in his capacity as Liquidating Trustee (the "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, files this Supplemental Brief addressing this Court's authority to stay proceedings with regard to the Trustee's Eighth Claim for Relief, which alleges violation of Utah Code Ann. § 76-10-1601 *et seq*. (the "Utah RICO Act").[1]

As set forth below, the Trustee contends that this Court has broad authority to stay proceedings pending before it and to control its docket as it sees fit. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963). Further, nothing in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Utah Uniform Arbitration Act, Utah Code Ann. § 78B-10-101 *et seq.*, limits this Court's authority to exercise that authority in this case, with respect to the Eighth Claim for Relief.

I. THIS COURT HAS BROAD POWER TO CONTROL PROCEEDINGS BEFORE IT UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 42 of the Federal Rules of Civil Procedure provides this Court with broad authority to control proceedings before it. In particular, Rule 42 allows the Court, "*for convenience*, to avoid prejudice, or *to expedite and economize*," to order separate trials of "one or more separate issues, claims, crossclaims, counterclaims or third-party claims." Fed. R. Civ. P. 42(b) (emphasis added).[2] Moreover, the court's power under Rule 42 is not strictly limited to ordering a separate trial. It gives the court broad authority to enter orders concerning, among other things, the sequence of proceedings before it. As the commentators Wright & Miller explained,

[1] The Trustee's Eighth Claim for Relief also alleges violation of the Nevada RICO Act, NRS § 207.470.

[2] A motion for bifurcation under Rule 42 is not necessary. The district court may order separate trials *sua sponte* on its own motion. *See, e.g., Saxion v. Titan-C-Mfg., Inc.*, 86 F.3d 553, 556 (6th Cir. 1996) ("The rule clearly suggests that a court may bifurcate a trial on its own motion"); *Hampton v. Dillard Dep't Stores Inc.*, 18 F. Supp. 2d 1256, 1268 (D. Kan. 1998) (same).

> The separate trial rule has an obvious relation to the discovery rules, since if a possibly dispositive issue is to be tried separately, the district court, although it need not, may limit discovery to that issue until after its resolution.

9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2387, at 92 (3d ed. 2008).[3]

There is a wealth of case law establishing that the determination of whether an order should be entered under Rule 42 is a matter left to the sound discretion of the trial court, exercised on the basis of the circumstances of the litigation before it. *See, e.g., Palace Exploration Co. v. Petroleum Development Co.*, 316 F.3d 1110, 1118-19 (10th Cir. 2003); *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275 (10th Cir. 1999); *see generally* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2388.

In determining whether to order "bifurcation," courts routinely consider a number of factors, such as:

> 1) whether holding separate trials is unfair because valid claims for contribution might be decided inconsistently with the initial action where two different juries are used (citations omitted); 2) whether separate trials would truly expedite the litigation (citations omitted); 3) whether claims at issue arise out of the same set of facts as main claims (citations omitted). . . .

TBG, Inc. v. Bendis, 160 F.R.D. 621, 622-23 (D. Kan. 1995). Thus, courts have routinely bifurcated cases (or specific issues or claims) where they have determined that potentially dispositive issues should be addressed first, or where it is advantageous (for efficiency or other reasons) to separate patent issues from antitrust or contract issues. *See generally* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2388, and cases cited therein.

[3] The court may also look to Rule 21 of the Federal Rules of Civil Procedure for similar authority. It allows the Court to "sever any claim against a party." Fed. R. Civ. P. 21. This rule also gives the court broad power to control the proceedings before it. Many courts have found that a trial court's discretion under this rule is "virtually unfettered." *17th Street Assoc., LLP v. Markel Intern. Ins. Co. Ltd.*, 373 F.Supp.2d 584, 598 (E.D.Va.2005); *see Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 652 (4th Cir.2006).

In short, Rule 42 gives the district court power to bifurcate and order proceedings in whatever way the court determines will promote the effective adjudication of the litigation. *See id*. § 2389, at 141, and cases cited therein.

In addition, the language of Rule 42 itself makes clear that an important mandate that must be considered in bifurcating and setting the order of proceedings is "preserv[ing] any federal right to a jury trial." Fed. R. Civ. P. 42(b). Thus, although the court has discretion to order proceedings in a way that will be most convenient and logical, if there legal and equitable claims, issues common to both of them must be tried first to a jury and only thereafter may the court resolve equitable claims. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In this case, the mandate to preserve the federal right to a jury trial augers in favor of the decision the Court has indicated it is inclined to make regarding the Trustee's Utah RICO Claim – try the underlying civil fraud and securities fraud claims first, and then proceed with the RICO claim.

II. THE FEDERAL ARBITRATION ACT DOES NOT LIMIT THIS COURT'S AUTHORITY TO STAY THE TRUSTEE'S UTAH RICO CLAIM

The provisions of the FAA do not in any way limit the Court's authority under Rule 42 to deal with the Trustee's Utah RICO claim, which is based on state law.

First, it is important to note that, with respect to the Utah RICO claim, Mr. Austin's Motion [Dkt.12] was not based on the provisions of the FAA. Rather, as the motion made clear, his argument was that "the Trustee [had] assert[ed] a claim under the Utah RICO act . . . that is predicated on fraud," Motion, at 7, and that as such, arbitration was required under Utah Code Ann. § 76-10-1605(3). *Id*. at 8.

Even if this was not the case, the plain language of the FAA does not reach this Court's ability to stay a state-law based claim, which is required to be arbitrated because of another

provision of state law. The FAA, by its terms, applies exclusively to *written agreements to arbitrate*. *See* 9 U.S.C. §§ 2-4. Sections 3 and 4, in particular, which allow a party to compel arbitration and force a stay of litigation regarding claims subject to arbitration, are specifically limited to and conditioned on the existence of written agreements to arbitrate claims. *See* 9 U.S.C. § 3 ("[i]f any suit or proceeding be brought . . . upon any issue referable to arbitration *under an agreement in writing for such arbitration* . . . ") (emphasis added); *id.* at § 4 ("[a] party aggrieved by the alleged failure . . . of another to arbitrate *under a written agreement for arbitration* may . . .") (emphasis added). And courts have repeatedly explained that "the FAA's primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms." *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220-21 (1985). Because arbitration of the Utah RICO Claim is required by Utah statute, and not by a written agreement, the limitations of the FAA do not apply to the Trustee's Utah RICO claim, or limit the Court's ability to enter an order under Rule 42 bifurcating this claim, and staying it.

III. THE UTAH UNIFORM ARBITRATION ACT DOES NOT LIMIT THIS COURT'S AUTHORITY TO STAY THE TRUSTEE'S UTAH RICO CLAIM

There are two reasons that the Utah Uniform Arbitration Act does not limit this Court's authority to stay the Trustee's RICO claim.

First, like the FAA, the Utah Uniform Arbitration Act (the "Utah Act"), by its terms, applies only to situations where there is a written agreement to arbitrate. *See* Utah Code Ann. § 78-11-104(1) ("This chapter applies to *any agreement to arbitrate* made on or after May 6, 2002") (emphasis added). And, in particular, the Utah Act allows a motion to compel arbitration

and to stay proceedings only upon "showing *an agreement to arbitrate* and alleging another person's refusal to arbitrate pursuant to the agreement." *Id*. § 108(1) (emphasis added).

Thus – very oddly – the Utah Act's provisions do not apply to claims (like the Trustee's Eighth Claim for Relief) which are made under the Utah RICO Act, Utah Code Ann. § 76-10-1605. That is, although the Utah RICO Act says that RICO actions grounded in fraud are subject to arbitration, the terms of the Utah Act make no provision for such an arbitration. To apply the Utah Act in such situations requires writing several terms out of the statute, and several other terms into the statute.

However, this Court need not wade into this quagmire. Even where arbitration is clearly mandated, the Utah Act limits the scope of the stay it requires. Section 78B-11-108(7) specifies that:

> If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to arbitration. *If a claim subject to arbitration is severable, the court may limit the stay to that claim*.

Emphasis added. In this case, this section allows this Court to simply "sever" the Trustee's Eighth Claim for Relief, and stay proceedings on that claim.

Second, and perhaps more important, the Utah Act does not limit this Court's ability to order the proceedings before it because the Utah Act does not trump the Federal Rules of Civil Procedure. The trial court's power under Rule 42 has been found to be a valid regulation of federal civil procedure. *See Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142, 1146 n.7 (5th Cir. 1991) ("The mode of the trial appears procedural under Fed. R.Civ.P. 42(b) and the teachings of *Hanna v. Plumer*, 380 U.S. 460, 473–74 [citation omitted] (1965)."

In *Shugart v. Central Rural Electric Cooperative*, 110 F.3d 1501 (10th Cir. 1997), the Tenth Circuit considered a claim that a federal district court had erred in bifurcating "actual and punitive damages," because Oklahoma law "require[d] an unbifurcated trial." *Id*. at 1504. The Tenth Circuit held "[t]here was no error in bifurcating the trial" because "bifurcation of trials is permissible in federal court even when such procedure is contrary to state law." *Id*.

Similarly, Rule 42 allows bifurcation and a stay, even when such procedure is contrary to state law.

IV. THE COURT SHOULD STAY PROCEEDINGS REGARDING THE TRUSTEE'S EIGHTH CLAIM.

The Court may and should stay the arbitration of the Utah RICO Claim pending the litigation of the Trustee's additional claims for relief. Doing so will enable the parties to efficiently litigate the claims in this case and prevent the potential for needless proceedings.

Exercising this authority is prudent in cases such as this one where the non-arbitrable claims may determine the outcome or moot the potentially arbitrable claims. To prevail on his Utah RICO Claim, the Trustee must first prove that Austin violated federal or state securities laws (Claims 2, 3, and 4 of the Complaint). The Trustee is entitled to a jury trial on those claims. And if the jury finds that Austin did not violate the Utah Securities Act, the Trustee's Utah RICO Claim becomes moot, negating the need to arbitrate the claim at all.

CONCLUSION

For the reasons expressed herein, the Court has authority to stay the Utah RICO Claim and should do so pending the adjudication of the Trustee's additional claims.

DATED this 17th day of April, 2015.

DORSEY & WHITNEY LLP

/s/ Milo Steven Marsden
Milo Steven Marsden
Peggy Hunt
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Attorneys for D. Ray Strong, Liquidating Trustee

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2015, I caused a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF REGARDING THE COURT'S AUTHORITY TO STAY THE UTAH RICO CLAIM** to be filed with the United States District Court for the District of Utah by using the CM/ECF system, which will automatically send email notifications of such filing to all counsel who have entered an appearance in this action.

/s/ Sarah Goldberg