David R. Hague, A11660
FABIAN & CLENDENIN
215 South State Street, Suite 1200
Salt Lake City, Utah 84111-2323
Telephone: (801) 531-8900
dhague@fabianlaw.com
Attorneys for Longview Financial Group, Inc. and Longview Financial Holding, Inc.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC; CASTLE ARCH OPPORTUNITY PARTNERS I, LLC; CASTLE ARCH OPPORTUNITY PARTNERS II, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; AND CASTLE ARCH SMYRNA, LLC, Debtors.	**REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY** Bankruptcy No. 11-35082 Bankruptcy No. 11-35237 Bankruptcy No. 11-35240 Bankruptcy No. 11-35241 Bankruptcy No. 11-35242 Bankruptcy No. 11-35243 Bankruptcy No. 11-35246 (Jointly Administered) (Chapter 11) Honorable Joel T. Marker

Longview Financial Group, Inc. ("**LFG**") and Longview Financial Holding, Inc. ("**LFH**") (collectively, "**Longview**"), through counsel, hereby submit their Reply Memorandum in Support of Amended Motion for Relief From Automatic Stay.

INTRODUCTION

On July 23, 2012, D. Ray Strong, Chapter 11 Trustee for Castle Arch Real Estate Investment Company, LLC (the "**Trustee**"), filed the *Trustee's Objection to Amended Motion for Relief From Automatic Stay Filed by Longview Financial Group, Inc. and Longview Financial*

Holding, Inc. (the "**Objection**"). Remarkably, not one of Castle Arch Real Estate Investment Company, LLC's ("**CAREIC**") creditors—to whom the Trustee owes a fiduciary duty—have filed objections to Longview's Amended Motion for Relief From Stay (the "**Motion**"). In fact, they have not even filed joinders to the Trustee's Objection. And none of the creditors of CAREIC's affiliates (*i.e.*, CAOP Managers, CAOP I, CAOP II, CAK, CASDF, and CAS (collectively, the "**CAREIC Affiliates**") (CAREIC and the CAREIC Affiliates are collectively referred to as the "**Castle Arch Debtors**" or "**Debtors**") have filed objections to Longview's Amended Motion for Relief From Stay or filed joinders to the Trustee's Objection. But that is not surprising, given that Longview is the largest unsecured creditor, if not the only unsecured creditor, of the CAREIC Affiliates.

In his Objection, the Trustee concedes several important points. First, the Trustee makes very clear that he does not understand the complexity and the advanced stages of the New York Action. Indeed, in nearly every response to Longview's statement of facts—several of which are critical to an understanding of the intricacy of the New York Action—the Trustee's only statement is that he is "without sufficient information to admit or deny" such allegations and that they are not "materially relevant" to Longview's Motion. Second, the Trustee admits that Rockhill Insurance Company ("**Rockhill**") will cover the costs of defending the Castle Arch Debtors in the New York Action, but might not provide coverage in the underlying bankruptcy cases. Third, the Trustee actually highlights the complexity of Longview's claims and the New York Action and, in fact, acknowledges that it involves several non-debtor defendants and "numerous individuals who had been affiliated with the Debtors" and several claims dealing with a number of different contracts, the majority of which contain express forum selection clauses.

The Trustee further acknowledges that the Castle Arch Debtors asserted several counterclaims against Longview, some of which are still pending in the New York Action, and that he is revising the Complaint filed in the Adversary Proceeding (the "**Adversary Proceeding**") to assert "independent causes of action" against Longview. Finally, the Trustee admits that there is really no ongoing business of the Debtors and that he simply intends to liquidate the Debtors' assets and make distributions to creditors holding allowed claims.

Despite all of these admissions, and several others discussed below, the Trustee argues that (1) the constitutional concerns raised in *Stern v. Marshall*, 131 S. Ct. 1594 (2011) are irrelevant and not applicable to this matter; (2) the claims asserted against the Castle Arch Debtors in the New York Action—and the soon-to-be "claims" asserted against Longview by the Trustee—can be dealt with by way of a simple claims estimation process; (3) even though insurance coverage is available to the Debtors in the New York Action and likely not in the bankruptcy cases, that it will somehow be more efficient and less costly to try the case before this Court rather than the New York Court; (4) this Court is the proper forum to essentially adjudicate the New York Action despite the express forum selection clauses in the contracts and the fact that there are several non-debtor defendants involved over whom this Court has no jurisdiction; and (5) Longview is not even entitled to discovery against the Debtors in order to prosecute its claims against the non-debtor defendants in the New York Action.

As argued in Longview's Motion, and as set forth below, the Court should lift the automatic stay imposed by Section 362(a) of the Bankruptcy Code in order for Longview to establish its claims against the Castle Arch Debtors in the New York Action or, alternatively, modify the stay imposed by Section 362(a) of the Bankruptcy Code to permit Longview to conduct

full discovery against the Castle Arch Debtors in the New York Action for the purpose of discovering facts which might help in its claims and defenses against the non-debtor defendants.

RESPONSE TO THE TRUSTEE'S STATEMENT OF FACTS

The Trustee's Statement of Facts is replete with inaccurate factual assertions, including a number of patently false and scurrilous statements concerning Longview and its CEO, J. Stuart Schultz. The evidence to be presented at the hearing on this matter will establish that many of the "facts" asserted by the Trustee are irrelevant to Longview's Motion and inaccurate or patently false. Longview will not respond in this reply memorandum to each of the unfounded, false or inaccurate factual assertions contained in the Objection, and will instead defer to actual evidence that will be presented at the hearing.[1] Nevertheless, Longview feels compelled to respond to some of the more egregious and fundamentally erroneous factual assertions as follows:

I. The Trustee's "Declaration Objection"

1. In the Objection, the Trustee objects to certain statements in the *Declaration of Bruce A. Schoenberg in Support of Amended Motion for Relief From Automatic Stay* (the "**Schoenberg Declaration**"), on the ground that such statements summarized the allegations of the Verified Complaint in the New York Action, which allegedly "speaks for itself." (*See* Objection at p. 7 ¶ 8(d) (the "**Declaration Objection**")).

2. Unlike the Trustee, Mr. Schoenberg is fully familiar with prior proceedings in the New York Action, having drafted the Verified Complaint, having briefed and argued all of the

[1] The fact that this reply memorandum does not address each of the factual assertions in the Objection does not constitute an admission of any such factual assertions. Longview reserves the right to challenge any of the factual assertions contained in the Objection and to present evidence regarding the same at the hearing on this matter.

prior motions in the New York Court, having attended all but one of the conferences in the New York Action (which was attended by his law partner) and having propounded and responded to extensive discovery requests in that action. However, Mr. Schoenberg's summarization of the allegations of the Verified Complaint was not offered for the truth of the matter asserted, but rather, as was clearly stated in the Schoenberg Declaration, was offered solely as "background" and to provide the Court with context and an understanding of Longview's allegations in the Verified Complaint in the New York Action. (*See Reply Declaration of Bruce A. Schoenberg in Support of Amended Motion for Relief From Automatic Stay* (the "**Schoenberg Reply Declaration**"), ¶ 3).

3. In addition, under New York law, the Verified Complaint is the functional equivalent of an affidavit and is therefore itself competent evidence.[2] If it is necessary to prove the allegations of the Verified Complaint at the hearing of this matter, J. Stuart Schultz, the CEO of Longview, could and would testify competently regarding the matters set forth therein. (Schoenberg Reply Declaration, ¶ 4).

II. The Trustee's Lack of Personal Knowledge and Misstatements of Fact

4. The Trustee freely admits that he is unfamiliar with the facts of the underlying dispute between Longview and CAREIC and with the prior proceedings in the New York Action, stating in response to virtually every paragraph that "The Trustee is without sufficient information to admit or deny this allegation and therefore denies the same." (*See, e.g.*, Objection, Response to Longview's Factual Statement ¶¶ 9-15, 24-28, 30, 34, 37, 38, 46-47, 49-53, 55 and 69).

[2] N.Y. Civ. Prac. L. & R. § 105(u) ("a verified pleading may be utilized as an affidavit whenever the latter is required"). *See also Taslansky v. Schulman*, 2 A.D.3d 355, 361, 770 N.Y.S.2d 48, 54 n. 6 (1st Dep't 2003).

5. Notwithstanding his admitted lack of knowledge, the Trustee makes certain representations about the New York Action which are false and misleading, including:

Representation	Paragraph of Objection	Response
"After the filing of the Chapter 11 petition, the New York Action was stayed."	Response to Longview's Factual Statement ¶ 18(b).	The New York Action is continuing; only the claims against the Castle Arch Debtors were stayed
Claugus & Mitchell, LLP (the "CM Firm") "was not employed by the Debtors [or] debtors in possession as special counsel or otherwise"	Response to Longview's Factual Statement ¶ 18(b).	Claugus & Mitchell is still counsel of record for the Debtor Defendants (other than CAREIC) in the New York Action and will continue to be counsel of record until a substitution is filed or they are relieved by the court. N.Y. Civ. Prac. L. & R. § 321(b).
Counterclaims were asserted against Longview by "all Defendants except for Conix, Inc. and Mr. Warwick"	Response to Longview's Factual Statement ¶ 21	Mr. Warwick also filed counterclaims against Longview
"The CM Firm represents that Longview has stated that its emails are unavailable and the only emails that have been produced are from Schultz's personal computer"	Response to Longview's Factual Statement ¶ 33	Hearsay. In addition, Longview has produced every e-mail sent by or to any person using LFG's corporate email server from January 1, 2008 to August 25, 2009
The New York court indicated that no privilege "likely existed" as a result as to certain documents	Response to Longview's Factual Statement ¶ 34 n. 15	The New York court ruled that there was no privilege with respect to <u>any</u> communications with Mr. Hunt
"All Defendants jointly asserted numerous counterclaims against Longview in the New York Action, several of which are still pending but stayed as against the Debtor Defendants."	Trustee's Statement of Facts ¶ 10	The counterclaims by the Debtor Defendants are still pending and have not been stayed or withdrawn.

(Schoenberg Reply Declaration, ¶ 6).

6. The Trustee's "Claim Analysis" and his assertion that "it does not appear that Longview has any valid claim against the Debtors at all, and in fact, the Debtors may have claims against Longview" (*see, e.g.*, Objections, Response to Longview Statement of Facts at ¶¶ 16, 17 and 37 and Trustee's Statement of Facts at ¶¶ 32-35) are misleading and factually inaccurate.

7. Indeed, the "Trustee's Claim Analysis" is defective for several reasons, including, among others, because: (a) the Trustee's "commission analysis" improperly deducts commissions earned in connection with numerous sales of securities by licensed brokers working together with unlicensed cold-callers; (b) the "commission analysis" improperly offsets certain payments for draws and other expenses against the fees which LFG should have received as commissions from the sale of securities; (c) the "commission analysis" omits the value of any equity compensation that LFG should have received under its broker/dealer selling agent agreements with the various Castle Arch Debtors; (d) the "claims analysis" fails to include any equity or debt profit participation from LFG's sales of interests in CAOP I and CAOP II or any other "real estate opportunity" funds; and (e) the "Claims Analysis" does not assign any value to LFG's claims for common law fraud, tortious interference with contract or aiding and abetting a breach of fiduciary duty, which are potentially LFG's largest claims and which carry the potential for an award of punitive damages. (*See Declaration of J. Stuart Schultz in Support of Amended Motion for Relief from Automatic Stay* ("**Schultz Declaration**"), ¶ 9).

8. It should be noted, however, that the "Claims Analysis" prepared by the Trustee's accountant includes an additional $74,750.74 in commissions for payments made in 2010. Longview did not include any damages for 2010 in its Verified Complaint because it did not

have any data for this period. The inclusion of these commissions proves both that sales occurred in 2010 and that data relating to these sales is readily available to the Trustee and should be produced to Longview. (Schultz Declaration, ¶ 10).

9. Furthermore, it is improper for the Trustee to attempt to litigate the validity of Longview's claims by means of an objection to a motion for relief from stay. The *Curtis* factors analyzed by this Court to determine whether granting relief from stay is warranted do not focus on the likelihood of success on the merits and, therefore, the Trustee's efforts to litigate Longview's claims at this juncture should be ignored.

III. The Trustee's Efforts to Disavow the Debtors' Prior Pleadings and Motions

10. The Trustee seeks to distance himself from positions taken by the Castle Arch Debtor Defendants in the New York Action and before this Court. (*See, e.g.*, Objection, Response to Longview's Factual Statement at ¶¶ 49, 51 and 52 (stating that "any inconsistent positions taken by former management of the Debtors is [sic] irrelevant") and ¶¶ 56 and 69 (stating that the DIP Stay Relief Motion was brought for the benefit of former management and that Longview's reliance on such statements "for present purposes" is therefore "without any basis as to the Debtors," and that "The Trustee affirmatively asserts that he does not accept all of the statements made in the DIP Stay Relief Motion").

11. However, any statements made by or on behalf of the Debtors are admissible as party admissions.[3] Furthermore, to the extent that any such statements are contained in the Debtors' pleadings or motion papers filed in the New York Action or with this Court, such statements are "judicial admissions," which are binding upon the Debtors throughout the course

[3] Fed. R. Evid. 801(d)(2).

of those litigations.[4] Even assuming, *arguendo*, that the Trustee is subsequently granted leave to amend the Debtors' prior pleadings, the earlier statements do not magically disappear and are still evidential.[5] The Trustee's claim that the positions taken by the Debtor Defendants in their prior court papers is "irrelevant" is therefore incorrect as a matter of law.

IV. The Trustee's Improper Disclosure of Settlement Negotiations

12. In his Statement of Facts, the Trustee discusses in great detail settlement negotiations between Longview and the Trustee. See Trustee's Statement of Facts at ¶¶ 20-31. The Trustee's reliance upon and disclosure of ongoing settlement discussions between the Trustee and Longview are improper, and violate Federal Rule of Evidence 408. These allegations should therefore be stricken.

V. The Trustee's Vague Claims Regarding Ongoing "Discussions" with Rockhill and an As-Yet Unfiled Amended Adversary Proceeding

13. As was set forth in Longview's moving papers, one of the main reasons for permitting Longview to litigate its claims against the Debtor Defendants in the New York Action is the presence of a directors' and officers' liability insurance policy (the "**D&O Policy**"), which will cover the cost of defense in New York, but which will not cover the cost of disputing Longview's proofs of claims in this Court.

---

[4] *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009); *Official Comm. of the Unsecured Creditors of Color Tile Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003).

[5] *See Imprimis Investors, LLC v. Insight Venture Mgmt., Inc.*, 300 A.D.2d 109, 110, 752 N.Y.S.2d 26, 27 (1st Dep't 2002) (defendant's original answer "although amended, constitutes an informal judicial admission"); *Bogoni v. Friedlander*, 197 A.D.2d 281, 610 N.Y.S.2d 511 (1st Dep't 1994) (statement in a pleading "constitutes a formal judicial admission . . . which even though subject to a subsequent, valid amendment, remains evidence of the facts admitted"); *Kelly v. St. Michael's Roman Catholic Church*, 148 A.D. 767, 771 133 N.Y.S. 328, 332–33 (2d Dep't 1912) (defendant's admission in answer to original complaint was evidence against defendant and in favor of plaintiff notwithstanding subsequent amendment of complaint and filing of answer to amended complaint).

14. On or about November 9, 2009, CAREIC purchased a D&O policy from Rockhill. Rockhill assumed the defense of the New York Action because several of CAREIC's former officers and directors—including Robert Geringer, William Davidson, Kirby Cochran, Douglas Child, Jeff Austin, William Warwick and Philip Polich—were named as individual defendants in that case. In addition to assuming the defense of the individual directors and officers, Rockhill also agreed to represent the Debtor Defendants and certain non-debtor affiliates of CAREIC in the New York Action. Upon information and belief, one of the reasons Rockhill agreed to defend the Debtor Defendants and the non-debtor CAREIC affiliates in the New York Action was because their interests are aligned with the interests of the director and officer defendants against Longview. (Schoenberg Reply Declaration, ¶ 11).

15. In his Objection to Longview's Amended Motion for Relief from Stay, the Trustee admits that Rockhill would cover the cost of defending the Debtor Defendants in New York, (Objection, Response to Longview's Factual Statements at ¶¶ 69-70), but claims that he is "in active discussions with Rockhill" regarding "the claims asserted against the Debtors in Longview's POCs that are the subject of the Longview Adversary Proceeding."

16. Aside from these vague references to "discussions" with Rockhill, the Trustee has not submitted any statements from Rockhill or any other evidence showing that Rockhill would, in fact, cover the cost of litigating Longview's claims in this Court. Indeed, it is unclear why Rockhill would ever agree to represent the Debtor Defendants in this Court under its "D&O" policy, when Longview has not asserted any claims against any "directors" or "officers" in its Proofs of Claim.

17. In Paragraphs 36-37 of the Trustee's Statement of Facts, the Trustee indicates that he intends to amend the adversary complaint that was previously filed against Longview in this action, but does not give any indication of the nature of these as-yet unfiled "amendments."

VI. The Remaining Discovery Required of the Debtors

18. The Trustee greatly exaggerates the amount of discovery sought by Longview and the burdensomeness of providing such discovery.

19. At the time Longview commenced the New York Action in April 2010, it already had extensive proof of the Debtor Defendants making undisclosed payments to LFG's associated persons. Attached to Longview's Verified Complaint in the New York Action were extensive spreadsheets obtained from the computer of LFG's former Palatine, Illinois Branch Manager, which showed numerous payments to LFG's associated persons in 2008 and 2009. (See Verified Complaint, ¶ 49, and Exhibit U thereto; spreadsheets entitled "Cost of Sales (Master-Updated) 1.27.09.xls" and "Cost of Sales 1.27.10.xls."). (Schoenberg Reply Declaration, ¶ 16).

20. In the New York Action, the Debtor Defendants did not deny that they made payments to LFG's associated persons, but claimed that LFG was aware of such payments "because this was the agreement." (See Schoenberg Declaration at Exhibit I, Affidavit of Kirby Cochran in Support of Opposition to Plaintiffs' Motion to Dismiss Counterclaims at ¶ 7; *see also* Schoenberg Reply Declaration, ¶ 17).

21. Plaintiff's First Request for the Voluntary Production of Documents by the Castle Arch Defendants contained 48 requests. (Schoenberg Declaration Ex. H). Of these, approximately half (Request Nos. 23-46) were directed to the defenses and counterclaims asserted by the Debtor Defendants in the New York Action. (See Objection, Exhibit 10, Email

from Bruce Schoenberg to Peggy Hunt, Esq. dated June 1, 2012, stating that "I have attached a proposed form of voluntary document request for your consideration" and that "It is longer than I anticipated but you will see that many of the requests relate to assertions made by the debtors in the New York Action"). To the extent that the Trustee has indicated that he intends to move for leave to amend the Debtor Defendants' answer in the New York Action, many of these requests may be mooted. (Schoenberg Reply Declaration, ¶ 18).

22. Of the remaining 25 requests, 6 are requests for routine corporate records of CAREIC, including minutes of board meetings, organizational charts, employment manuals and agreements, and the general ledger of CAREIC (Request Nos. 1-4, 7 and 20) and should be readily available to the Trustee. (Schoenberg Reply Declaration, ¶ 19).

23. With regard to the remaining requests, which mainly seek documents relating to the sale of securities by LFG associated persons, including subscription agreements, payment records, commission runs and payroll records (Request Nos. 12, 13, 14, 15, 16 and 48) and LFG's alleged knowledge of such sales (Request Nos. 17, 18 and 19), the Trustee would have to produce such documents in connection with the litigation of Longview's Proofs of Claim and/or the Trustee's as-yet unfiled amended adversary complaint against Longview. (Schoenberg Reply Declaration, ¶ 20).

24. The Trustee's claim that Longview's motion for relief from stay should be denied because it would take the Trustee "hundreds of hours" to respond to discovery requests in the New York Action [Objection, at p. 49 ¶ 49] is entirely misleading. The Trustee would be required to produce the exact same discovery in this Court, both during the adversary proceeding and during the claims estimation process.

25. To the extent that the Trustee finds any specific document request burdensome or oppressive, Longview has already offered to work together with the Trustee to limit such request. (*See* Objection, Exhibit 10, Email from Bruce Schoenberg to Peggy Hunt, Esq. dated June 1, 2012 (stating that "if any of the requested items is problematic, I would be more than willing to work with you to narrow the requests so as to minimize the burden on the Trustee")). (Schoenberg Reply Declaration, ¶ 22).

VII. The Current Status of the New York Action

26. On August 1, 2012, the New York Court held a status conference. During the status conference, the New York court directed the parties (including CAREIC, which was represented by Dorsey & Whitney, LLP, counsel for the Trustee in this case) to submit a joint proposed Scheduling Order by August 31, 2012. (Schoenberg Reply Declaration, ¶ 23).

27. On August 1, 2012, Longview circulated a proposed Scheduling Order to counsel for the Non-Debtor Defendants and to counsel for CAREIC for their consideration and comment. (Schoenberg Reply Declaration, ¶ 24). (A true and correct copy of this proposed Scheduling Order is attached to the Schoenberg Reply Declaration as Exhibit A).

28. Pursuant to Longview's proposed Scheduling Order, all written discovery requests and interrogatories must be exchanged by August 17, 2012; all responsive documents and interrogatory answers must be served by September 17, 2012, all non-party depositions must be completed by October 31, 2012; all party depositions must be completed by November 30, 2012 and a "Note of Issue" certifying that all discovery has been completed and that the case is trial-ready must be filed no later than November 30, 2012—only four (4) months from now. Longview is prepared to meet these deadlines, although they will obviously have to be adjusted

slightly if Longview's motion for relief from stay is not decided prior to August 17, 2012, when discovery requests would otherwise be due. (Schoenberg Reply Declaration, ¶ 25).

29. Under Judge Marks' individual practices, dispositive motions are due only thirty (30) days after the completion of discovery. Under N.Y. Civil Practice Rule 2214(b), such motions can be made on as little as eight (8) days' notice, although Justice Marks will probably set down a schedule for briefing and argument. Pursuant to Commercial Division Rule 23, Judges are supposed to rule on motions within sixty (60) days of oral argument, although they sometimes take longer. (Schoenberg Reply Declaration, ¶ 26).

30. Longview believes that by the end of discovery, it may be in a position to move for partial summary judgment determining the amount of commissions and other compensation that LFG should have earned pursuant to the broker/dealer selling agreements between LFG and the various Castle Arch Debtors. This appears to be one of the main objectives of the Trustee's proposed "claims estimation" process. LFG may also be able to move for summary judgment dismissing certain of the Debtor Defendants' counterclaims, which would further narrow the issues for trial. (Schoenberg Reply Declaration, ¶ 27).

31. However, a trial will still be required to determine the Debtor Defendants' entitlement to various offsets claimed by the Debtor Defendants for unrelated payments to LFG, as well as to determine LFG's RICO claims against the individual non-debtor defendants and LFG's tort claims against all of the defendants for common law fraud, tortious interference with contract and aiding and abetting a breach of fiduciary duty. Longview's common law fraud, tortious interference with contract and aiding and abetting a breach of fiduciary duty claims all carry the possibility of an award of punitive damages. Whether to award punitive damages in a

particular case and the amount of such damages is within the discretion of the jury.[6] Unlike compensatory damages, which are quantifiable, "there is no rigid formula by which the amount of punitive damages is fixed, although they should bear some reasonable relation to the harm done and the flagrancy of the conduct causing it."[7] The value of these claims is therefore not capable of "estimation" with any degree of certainty prior to trial. (Schoenberg Reply Declaration, ¶ 28).

VIII. The Availability of Documents and Witnesses

32. The Trustee also asserts and argues that Longview's Motion should be denied because "The Debtors and all of their books and records are located in Utah," and "Upon information and belief, a majority of the witnesses are located in Utah or the Western States." [Objection at page 46 ¶ 43]. The fact that the Debtors and their books and records are allegedly located in Utah is of no significance. Certainly, the Trustee is not suggesting that Longview should be required—or would even be permitted—to physically inspect the Debtors Defendants' documents in the Debtor Defendants' offices. Whether Longview's case is pending in this Court or New York, in the ordinary course of discovery, Longview would request documents and the Trustee would produce responsive documents to Longview's counsel in New York.

33. With regard to the alleged availability of witnesses, the Trustee has not identified any specific witnesses allegedly located in "Utah or the Western States."

34. To the extent that the Trustee is referring to the Debtors' former management, all of CAREIC's former board members were named as defendants in the New York Action.

---

[6] *Ferguson v. City of New York*, 73 A.D.3d 649, 651, 901 N.Y.S.2d 609, 612 (1st Dep't 2010).

[7] *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 194, 856 N.Y.S.2d 505, 509, 886 N.E.2d 127, 131 (2008).

Defendants William Davidson, Kirby Cochran, Douglas W. Child, Jeff Austin and Philip Polich are still defendants in the New York Action and have either been found to be subject to personal jurisdiction there or have consented to personal jurisdiction there. These parties can therefore be compelled to appear for deposition and to produce documents in New York. Former defendants Robert Geringer and William Warwick are no longer parties to the New York Action, but have agreed to make themselves available for deposition and to appear for trial in New York. Thus, all of the Debtor Defendants' former directors are available for deposition and trial in New York. (Schoenberg Reply Declaration, ¶ 32).

35. Upon information and belief, Messrs. Davidson, Geringer, and Austin are all citizens of the State of California, Mr. Polich is a citizen of the State of Arizona, and Mr. Warwick is a citizen of North Carolina. [Verified Complaint ¶¶ 17-24]. These individuals are more than 100 miles outside of the State of Utah and therefore cannot be compelled to appear for deposition or trial in Utah pursuant to Fed. R. Civ. P. 45(b)(2). (Schoenberg Reply Declaration, ¶ 33).

36. Furthermore, Longview will be severely prejudiced if its motion for relief from stay is denied, as it will be required to incur the cost of two separate and interrelated proceedings. Upon information and belief, Messrs. Davidson, Geringer, Polich, Austin and Warwick are not subject to personal jurisdiction in Utah, and even if they were, this Court would not have jurisdiction to hear Longview's RICO, common law fraud, tortious interference and aiding and abetting breach of fiduciary duty claims against the individual former officers and directors of CAREIC. New York is therefore the only place where Longview can try all of its claims in one forum. (Schoenberg Reply Declaration, ¶ 34).

IX. The Alleged Additional Cost of Retaining Local Counsel in New York

37. The Trustee also asserts that the Debtors' estates will be prejudiced if Longview is permitted to prosecute the New York Action because the Trustee will be required to hire separate New York counsel. (*See* Objection, Trustee's Statement of Facts at ¶ 43 (stating that "the Trustee will be required to employ New York counsel at significantly higher rates") and Legal Argument at page 63 (stating that "if forced to litigate in New York, the Trustee will require time to obtain independent New York counsel approved by Rockhill")). These statements are false and misleading. The Trustee's current counsel, Dorsey & Whitney, LLP, is a national law firm having a New York office. If Longview's motion is granted and Dorsey is permitted to remain as counsel for the Trustee,[8] there is no reason why Dorsey & Whitney could not represent the Trustee both in this Court and in Utah. Indeed, an attorney from Dorsey's New York office has already filed a notice of appearance on behalf of CAREIC in the New York Action. (Schoenberg Reply Declaration, at 35). (A copy of Dorsey's Notice of Appearance in the New York Action is attached to the Schoenberg Reply Declaration as Exhibit B.)

X. The Unfounded and Irrelevant *Ad Hominem* Attacks on Schultz and Longview

38. In Paragraphs 57 of the Trustee's Statement of "Facts," the Trustee questions Longview's "motives" for bringing the New York Action. In Paragraph 63, the Trustee also states that "Schultz obtained a supervisory securities license (Series 24) in February 2007, just after a personal bankruptcy filing in June 2006."

39. Longview's and Schultz's only "motive" in bringing the New York Action was to seek economic redress for the wrongdoing of the Castle Arch Defendants (including the Debtor

[8] Longview anticipates making a motion to disqualify Dorsey & Whitney, LLP from acting as counsel for the Trustee in the New York Action and/or this action in the near future based upon a conflict of interest.

Defendants now represented by the Trustee) for their illegal conduct, including the payment of kickbacks to LFG's associated persons, which ultimately caused LFG to go out of business. (Schultz Declaration, ¶ 4).

40. The allegation regarding Schultz's personal bankruptcy is wholly irrelevant to any issue in this case, and an identical allegation was previously stricken from the Debtor Defendants' Counterclaims in the New York Action on the ground that it was "scandalous and impertinent." (See Declaration of Bruce A. Schoenberg filed July 3, 2012 at Exhibit B, Transcript of Hearing before the Honorable Shirley Werner Kornreich dated August 19, 2011 at pp. 5-8). The Trustee's attempt to raise this issue before this Court after it had already been stricken by the New York court is outrageous, and further demonstrates his clear lack of attention to the proceedings in the New York Action. It is also somewhat ironic that the Debtor Defendants should attempt to impugn Schultz's character based upon his personal bankruptcy when they themselves are in bankruptcy. (Schultz Declaration, ¶ 5).

41. In Paragraph 65 of the Trustee's Findings of "Fact," the Trustee further seeks to besmirch Schultz's name by reference to a FINRA "broker check" report containing a summary of allegations made against Schultz by FINRA in connection with the very events underlying the New York Action. There has never been any adjudicated finding against Schultz relating to any of the allegations by FINRA, and as the Trustee acknowledges—albeit it in miniscule type in a footnote—Schultz entered into a settlement with FINRA without admitting any liability. (Trustee's Objection at footnote 71). (Schultz Declaration, ¶ 6).

42. As the very FINRA "broker check" relied upon by the Trustee states, "When evaluating this information, please keep in mind that a disclosure event may . . . involve

allegations that are contested and have not been resolved or proven," and that allegations may be "concluded through a negotiated settlement for certain business reasons (*e.g.*, to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing." (Trustee's Objection, Exhibit 13, page 11 of 18 (emphasis added)). (Schultz Declaration, ¶ 7).

43. Schultz elected to settle the regulatory charges brought against him by FINRA solely because he was financially unable to contest them. Because he had extremely limited resources, he was forced to choose between either defending himself in a FINRA regulatory proceeding or seeking financial redress against the Castle Arch Defendants, and he elected to seek monetary compensation. In any event, the FINRA allegations against Schultz are wholly irrelevant to any of the *Curtis* factors that the Court considers when deciding a motion to lift stay. (Schultz Declaration, ¶ 8).

44. With regard to the Trustee's claim that Holding is no longer in good standing and that LFG has been administratively dissolved, (Objection, Trustee's Statement of Facts ¶¶ 59-60), this is correct. Since LFG is no longer operating, it has fallen behind on its corporate franchise taxes. However, this is irrelevant and does not preclude LFG from maintaining the New York Action or prosecuting its Proofs of Claim or defending any adversary proceeding in this Court. (See N.Y. Bus. Corp. Law § 1006(a)(4) (stating that a dissolved corporation "may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise")). (Schultz Declaration, ¶ 11).

45. Furthermore, the Trustee's claim that Longview is being represented on a contingency basis and can therefore afford to litigate in two forums is incorrect and illogical.

(Objection, Trustee's Responses to Longview's Statement of Facts at ¶ 53(e)). Longview is being represented by its New York counsel on a modified contingency basis. To date, Longview has paid its New York counsel approximately $70,000, including an assignment of the attorneys' fees paid by the Non-Debtor Defendants and their counsel in the New York Action in lieu of sanctions. Longview's Utah bankruptcy counsel is being paid on an hourly basis, and has been paid approximately $38,000 to date. Furthermore, Longview is responsible for paying all expenses as they are incurred, and has already paid more than $20,000 in filing fees, copying costs, travel costs and other expenses. (Schultz Declaration, ¶ 12).

46. As the result of the wrongdoing by the Castle Arch Defendants as alleged in the Verified Complaint in the New York Action, LFG was forced out of business. Schultz has been unemployed for approximately two years and can no longer work in the securities industry as the result of his settlement with FINRA. He is many months behind on his mortgage and facing foreclosure. He has been forced to borrow funds to pay counsel in an effort to recover damages for the benefit of Longview's shareholders and creditors. The cost of litigating in two forums—including travel expenses and the cost of taking depositions in multiple states—would impose extreme hardship on Schultz and his family. (Schultz Declaration, ¶ 13).

47. By contrast, the Trustee seems perfectly willing to deplete the Debtors' estates to pay different attorneys to represent each of the Debtor Defendants in this Court, when there is D&O coverage in the New York Action and the Trustee could litigate all of his disputes with Longview in New York at no cost to the Debtors' estates.

ARGUMENT

I. THE STAY SHOULD BE LIFTED BECAUSE OF THE CONSTITUTIONAL CONCERNS.

While this case may differ in some aspects from *Stern v. Marshall,* 131 S. Ct. 2594 (2011), *Stern* is still very applicable. *Stern* did not make any rulings as to a bankruptcy court's subject matter jurisdiction, but dealt instead with a bankruptcy court's power to enter final, binding judgments as to certain state-law actions. *Stern* addressed a bankruptcy court's authority to hear and make a final determination of a debtor's common-law counterclaim to a proof of claim filed against the bankruptcy estate. The extent of the lack of bankruptcy court authority to enter final judgments based upon *Stern* has not been decided in the Tenth Circuit. Some courts hold that the ruling in *Stern* should be limited to the unique circumstances of that case, which involved the listing of estate counterclaims against persons filing claims against the estate as "core proceedings" in 28 U.S.C. § 157(b)(2)(C). However, other courts read *Stern* more expansively, by looking to its reasoning.[9] But even under a narrow reading of *Stern,* the matter before the Court undoubtedly creates a constitutional concern.

The New York Action, Longview's proofs of claim filed in the Debtors' bankruptcy cases, the Adversary Proceeding commenced by the Debtors against Longview which seeks to litigate the validity of Longview's proofs of claim, and the objection to Longview's Claim No. 20 all involve state-law causes of action and, more significantly, state-law counterclaims asserted by the Debtors against Longview. Thus, the holding in *Stern* clearly has some application. Furthermore, several of the claims asserted by Longview and the Debtors will not necessarily be resolved in the claims

[9] *See, e.g., In re Heller Ehrman LLP,* 464 B.R. 348, 352–54 (N.D. Cal. 2011); *In re Teleservices Group, Inc.*, 456 B.R. 318, 338 (W.D. Mich. 2011).

allowance process, which is why the Trustee has indicated that he will now need to file an amended complaint against Longview. Similarly, in order for this Court to even "estimate" Longview's claims and afford it proper due process, it will have to conduct some trial process—even if it is truncated—in which state-law claims of breach of contract, fraud, tortious interference with contractual relations, and breach of fiduciary duty will be tried. Longview has also sued several individual defendants under RICO for operating the Castle Arch Defendants through a pattern of racketeering. The liability of the individual defendants—over whom this Court has no jurisdiction—is dependent upon the liability of the Castle Arch Defendants, including the Castle Arch Debtors. To argue that the issues raised in *Stern* have no application to this case is simply incorrect. The claims involved in the New York Action are in no way derived from or dependent upon bankruptcy law. Moreover, the counterclaims asserted by the Castle Arch Defendants in the New York Action are still pending and are precisely the type of claims that only Article III judges can decide because they clearly arise under state or other nonbankruptcy law. *See Stern*, 131 S. Ct. at 2609.[10] Accordingly, the Court should grant Longview's motion for relief from stay to avoid the constitutional issues raised in *Stern* and so that these claims can receive a proper hearing in a proper forum.

II. THE *CURTIS* FACTORS WEIGH IN FAVOR OF LIFTING THE STAY.

Setting aside the constitutional concerns, both the Trustee and Longview agree that in evaluating whether to grant relief from stay to permit litigation in another forum, courts in this

[10] Contrary to the Trustee's argument, the fact that Longview filed its proofs of claim in the bankruptcy cases does not, *ipso facto*, give this court jurisdiction to hear and make final judgments with respect to every claim associated with, or related to, the proofs of claim, including the counterclaims asserted by the Debtors against Longview in the New York Action. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011).

District look to the non-exclusive factors identified in *In re Curtis.*[11] Longview has already identified the *Curtis* factors relevant to this case and provided the Court with an extensive analysis of these factors. The Trustee has also analyzed these factors. Longview responds to the Trustee's points as follows:

(1) *Whether the relief will result in a partial or complete resolution of the issues.*

The Trustee's only argument regarding this factor is that "the Debtors may have claims against Longview which cannot be adjudicated in the New York Action as they arise under the Bankruptcy Code." (Objection, p. 56). If all a trustee has to do to oppose a motion for relief from stay is assert that some potential claims might arise under the Bankruptcy Code, the entire relief process afforded by section 362(d) would be thwarted. The fact that the Trustee might have a claim against Longview that derives from the Bankruptcy Code is simply not enough to show that this factor cuts his way. On the other hand, Longview has clearly demonstrated that an order granting relief from stay to permit Longview to establish its claims against the Castle Arch Debtors in the New York Action will result in a complete resolution of the issues and avoid needless relitigation of issues that have already been decided.

As the Trustee acknowledges, the New York Action involves "the Debtors, certain entities affiliated with the Debtors, numerous individuals who had been affiliated with the Debtors and the Non-Debtor Castle Arch Defendants, Conix, Inc. and Flobridge Group, LLC." (Objection, Statement of Facts, ¶ 6). This Court does not have personal jurisdiction over all of these defendants, yet they are critical witnesses in establishing Longview's claims against the Debtors. As stated, Longview has sued several individual defendants under RICO for operating

[11] 40 B.R. 795, 799–800 (Bankr. D. Utah 1984)

the debtor defendants through a pattern of racketeering. The liability of the individual defendants (over whom this Court has no jurisdiction) is dependent upon the liability of the Castle Arch Debtors—liability which cannot, as a matter of law of, be adjudicated by the bankruptcy court. Longview's common law fraud, tortious interference with contract and aiding and abetting a breach of fiduciary duty claims also all carry the possibility of an award of punitive damages. Whether to award punitive damages in a particular case and the amount of such damages is within the discretion of the jury.[12] Unlike compensatory damages, which are quantifiable, "there is no rigid formula by which the amount of punitive damages is fixed, although they should bear some reasonable relation to the harm done and the flagrancy of the conduct causing it."[13] The value of these claims is therefore not capable of "estimation" with any degree of certainty prior to trial. Accordingly, New York is the only place where Longview can try all of its claims in one forum. This Court should therefore grant Longview relief from the stay so that all claims can be resolved in one forum.

(2) *The lack of any connection with or interference with the bankruptcy case.*

The Trustee also argues that adjudication of Longview's claims against the Debtors in the New York Court as opposed to this Court "will greatly interfere with and negatively impact the Trustee's administration of the Debtors' bankruptcy estate." (Objection, p. 57). The evidence before the Court, however, tells the exact opposite. Indeed, the Trustee has not given the Court one example as to why, or how, the impact on the estate will be greater if the New York Court decides Longview's claims against the Debtors. To the contrary, resolution of Longview's

[12] *Ferguson v. City of New York*, 73 A.D.3d 649, 651, 901 N.Y.S.2d (1st Dep't 2010).

[13] *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 194, 856 N.Y.S.2d 505, 509, 886 N.E.2d 127, 131 (N.Y. 2008).

claims against the Castle Arch Debtors aids, rather than hinders, the administration of the bankruptcy cases because it avoids the needless litigation expenses of relitigating several issues already decided by, or pending, in the New York Action. But more importantly is the fact that Rockhill will provide coverage in the New York Action under the D&O Policy—a fact the Trustee does not, because he cannot, dispute. And Rockhill will still provide coverage even if the Trustee decides to hire new counsel in the New York Action. In other words, if the case proceeds in this Court, it is unquestionable that the creditors of the Debtors will pay the costs associated with the litigation and the claims estimation process. But if the case proceeds in New York, it is undisputed that Rockhill will cover the cost of defense for the Debtors.

Furthermore, even if a portion of Longview's claims can be "estimated" by the Court, this would neither save the estate money, nor assist the Trustee with the administration of the estate. In fact, it would do just the opposite. If the case proceeds in this Court, rather than in New York, there will be months of evidentiary hearings, depositions, extensive discovery, and relitigation of several issues already resolved or pending in the New York Action.[14] As such, regardless if Longview's claims are dealt with in the Adversary Proceeding, through a claims estimation procedure, or both, the estates will undoubtedly incur substantial, and possibly duplicative, fees (involving five separate law firms as opposed to one in New York) which the

[14] *See, e.g.*, Fed. R. Bankr. P. 9014 (governing contested matters and incorporating, among others, Rules 7026, 7028-7037); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982) (In estimating claims pursuant to § 502(c), a bankruptcy court "is bound by the legal rules which may govern the ultimate value of the claim. For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law."); *In re Chemtura Corp.*, 448 B.R. 635, 650 n.46 (Bankr. S.D. N.Y. 2011) ("Using estimation for claims allowance purposes, while permissible (and, indeed, expressly mentioned in section 502(c)(1)), can sometimes raise due process concerns, and for that reason . . . I used estimation solely for purposes of gauging feasibility, and not for determining ultimate claims allowance.").

estates would not incur (because of the insurance coverage) if the litigation is allowed to proceed in New York.

Finally, the fact that the Trustee admits that what he is doing is nothing more than liquidating the Debtors' assets and making distributions to creditors further demonstrates the New York Action's lack of interference with the bankruptcy case or a possible intrusion into the going concern of the Debtors and also calls into question the Trustee's claim that permitting Longview to establish its claims against the Debtors in the New York Action would unduly delay administration of the case.[15]

(3) *Whether a specialized tribunal has been established to hear the particular causes of action and that tribunal has the expertise to hear such cases.*

In his attempt to overcome this factor, which clearly cuts in Longview's favor, the Trustee tries to discredit Judge Marks' familiarity with the New York Action, and the specialized Commercial Division of the New York Court. Contrary to the Trustee's argument, the Commercial Division of the New York Court is "a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993. The Commercial Division was not established merely to hear contractual disputes."[16] Thus, the New York Court is clearly in a better position to decide these complex matters.

Moreover, the Trustee does not dispute that the parties to the New York Action have exchanged written interrogatories and document requests, have produced approximately 100,000 pages of documents, and are all subject to the New York court's jurisdiction. And contrary to

[15] *See, e.g., In re Apex Oil Co.*, 107 B.R. 189, 193 (Bankr. E.D. Mo. 1989) ("[T]he duty to estimate is not mandatory until the court determines that liquidation of the claim outside of the bankruptcy court would unduly delay the bankruptcy proceeding.") (emphasis added).

[16] *See, e.g., In re The Topps Co., Inc. Shareholder Litigation*, 19 Misc.3d 1103(A), 859 N.Y.S.2d 907 (Supr. Ct., N.Y. County 2007) (

the Trustee's assertions, the New York Action is being actively managed by the judge. Both sides have served numerous document and deposition subpoenas and trial could begin in as little as four months. Additionally, as a matter of comity, the New York courts have a particularized interest in determining disputes and issues regarding claims that arose in their jurisdiction.

Finally, the Trustee does not dispute that the majority of the contracts at issue contain express forum selection clauses whereby the parties to those contracts have explicitly agreed that any dispute which may arise between them must be adjudicated exclusively before a court located in New York City. The Trustee's only argument on this point is that if the forum selection clause is unreasonable, it should not be enforced. The Trustee, however, provides no evidence or facts—because he cannot—detailing why each and every contract containing the express forum selection clause is unreasonable. Instead, the Trustee simply throws out a public policy argument, which is nothing more than a red herring and inapplicable in this case. As set forth in Longview's motion, the Court should enforce the forum selection clause because that is what the parties explicitly agreed to and the New York Court is undoubtedly the most appropriate forum for adjudicating these issues as that court has been dealing with these specific disputes and related parties for over two years.[17] And "[m]erely because the court has the authority to render a decision does not mean it should do so."[18] In fact, "all non-core claims and all core claims 'inextricably intertwined' with non-core claims should be transferred or dismissed

[17] *See, e.g., In re D.E. Frey Group, Inc.*, 387 B.R. 799, 807 (D. Colo. 2008) ("In the Tenth Circuit, '[b]ankruptcy courts should be reluctant to entertain questions which may be equally well resolved elsewhere.'").

[18] *In re Nat'l Gypsum Co.* 118 F.3d 1056, 1068 (5th Cir. 1997).

to give effect to the parties forum selection clause."[19] In short, the Trustee simply cannot argue that this Court is in a better position than the New York Court to hear and decide the claims associated with the New York Action.

(4) *Whether the debtors' insurance carrier has assumed full financial responsibility for defending the litigation.*

Since the Trustee has no evidence or facts to address this factor, he simply claims that he is "in active discussions with Rockhill" regarding "the claims asserted against the Debtors in Longview's POCs that are the subject of the Longview Adversary Proceeding." Aside from these vague references to "discussions" with Rockhill, the Trustee has not submitted any statements from Rockhill or any other evidence showing that Rockhill would, in fact, cover the cost of litigating Longview's claims in this Court. Indeed, it is unclear why Rockhill would ever agree to represent the Debtor Defendants in this Court under its "D&O" policy, when Longview has not asserted any claims against any "directors" or "officers" in its proofs of claim. This factor undeniably cuts in Longview's favor.

(5) *Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.*

As set forth above, it is undisputed that harm would be imposed if the case is not allowed to proceed in New York because the estates would incur fees and costs in bankruptcy court that can undeniably be avoided. Only the Trustee and his professionals benefit if the case proceeds in

[19] *Frey*, 387 B.R. at 806; *see also In re The Topps Co., Inc. Shareholder Litigation*, 19 Misc.3d 1103(A), 859 N.Y.S.2d 907 (Supr. Ct., N.Y. County 2007) ("since New York was the first-filed action, Topps is a New York-based company with numerous New York shareholders, New York is a more convenient forum for most of the parties, non-party witnesses and their attorneys than Delaware, plaintiffs' claims arise out of conduct that took and is taking place in this state, the Merger Agreement is governed by New York law, and this court is prepared to and fully capable of applying Delaware law where it applies, the Topps' defendants motion to dismiss and/or stay this action in deference to the action pending in Delaware is denied.").

this Court. The Trustee can still liquidate the assets and administer the estates while Longview is concurrently establishing its claims against the Debtors in the New York Action. The Trustee can hire competent counsel in New York—since he already has—and can monitor the case without any delay and without incurring needless fees and expenses. There is simply no evidence of prejudice to the creditors or the estate if the Court grants relief from stay.

(6) *The interest of judicial economy and the expeditious and economical determination of litigation for the parties.*

For the reasons already stated, judicial economy can only be served by allowing the New York Action to proceed. It was commenced over two years ago, all claims and defenses have already been plead, and the New York Court has the expertise and familiarly with the causes of action. Moreover, the New York court has already decided several evidentiary issues, dismissed a significant number of claims on the merits, and awarded sanctions. Restarting the entire process all over again in this Court—and without the benefit of insurance coverage—makes no sense and is a waste of judicial resources and estate assets. Furthermore, there is simply no evidence or guarantee of plan confirmation before the New York Action is resolved. Indeed, the Trustee has not even filed a plan or disclosure statement. The parties will still have to determine the adequacy of the disclosure statement, and the plan must receive confirmation from the creditors. Although seemingly simple, these events could become difficult, lengthy, and involved. Finally, because Longview's claims eventually must be litigated, the interest of judicial economy would best be served by a trial of all claims and counterclaims in one proceeding.

(7) *Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.*

On August 1, 2012, the New York Court held a status conference, during which the parties were requested to submit a joint proposed Scheduling Order by August 31, 2012. Longview circulated a proposed Scheduling Order to counsel for the Non-Debtor Defendants and to counsel for CAREIC for their consideration and comment. Pursuant to the proposed Scheduling Order, a "Note of Issue" certifying that all discovery has been completed and that the case is trial-ready must be filed no later than November 30, 2012—only four (4) months from now. Longview believes that by the end of discovery, it may be in a position to move for partial summary judgment determining the amount of commissions and other compensation that LFG should have earned pursuant to the broker/dealer selling agreements between LFG and the various Castle Arch Debtors. This appears to be one of the main objectives of the Trustee's proposed "claims estimation" process. LFG may also be able to move for summary judgment dismissing certain of the Debtor Defendants' counterclaims, which would further narrow the issues for trial.

(8) *The impact of the stay on the parties and the "balance of hurt."*

It is undisputed that Longview, Schultz, the non-debtor defendants in the New York Action, the various witnesses to the New York Action, and the unsecured creditors of the Debtors' bankruptcy cases will be severely harmed if Longview is required to litigate its claims in this Court. There will be no insurance coverage. Evidence will be presented in this Court and then essentially the same case would have to be presented in the New York Action against the Non-Debtor Parties. The other unsecured creditors in these bankruptcy cases would also be

harmed because the estates will incur substantial, and possibly duplicative, fees which simply will not happen if the litigation is allowed to proceed in New York.

Consequently, considering the relevant factors under the *Curtis* analysis, there can be no dispute that "cause" exists to grant relief from stay to allow Longview to establish its claims against the Castle Arch Debtors in the New York Action.

III. LONGVIEW IS ENTITLED TO CONDUCT FULL DISCOVERY AGAINST THE DEBTORS IN THE NEW YORK ACTION AND THE TRUSTEE IS NOT ENTITLED TO A STAY UNDER SECTION 105(a).

Ironically, the Trustee spends a substantial portion of his Objection trying to convince the Court that a simple claims estimation procedure can do away with Longview's claims, but then, as he talks out the other side of his mouth, he argues that production of certain documents are burdensome and that production would "consume an inordinate amount of time and expense to the detriment of the estate and other creditors" and would "consume hundreds of hours by the Trustee and his professionals time in this case where it is vitally important for the Trustee to formulate a plan." (Objection, Trustee's Statement of Facts, ¶¶ 48-49). In other words, in deciding whether to grant stay relief to allow Longview to proceed with litigation in the New York Action, the Trustee wants this Court to believe that the claims estimation procedure is simple and can be dealt with efficiently and expeditiously, which is simply not true. On the other hand, in deciding whether to modify the stay to allow Longview to conduct discovery against the Debtors in order to establish its claims against the non-debtor defendants in the New York Action, the Trustee wants this Court to believe that document production alone is going to be an "incredibly burdensome," "incredibly difficult," "time consuming," and "expensive" process. The Trustee cannot have it both ways. The bottom line is that the New York Action is very complex and involves a substantial amount of

documents, but the Trustee would be required to produce the exact same discovery in this Court, both during the adversary proceeding and during any claims estimation procedure.

Furthermore, there is no dispute—nor any case law to the contrary—that courts allow litigants to conduct discovery against debtors in order to prepare for collateral litigation. Denying such relief would be a manifest injustice and would severely prejudice Longview in establishing its claims against the non-debtor defendants. *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation* is instructive.[20] In *Mahurkar,* Kendall Med-West was a defendant in certain multi-defendant patent infringement litigation. Kendall filed for bankruptcy and contended that the automatic stay prevented further prosecution of the claims against it and barred discovery of its employees and former employees. The district court agreed that the automatic stay applied to a request for injunctive relief against Kendall, but held that Kendall (and its employees) were not protected by the automatic stay with respect to discovery relating to claims against the other defendants.[21] The court did not, however, dismiss the action against Kendall; rather, it merely treated Kendall "as if [it] were no longer a party to the litigation" and "as if [it] were an interested non-litigant."[22] The *Mahurkar* court stated:

> We come, then, to discovery in the multidistrict patent case. Section 362(a)(1) applies only to actions against the debtor. At oral argument, counsel for Kendall conceded that the automatic stay does not affect discovery affecting IMPRA [the other non-debtor defendant], and that Kendall is obliged to participate to the extent it would be as a non-party. Related litigation goes on without the debtor.
>
> That concession, which I believe correctly states the law (although there are no cases on point), means that Mahurkar is entitled to at least some of the relief he seeks. Kendall has no ground to interfere with or disrupt discovery that is calculated to lead to evidence admissible against IMPRA. That a given witness

[20] 140 B.R. 969 (N.D. Ill. 1992),
[21] *Id.* at 977.
[22] *Id.* at 978–79.

> used to work for Kendall (or still works for Kendall) is irrelevant, if the discovery has utility other than to facilitate recovery against Kendall.

Id. at 977 (emphasis added).[23]

In this case, Longview is entitled to obtain discovery against the Debtors (and now the Trustee)—including through depositions, discovery requests, subpoenas, etc.—in an effort to continue its prosecution of its claims against the other non-debtor defendants in the New York Action. Under the Trustee's analysis, a debtor could never be called as a witness or required to produce documents (even in actions where the debtor is a non-party) without relief from stay. The Trustee's interpretation of section 362(a) defies common sense, case law, and the spirit of the Bankruptcy Code. Section 362(a) does not prevent Longview from conducting discovery

[23] Another case is also illustrative. In *In re Hillsborough Holdings Corp.*, 130 B.R. 603, 605 (Bankr. M.D. Fla. 1991), a non-debtor co-defendant sought relief from stay in order to depose employees of debtor, its co-defendant. The plaintiff was unable to obtain relief from the stay to pursue its claims against the debtor, so it was pursuing its claims against the co-defendant only. Consequently, the co-defendant wanted to depose the debtor's employees "for the purpose of discovering facts which might help in its defense against the claim asserted against it by [the plaintiff]." *Id.* The debtor argued that the depositions would violate the automatic stay and would adversely affect its defense of the stayed claim of the plaintiff. The debtor therefore contended that the requested discovery "would in effect be tantamount to an 'end run' around the shield of protection erected by the automatic stay already available to [it]." *Id.*

The *Hillsborough* court granted relief from the stay, but noted that it did not believe that the automatic stay prevented discovery aimed at debtor as long as the discovery pertained to claims and defenses of a non-debtor party:

> Considering [the co-defendant's] right to the relief sought, the initial inquiry must be addressed to the threshold question, which is whether or not the proposed action, *i.e.*, proposed discovery by [the plaintiff], is in fact prohibited by the automatic stay protecting [debtor]. At first blush, it would appear that the proposed action by [the co-defendant], that is to conduct discovery in order to prepare its defense against the suit filed by [the plaintiff], is not prohibited by the automatic stay. This is so because there is no question that [co-defendant] does not seek relief from the automatic stay in order to undertake any action against [debtor] or against any property of [debtor] in order to enforce a pre-petition claim against [debtor], which action would clearly be within the specific provisions of § 362(a) of the Bankruptcy Code. Based on the undisputed facts, it is clear that a literal reading of § 362(a) leaves no doubt that the automatic stay would not prevent [co-defendant] from conducting the proposed discovery to be used for its defense in the suit filed by [the plaintiff].

Id. at 605 (emphasis added); *see also In re Med. Mgmt. Group, Inc.*, 302 B.R. 112 (B.A.P. 10th Cir. 2003) (holding that "nothing prevents creditors from obtaining the Debtor's records pursuant to valid discovery requests not made for the purpose of collecting from the debtor or property of the estate.").

against the Debtors and the Trustee as part of the development of a case against non-debtor parties, even if the information obtained could later be used against the Debtors.

Additionally, even without regard to Longview's need to obtain discovery of the Debtor Defendants for use against the Non-Debtors in the New York Action, Longview would still be entitled to discovery of the Debtor Defendants for the purpose of defending itself against the counterclaims asserted by the Debtor Defendants in the New York Action. As was set forth above, the Debtor Defendants asserted a number of counterclaims against Longview in the New York Action, and those counterclaims have not been stayed, either by operation of law or by the New York Court's prior order staying claims against the Debtor Defendants.[24] The Trustee has had an opportunity to withdraw the pending counterclaims against Longview and has not done so. Section 362(a) should operate as a shield for a debtor, not as a sword. A debtor cannot assert claims against a non-debtor while simultaneously claiming that Section 362(a) prevents the non-debtor from taking the discovery necessary to defend itself against such claims.

Furthermore, the Trustee's section 105(a) request—albeit in a footnote—to prevent Longview from obtaining documents and other discovery from the Trustee in order to establish its claims against the non-debtor defendants has no merit. First, it is widely accepted that "the automatic stay does not protect non-debtor parties or their property."[25] "Thus, section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on

[24] *See Teachers Ins. And Annuity Ass'n v. Butler*, 803 F.2d 61, 64 (2d Cir. 1986) (stating that "there are compelling reasons why an appeal *initiated by the debtor* should not be considered a proceeding "against the debtor" within the meaning of section 362(a)") (italics original); *Advanced Computer Servs. v. MAI Systems Corp*., 161 B.R. 771, 775 (E.D. Va. 1993) ("Although the claims in the complaint are subject to the § 362(a) automatic stay, the same result does not obtain with respect to the counterclaim. By its plain terms, § 362(a) has no application to a debtor's claim").

[25] *In re Advanced Ribbons and Office Products, Inc. v. U.S. Interstate Distributing, Inc.*, 125 B.R. 259, 263 (B.A.P. 9th Cir. 1991).

the debts of the debtor."[26] Moreover, section 105(a) should only be used in "unusual circumstances" and "only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate."[27] Indeed, "most, if not all courts consider the extension of the automatic stay under section 362(a) to a nondebtor to be extraordinary relief. Because of this, this Court has found that when an extension is allowed it is in circumstances where the debtor is a corporation and the nondebtor is an individual or related corporation deemed necessary for the reorganization of the debtor corporation.").[28]

The Trustee's (or the non-debtor defendant's) circumstances simply do not constitute "special" or "unusual" circumstances which would warrant the extraordinary relief of an extension of the stay. The Trustee has not set forth any evidence as to the unusual or special nature of this case. Furthermore, the non-debtor defendants are not deemed necessary for the reorganization of the Debtors since the Debtors are not reorganizing. The Trustee's own admission—*i.e.*, that he is doing nothing more than liquidating the Debtors' assets via a liquidating plan completely undermines his footnote request for a stay under 11 U.S.C. § 105(a). Moreover, there is simply no evidence before the Court that prosecution against the non-debtor defendants will in effect be a judgment against the Debtors. To the extent the Trustee's footnote request is even proper, it should be denied.

---

[26] *In re Miller*, 262 B.R. 499, 503 (B.A.P. 9th Cir. 2001); *see also Seiko Epson Corp. v. Nu-Kote International, Inc.*, 190 F.3d 1360, 1364 (Fed. Cir. 1999) ("It is clearly established that the automatic stay does not apply to non-bankruptcy co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor.") (emphasis added)

[27] *In re McCormick*, 381 B.R. 594, 601 (Bankr. S.D.N.Y. 2008) (internal citations omitted)

[28] *Id.* (emphasis added)*; see also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (holding that in light of the "narrow construction" courts give the scope of § 362 stays, extension of a stay to a non-debtor only "arises when there is such an identity between the debtor and [non-debtor] that the debtor may be said to be the real defendant and that a judgment against the [non-debtor] will in effect be a judgment . . . against the debtor.").

WHEREFORE, for the reasons set forth in its moving papers and those above, Longview respectfully requests that this Court grant the following relief:

A. Lift the automatic stay imposed by Section 362(a) of the Bankruptcy Code in order for Longview to establish its claims against the Castle Arch Debtors in the New York Action;

B. Alternatively, modify the stay imposed by Section 362(a) of the Bankruptcy Code to permit Longview to conduct full discovery against the Castle Arch Debtors in the New York Action. The scope of the order modifying the automatic stay should (1) be broad enough to allow Longview, without further action of this Court, to take depositions of corporate representatives of the Castle Arch Debtors regarding any and all issues relating to the New York Action, (2) require the Castle Arch Debtors and the Trustee to preserve and provide access to corporate records that may be relevant, and (3) require the Castle Arch Debtors and the Trustee to respond to written requests for discovery;

C. Waive the 14-day stay which would otherwise apply pursuant to Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure; and

D. Grant such other and further relief as this Court deems just and proper.

DATED this 2nd day of August, 2012.

/s/ David R. Hague
David R. Hague
FABIAN & CLENDENIN
Attorneys for Longview

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2012, I electronically filed the foregoing **REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY** with the Clerk of the Court using the CM/ECF system which caused notification of such filing to be sent to those registered to receive notice in the underlying case.

/s/ David R. Hague

4847-3994-3952, v. 1

David R. Hague, A11660
FABIAN & CLENDENIN
215 South State Street, Suite 1200
Salt Lake City, Utah 84111-2323
Telephone: (801) 531-8900
dhague@fabianlaw.com
Attorneys for Longview Financial Group, Inc. and Longview Financial Holding, Inc.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC; CASTLE ARCH OPPORTUNITY PARTNERS I, LLC; CASTLE ARCH OPPORTUNITY PARTNERS II, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; AND CASTLE ARCH SMYRNA, LLC, Debtors.	**DECLARATION OF J. STUART SCHULTZ IN SUPPORT OF AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY** Bankruptcy No. 11-35082 Bankruptcy No. 11-35237 Bankruptcy No. 11-35240 Bankruptcy No. 11-35241 Bankruptcy No. 11-35242 Bankruptcy No. 11-35243 Bankruptcy No. 11-35246 (Jointly Administered) (Chapter 11) Honorable Joel T. Marker

I, J. STUART SCHULTZ, make the following statement under the penalty of perjury pursuant to 28 U.S.C. 1746:

1. I am the CEO of Longview Financial Group, Inc. ("**LFG**") and of Longview Financial Holding, Inc. ("**LFH**") (collectively, "**Longview**"), the plaintiffs in the matter entitled *Longview Financial Group, Inc. et al. v. Castle Arch Real Estate Investment Co., LLC, et al.* (Index No. 600904/10) (the "**New York Action**"). I submit this reply declaration in further support of Longview's motion for relief from the automatic stay pursuant to 11 U.S.C. §§ 105(a)

and 362 and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure in order for Longview to establish its claims against the Castle Arch Debtors (as defined below) in litigation pending in the Supreme Court of the State of New York, New York County, Commercial Division, or in the alternative, for leave to take full discovery of the Castle Arch Debtors in the New York Action for the purpose of discovering facts which might help in its claims and defenses against the Non-Debtor Parties.

2. Although I will not attempt to respond to all of the factual inaccuracies in the Trustee's Objection to Amended Motion for Relief from Stay, I submit this declaration to address certain false, scandalous and defamatory statements by the Trustee.

3. As an initial matter, I wish to address the Trustee's unfounded and irrelevant *ad hominem* attack upon my character. In Paragraphs 57 of the Trustee's Statement of "Facts," the Trustee questions my "motives" for bringing the New York Action. In Paragraph 63, the Trustee also states that "Schultz obtained a supervisory securities license (Series 24) in February 2007, just after a personal bankruptcy filing in June 2006."

4. I assure the Court that my only "motive" in bringing the New York Action was to seek economic redress for the wrongdoing of the Castle Arch Defendants (including the Debtor Defendants now represented by the Trustee) for their illegal conduct, including the payment of kickbacks to LFG's associated persons, which ultimately caused LFG to go out of business.

5. The allegation regarding my prior personal bankruptcy is wholly irrelevant to any issue in this case, and an identical allegation was previously stricken from the Debtor Defendants' Counterclaims in the New York Action on the ground that it was "scandalous and impertinent." (See Declaration of Bruce A. Schoenberg filed July 3, 2012 (the "**Schoenberg**

Decl.") at Exhibit B, Transcript of Hearing before the Honorable Shirley Werner Kornreich dated August 19, 2011 at pp. 5-8). The Trustee's attempt to raise this issue before this Court after it had already been stricken by the New York court is outrageous, and the Trustee should be sanctioned. It is also somewhat ironic that the Debtor Defendants should attempt to impugn my character based upon my personal bankruptcy when they themselves are in bankruptcy.

6. In Paragraph 65 of the Trustee's Findings of "Fact," the Trustee further seeks to besmirch my name by reference to a FINRA "broker check" report containing a summary of allegations made against me by FINRA in connection with the very events underlying the New York Action. There has never been any adjudicated finding against me relating to any of the allegations by FINRA, and as the Trustee acknowledges—albeit it in miniscule type in a footnote—I entered into a settlement with FINRA without admitting any liability. (Trustee's Objection at footnote 71).

7. As the very FINRA "broker check" relied upon by the Trustee states, "When evaluating this information, please keep in mind that a disclosure event may . . . involve allegations that are contested and have not been resolved or proven," and that allegations may be "concluded through a negotiated settlement for certain business reasons (*e.g.*, to maintain customer relationships or to limit the litigation costs associated with disputing the allegations) with no admission or finding of wrongdoing." (Trustee's Objection, Exhibit 13, page 11 of 18 (emphasis added)).

8. I categorically deny the allegations referred to in the Trustee's Objection. I elected to settle the regulatory charges brought against me by FINRA solely because I was financially unable to contest them. Because I had extremely limited resources, I forced to choose

between either defending myself in a FINRA regulatory proceeding or seeking financial redress against the Castle Arch Defendants, and I elected to seek monetary compensation. In any event, the FINRA allegations against me are wholly irrelevant to any of the *Curtis* factors that I understand should be considered when deciding a motion to lift stay.

9. With regard to the factual allegations made by the Trustee, I wish to dispute the Trustee's "Claims Analysis" and his claim that "it does not appear that Longview has any valid claim against the Debtors at all, and in fact, the Debtors may have claims against Longview." (*See, e.g.*, Objections, Response to Longview Statement of Facts at ¶¶ 16, 17 and 37 and Trustee's Statement of Facts at ¶¶ 32-35). Without going into great detail, I have reviewed what I believe to be the "Trustee's Claims Analysis," and is defective for numerous reasons, including, *inter alia* because: (a) the Trustee's "commission analysis" improperly deducts commissions earned in connection with numerous sales of securities by licensed brokers working together with unlicensed cold-callers; (b) the "commission analysis" improperly offsets certain payments for draws and other expenses against the fees which LFG should have received as commissions from the sale of securities; (c) the "commission analysis" omits the value of any equity compensation that LFG should have received under its broker/dealer selling agent agreements with the various Castle Arch Debtors; (d) the "claims analysis" fails to include any equity or debt profit participation from LFG's sales of interests in CAOP I and CAOP II or any other "real estate opportunity" funds; and (e) the "Claims Analysis" does not assign any value to LFG's claims for common law fraud, tortious interference with contract or aiding and abetting a breach of fiduciary duty, which are potentially LFG's largest claims and which carry the potential for an award of punitive damages.

10. It should be noted, however, that the "Claims Analysis" prepared by the Trustee's accountant includes an additional $74,750.74 in commissions for payments made in 2010. Longview did not include any damages for 2010 in its Verified Complaint because it did not have any data for this period. The inclusion of these commissions proves both that sales occurred in 2010 and that data relating to these sales is readily available to the Trustee and should be produced to Longview.

11. With regard to the Trustee's claim that Holding is no longer in good standing and that LFG has been administratively dissolved, (Objection, Trustee's Statement of Facts ¶¶ 59-60), this is correct. Since LFG is no longer operating, it has fallen behind on its corporate franchise taxes. However, I am informed by my counsel that this is irrelevant and does not preclude LFG from maintaining the New York Action or prosecuting its Proofs of Claim or defending any adversary proceeding in this Court. (*See* N.Y. Bus. Corp. Law § 1006(a)(4) (stating that a dissolved corporation "may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise")).

12. Finally, I wish to address the Trustee's claim that Longview is being represented on a contingency basis and can therefore afford to litigate in two forums. [Objection, Trustee's Responses to Longview's Statement of Facts at ¶ 53(e)]. This is incorrect. Longview is being represented by its New York counsel on a <u>modified</u> contingency basis. To date, Longview has paid its New York counsel approximately $70,000, including an assignment of the attorneys' fees paid by the Non-Debtor Defendants and their counsel in the New York Action in lieu of sanctions. Longview's Utah bankruptcy counsel is being paid on an hourly basis, and has been paid approximately $38,000 to date. Furthermore, Longview is responsible for paying all

expenses as they are incurred, and has already paid more than $20,000 in filing fees, copying costs, travel costs and other expenses.

13. As the result of the wrongdoing by the Castle Arch Defendants as alleged in the Verified Complaint in the New York Action, LFG was forced out of business. I have been unemployed for approximately two years and can no longer work in the securities industry as the result of my settlement with FINRA. I am many months behind on my mortgage and facing foreclosure. I have been forced to borrow funds to pay counsel in an effort to recover damages for the benefit of Longview's shareholders and creditors. The cost of litigating in two forums—including travel expenses and the cost of taking depositions in multiple states—would impose extreme hardship on me and my family.

14. By contrast, the Trustee seems perfectly willing to deplete the Debtors' estates to pay different attorneys to represent each of the Debtor Defendants in this Court, when there is D&O coverage in the New York Action and the Trustee could litigate all of its disputes with Longview in New York at no cost to the debtors' estates.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 1st, 2012.

/s/ J. Stuart Schultz

David R. Hague, A11660
FABIAN & CLENDENIN
215 South State Street, Suite 1200
Salt Lake City, Utah 84111-2323
Telephone: (801) 531-8900
dhague@fabianlaw.com
Attorneys for Longview Financial Group, Inc. and Longview Financial Holding, Inc.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC; CASTLE ARCH OPPORTUNITY PARTNERS I, LLC; CASTLE ARCH OPPORTUNITY PARTNERS II, LLC; CASTLE ARCH KINGMAN, LLC; CASTLE ARCH SECURED DEVELOPMENT FUND, LLC; AND CASTLE ARCH SMYRNA, LLC, Debtors.	**REPLY DECLARATION OF BRUCE A. SCHOENBERG IN SUPPORT OF AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY** Bankruptcy No. 11-35082 Bankruptcy No. 11-35237 Bankruptcy No. 11-35240 Bankruptcy No. 11-35241 Bankruptcy No. 11-35242 Bankruptcy No. 11-35243 Bankruptcy No. 11-35246 (Jointly Administered) (Chapter 11) Honorable Joel T. Marker

I, BRUCE A. SCHOENBERG, make the following statement under the penalty of perjury pursuant to 28 U.S.C. 1746:

1. I am a partner in Schrader & Schoenberg, LLP, New York counsel for plaintiffs Longview Financial Group, Inc. ("**LFG**") and Longview Financial Holding, Inc. ("**LFH**") (collectively, "**Longview**") in the matter entitled *Longview Financial Group, Inc. et al. v. Castle Arch Real Estate Investment Co., LLC, et al.* (Index No. 600904/10) (the "**New York Action**"). I am an attorney admitted to the practice of law in the State of New York. I submit this reply

declaration in further support of Longview's amended motion for relief from the automatic stay pursuant to 11 U.S.C. §§ 105(a) and 362 and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure in order for Longview to establish its claims against the Castle Arch Debtors (as defined below) in litigation pending in the Supreme Court of the State of New York, New York County, Commercial Division, or in the alternative, for leave to take full discovery of the Castle Arch Debtors in the New York Action for the purpose of discovering facts which might help in its claims and defenses against the non-debtor parties.

A. The Trustee's "Declaration Objection"

2. In the Trustee's Objection to Amended Motion for Relief from Automatic Stay filed July 23, 2012 (the "**Objection**"), D. Ray Strong, the Chapter 11 Trustee of Castle Arch Real Estate Investment Company, LLC ("**CAREIC**") and manager of CAOP Managers, LLC ("**CAOP Managers**"), Castle Arch Opportunity Partners I, LLC ("**CAOP I**"), Castle Arch Opportunity Partners II, LLC ("**CAOP II**"), Castle Arch Kingman, LLC ("**CAK**"), Castle Arch Secured Development Fund, LLC ("**CASDF**") and Castle Arch Smyrna, LLC ("**CAS**") (collectively, the "**Castle Arch Debtors**") objects to certain statements in my prior declaration, on the ground that such statements summarized the allegations of the Verified Complaint in the New York Action, which allegedly "speaks for itself." (*See* Objection at p. 7 ¶ 8(d) (the "**Declaration Objection**")).

3. Unlike the Trustee, I am fully familiar with prior proceedings in the New York Action, having drafted the Verified Complaint, having briefed and argued all of the prior motions in the New York Court, having attended all but one of the conferences in the New York Action (which was attended by my law partner) and having propounded and responded to extensive

discovery requests in that action. However, my summarization of the allegations of the Verified Complaint was not offered for the truth of the matter asserted, but rather, as was clearly stated in my prior declaration, was offered solely as "background" and to provide the Court with context and an understanding of plaintiffs' allegations in the Verified Complaint in the New York Action.

4. In addition, under New York law, the Verified Complaint is the functional equivalent of an affidavit and is therefore itself competent evidence.[1] If it is necessary to prove the allegations of the Verified Complaint at the hearing of this matter, J. Stuart Schultz, the CEO of Longview, could and would testify competently regarding the matters set forth therein.

B. The Trustee's Lack of Personal Knowledge and Misstatements of Fact

5. In contrast, the Trustee freely admits that he is unfamiliar with the facts of the underlying dispute between Longview and CAREIC and with the prior proceedings in the New York Action, stating in response to virtually every paragraph that "The Trustee is without sufficient information to admit or deny this allegation and therefore denies the same." (*See, e.g.,* Objection at Response to Longview's Factual Statement ¶¶ 9-15, 24-28, 30, 34, 37, 38, 46-47, 49-53, 55 and 69).

6. Notwithstanding his admitted lack of knowledge, the Trustee makes certain representations about the New York Action which are false, including:

1. N.Y. Civ. Prac. L. & R. § 105(u) ("a verified pleading may be utilized as an affidavit whenever the latter is required"). *See also Taslansky v. Schulman*, 2 A.D.3d 355, 361, 770 N.Y.S.2d 48, 54 n. 6 (1st Dep't 2003).

Representation	Paragraph of Objection	Response
"After the filing of the Chapter 11 petition, the New York Action was stayed."	Response to Longview's Factual Statement ¶ 18(b).	The New York Action is continuing; only the claims against the Castle Arch Debtors were stayed.
Claugus & Mitchell, LLP (the "CM Firm") "was not employed by the Debtors [or] debtors in possession as special counsel or otherwise"	Response to Longview's Factual Statement ¶ 18(b).	Claugus & Mitchell is still counsel of record for the Debtor Defendants (other than CAREIC) in the New York Action and will continue to be counsel of record until a substitution is filed or they are relieved by the court. N.Y. Civ. Prac. L. & R. § 321(b).
Counterclaims were asserted against Longview by "all Defendants except for Conix, Inc. and Mr. Warwick"	Response to Longview's Factual Statement ¶ 21	Mr. Warwick also filed counterclaims against Longview
"The CM Firm represents that Longview has stated that its emails are unavailable and the only emails that have been produced are from Schultz's personal computer"	Response to Longview's Factual Statement ¶ 33	Hearsay. In addition, Longview has produced every responsive e-mail sent by or to any person using LFG's corporate email server from January 1, 2008 to August 25, 2009.
The New York court indicated that no privilege "likely existed" as a result as to certain documents	Response to Longview's Factual Statement ¶ 34 n. 15	The New York court ruled that there was no privilege with respect to any communications with Mr. Hunt.
"All Defendants jointly asserted numerous counterclaims against Longview in the New York Action, several of which are still pending but stayed as against the Debtor Defendants."	Trustee's Statement of Facts ¶ 10	The counterclaims by the Debtor Defendants are still pending and have not been stayed or withdrawn.

C. The Trustee's Efforts to Disavow the Debtors' Prior Pleadings and Motions

7. The Trustee seeks to distance himself from positions taken by the Castle Arch Debtor Defendants in the New York Action and before this Court. *See, e.g.*, Objection, Response to Longview's Factual Statement at ¶¶ 49, 51 and 52 (stating that "any inconsistent positions taken by former management of the Debtors is [sic] irrelevant") and ¶¶ 56 and 69

(stating that the DIP Stay Relief Motion was brought for the benefit of former management and that Longview's reliance on such statements "for present purposes" is therefore "without any basis as to the Debtors," and that "The Trustee affirmatively asserts that he does not accept all of the statements made in the DIP Stay Relief Motion").

8. However, any statements made by or on behalf of the Debtors are admissible as party admissions.[2] Furthermore, to the extent that any such statements are contained in the Debtors' pleadings or motion papers filed in the New York Action or with this Court, such statements are "judicial admissions" which are binding upon the Debtors throughout the course of those litigations.[3] Even assuming, *arguendo*, that the Trustee is subsequently granted leave to amend the Debtors' prior pleadings, the earlier statements do not magically disappear and are still evidential.[4] The Trustee's claim that the positions taken by the Debtor Defendants in their prior court papers is "irrelevant" is therefore incorrect as a matter of law.

D. The Trustee's Improper Disclosure of Settlement Negotiations

9. In its Statement of Facts, the Trustee discusses in great detail settlement negotiations between Longview and the Trustee. See Trustee's Statement of Facts at ¶¶ 20-31.

---

[2] Fed. R. Evid. 801(d)(2).

[3] *Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009); *Official Committee of the Unsecured Creditors of Color Tile Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003).

[4] *See Imprimis Investors, LLC v. Insight Venture Management, Inc.*, 300 A.D.2d 109, 110, 752 N.Y.S.2d 26, 27 (1st Dep't 2002) (defendant's original answer "although amended, constitutes an informal judicial admission"); *Bogoni v. Friedlander*, 197 A.D.2d 281, 610 N.Y.S.2d 511 (1st Dep't 1994) (statement in a pleading "constitutes a formal judicial admission . . . which even though subject to a subsequent, valid amendment, remains evidence of the facts admitted"); *Kelly v. St. Michael's Roman Catholic Church*, 148 A.D. 767, 771, 133 N.Y.S. 328, 332–33 (2d Dep't 1912) (defendant's admission in answer to original complaint was evidence against defendant an in favor of plaintiff notwithstanding subsequent amendment of complaint and filing of answer to amended complaint).

The Trustee's reliance upon and disclosure of ongoing settlement discussions between the Trustee and Longview is improper, and violates Federal Rule of Evidence 408. These allegations should therefore be stricken.

E. The Trustee's Vague Claims Regarding Ongoing "Discussions" with Rockhill and an As-Yet Unfiled Amended Adversary Proceeding

10. As was set forth in Longview's moving papers, one of the main reasons for permitting Longview to litigate its claims against the Debtor Defendants in the New York Action is the presence of a directors' and officers' liability insurance policy (the "**D&O Policy**") which will cover the cost of defense in New York, but which will not cover the cost of disputing Longview's proofs of claims in this Court.

11. On or about November 9, 2009, CAREIC purchased a D&O policy from Rockhill Insurance Company ("**Rockhill**"). Rockhill assumed the defense of the New York Action because several of CAREIC's former officers and directors—including Robert Geringer, William Davidson, Kirby Cochran, Douglas Child, Jeff Austin, William Warwick and Philip Polich—were named as individual defendants in that case. In addition to assuming the defense of the individual directors and officers, Rockhill also agreed to represent the Debtor Defendants and certain non-debtor affiliates of CAREIC in the New York Action. Upon information and belief, one of the reasons Rockhill agreed to defend the Debtor Defendants and the non-debtor CAREIC affiliates in the New York Action was because their interests are aligned with the interests of the director and officer defendants against Longview.

12. In his Objection to Longview's Amended Motion for Relief from Stay, the Trustee admits that Rockhill would cover the cost of defending the Debtor Defendants in New York, (Objection, Response to Longview's Factual Statements at ¶¶ 69-70), but claims that he is

"in active discussions with Rockhill" regarding "the claims asserted against the Debtors in Longview's POCs that are the subject of the Longview Adversary Proceeding."

13. Aside from these vague references to "discussions" with Rockhill, the Trustee has not submitted any statements from Rockhill or any other evidence showing that Rockhill would, in fact, cover the cost of litigating Longview's claims in this Court. Indeed, it is unclear why Rockhill would ever agree to represent the Debtor Defendants in this Court under its "D&O" policy, when Longview has not asserted any claims against any "directors" or "officers" in its Proofs of Claim.

14. In Paragraphs 36-37 of the Trustee's Statement of Facts, the Trustee also indicates that he intends to amend the adversary complaint that was previously filed against Longview in this action, but does not give any indication of the nature of these as-yet unfiled amendments.

F. The Remaining Discovery Required of the Debtors

15. The Trustee greatly exaggerates the amount of discovery sought by Longview and the burdensomeness of providing such discovery.

16. At the time Longview commenced the New York Action in April 2010, it already had extensive proof of the Debtor Defendants making undisclosed payments to LFG's associated persons. Attached to Longview's Verified Complaint in the New York Action were extensive spreadsheets obtained from the computer of LFG's former Palatine, Illinois Branch Manager, which showed numerous payments to LFG's associated persons in 2008 and 2009. (*See* Verified Complaint ¶ 49 and Exhibit U thereto, spreadsheets entitled "Cost of Sales (Master-Updated) 1.27.09.xls" and "Cost of Sales 1.27.10.xls."]

17. In the New York Action, the Debtor Defendants did not deny that they made payments to LFG's associated persons, but claimed that LFG was aware of such payments "because this was the agreement." (*See* Schoenberg Declaration at Exhibit I, Affidavit of Kirby Cochran in Support of Opposition to Plaintiffs' Motion to Dismiss Counterclaims at ¶ 7).

18. Plaintiff's First Request for the Voluntary Production of Documents by the Castle Arch Defendants contained 48 requests. (Schoenberg Decl. Ex. H). Of these, approximately half (Request Nos. 23-46) were directed to the defenses and counterclaims asserted by the Debtor Defendants in the New York Action. (See Objection, Exhibit 10, Email from Bruce Schoenberg to Peggy Hunt, Esq. dated June 1, 2012, stating that "I have attached a proposed form of voluntary document request for your consideration" and that "It is longer than I anticipated but you will see that many of the requests relate to assertions made by the debtors in the New York Action"). To the extent that the Trustee has indicated that he intends to move for leave to amend the Debtor Defendants' answer in the New York Action, many of these requests may be mooted.

19. Of the remaining 25 requests, 6 are requests for routine corporate records of CAREIC, including minutes of board meetings, organizational charts, employment manuals and agreements, and the general ledger of CAREIC (Request Nos. 1-4, 7 and 20) and should be readily available to the Trustee.

20. With regard to the remaining requests, which mainly seek documents relating to the sale of securities by LFG associated persons, including subscription agreements, payment records, commission runs and payroll records (Request Nos. 12, 13, 14, 15, 16 and 48) and LFG's alleged knowledge of such sales (Request Nos. 17, 18 and 19), the Trustee would have to

produce such documents in connection with the litigation of Longview's Proofs of Claim and/or the Trustee's as-yet unfiled amended adversary complaint against Longview.

21. The Trustee's claim that Longview's motion for relief from stay should be denied because it would take the Trustee "hundreds of hours" to respond to discovery requests in the New York Action (Objection, at p. 49 ¶ 49) must therefore be rejected, as the Trustee would be required to produce the exact same discovery in this Court.

22. To the extent that the Trustee finds any specific document request burdensome or oppressive, Longview has already offered to work together with the Trustee to limit such request. (*See* Objection, Exhibit 10, Email from Bruce Schoenberg to Peggy Hunt, Esq. dated June 1, 2012 (stating that "if any of the requested items is problematic, I would be more than willing to work with you to narrow the requests so as to minimize the burden on the Trustee")).

G. The Current Status of the New York Action

23. On August 1, 2012, the New York Court held a status conference. During the status conference, the New York court directed the parties (including CAREIC, which was represented by Dorsey & Whitney, LLP, counsel for the Trustee in this case) to submit a joint proposed Scheduling Order by August 31, 2012.

24. On August 1, 2012, Longview circulated a proposed Scheduling Order to counsel for the Non-Debtor Defendants and to counsel for CAREIC for their consideration and comment. A true and correct copy of this proposed Scheduling Order is attached hereto as "**Exhibit A**."

25. Pursuant to Longview's proposed Scheduling Order all written discovery requests and interrogatories must be exchanged by August 17, 2012; all responsive documents and interrogatory answers must be served by September 17, 2012, all non-party depositions must be

completed by October 31, 2012; all party depositions must be completed by November 30, 2012 and a "Note of Issue" certifying that all discovery has been completed and that the case is trial-ready must be filed no later than November 30, 2012—only four (4) months from now. *Id.* Longview is prepared to meet these deadlines, although they will obviously have to be adjusted slightly if Longview's motion for relief from stay is not decided prior to August 17, 2012, when discovery requests would otherwise be due.

26. Under Judge Marks' individual practices, dispositive motions are due only thirty (30) days after the completion of discovery. Under N.Y. Civil Practice Rule 2214(b), such motions can be made on as little as eight (8) days' notice, although Justice Marks will probably set down a schedule for briefing and argument. Pursuant to Commercial Division Rule 23, Judges are supposed to rule on motions within sixty (60) days of oral argument, although they sometimes take longer.

27. Longview believes that by the end of discovery, it may be in a position to move for partial summary judgment determining the amount of commissions and other compensation that LFG should have earned pursuant to the broker/dealer selling agreements between LFG and the various Castle Arch Debtors. It is my understanding that this one of the main objectives of the Trustee's proposed "claims estimation" process. LFG may also be able to move for summary judgment dismissing certain of the Debtor Defendants' counterclaims, which would further narrow the issues for trial.

28. However, a trial will still be required to determine the Debtor Defendants' entitlement to various offsets claimed by the Debtor Defendants for unrelated payments to LFG, as well as to determine LFG's RICO claims against the individual non-debtor defendants and

LFG's tort claims against all of the defendants for common law fraud, tortious interference with contract and aiding and abetting a breach of fiduciary duty. Longview's common law fraud, tortious interference with contract and aiding and abetting a breach of fiduciary duty claims all carry the possibility of an award of punitive damages. Whether to award punitive damages in a particular case and the amount of such damages is within the discretion of the jury.[5] Unlike compensatory damages, which are quantifiable, "there is no rigid formula by which the amount of punitive damages is fixed, although they should bear some reasonable relation to the harm done and the flagrancy of the conduct causing it."[6] The value of these claims is therefore not capable of "estimation" with any degree of certainty prior to trial.

H. The Availability of Documents and Witnesses

29. The Trustee also argues that Longview's motion for relief from stay should be denied because "The Debtors and all of their books and records are located in Utah," and "Upon information and belief, a majority of the witnesses are located in Utah or the Western States." [Objection at page 46 ¶ 43].

30. The fact that the Debtors and their books and records are allegedly located in Utah is of no significance. Certainly, the Trustee is not suggesting that Longview should be required—or would even be permitted—to physically inspect the Debtors Defendants' documents in the Debtor Defendants' offices. Whether Longview's case is pending in this Court or New York, in the ordinary course of discovery, Longview would request documents and the Trustee would produce responsive documents to Longview's counsel in New York.

---

[5] *Ferguson v. City of New York*, 73 A.D.3d 649, 651, 901 N.Y.S.2d 609, 612 (1st Dep't 2010).

[6] *Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 194, 856 N.Y.S.2d 505, 509, 886 N.E.2d 127, 131 (2008).

31. With regard to the alleged availability of witnesses, the Trustee has not identified any specific witnesses allegedly located in "Utah or the Western States."

32. To the extent that the Trustee is referring to the Debtors' former management, all of CAREIC's former board members were named as defendants in the New York Action. Defendants William Davidson, Kirby Cochran, Douglas W. Child, Jeff Austin and Phillip Pollich are still defendants in the New York Action and have either been found to be subject to personal jurisdiction there or have consented to personal jurisdiction there. These parties can therefore be compelled to appear for deposition and to produce documents in New York. Former defendants Robert Geringer and William Warwick are no longer parties to the New York Action, but have agreed to make themselves available for deposition and to appear for trial in New York. Thus, all of the Debtor Defendants' former directors are available for deposition and trial in New York.

33. Upon information and belief, Messrs. Davidson, Geringer, and Austin are all citizens of the State of California, Mr. Polich is a citizen of the State of Arizona, and Mr. Warwick is a citizen of North Carolina. (Verified Complaint ¶¶ 17-24). These individuals are more than 100 miles outside of the State of Utah and therefore cannot be compelled to appear for deposition or trial in Utah pursuant to Fed. R. Civ. P. 45(b)(2).

34. Furthermore, Longview will be severely prejudiced if its motion for relief from stay is denied, as it will be required to incur the cost of two separate and interrelated proceedings. Upon information and belief, Messrs. Davidson, Geringer, Pollich, Austin and Warwick are not subject to personal jurisdiction in Utah, and even if they were, this Court would not have jurisdiction to hear Longview's RICO, common law fraud, tortious interference and

aiding and abetting breach of fiduciary duty claims against them. New York is therefore the only place where Longview can try all of its claims in one forum.

I. The Alleged Additional Cost of Retaining Local Counsel in New York

35. Finally, the Trustee alleges that the debtors' estates will be prejudiced if Longview is permitted to prosecute the New York Action because the Trustee will be required to hire separate New York counsel. (*See* Objection, Trustee's Statement of Facts at ¶ 43 (stating that "the Trustee will be required to employ New York counsel at significantly higher rates") and Legal Argument at page 63 (stating that "if forced to litigate in New York, the Trustee will require time to obtain independent New York counsel approved by Rockhill")). These statements are false.

36. The Trustee's current counsel, Dorsey & Whitney, LLP is a national law firm having a New York office. (*See* www.dorsey.com). If Longview's motion is granted and Dorsey is permitted to remain as counsel for the Trustee,[7] there is no reason why Dorsey & Whitney could not represent the Trustee both in this Court and in Utah. Indeed, an attorney from Dorsey's New York office has already filed a notice of appearance on behalf of CAREIC in the New York Action. A copy of the Dorsey's Notice of Appearance in the New York Action is attached hereto as **Exhibit B**.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 1st, 2012.

/s/ Bruce A. Schoenberg

[7] Longview anticipates making a motion to disqualify Dorsey & Whitney, LLP from acting as counsel for the Trustee in the New York Action and/or this action in the near future based upon a conflict of interest.

EXHIBIT A

SCHRADER & SCHOENBERG, LLP
ATTORNEYS AT LAW
711 THIRD AVENUE, SUITE 1803
NEW YORK, NEW YORK 10017

(212) 986-4888 • (973) 313-0600
FAX (212) 986-4228

DAVID A. SCHRADER *
BRUCE A. SCHOENBERG *

BENJAMIN SUESS *

* ADMITTED IN N.Y. AND N.J.

August 1, 2012

BY E-MAIL AND BY U.S. MAIL

Clyde Mitchell, Esq.
Gilbert De Dios, Esq.
Claugus & Mitchell, LLP
Suite 2700
110 Wall Street
New York, New York 10005
cmitchell@c-mlaw.com
gdedios@c-mlaw.com

Jessica D. Mikhailevich, Esq.
Dorsey & Whitney, LLP
51 W. 52nd Street
New York, New York 10019
mikhailevich.jessica@dorsey.com

Re: Longview Financial Group, Inc. v.
Castle Arch Real Estate Investment Co., LLC, et al.
Supreme Court of New York, N.Y. County (Index No. 10/600904)

Dear Counselors:

This firm represents plaintiffs Longview Financial Group, Inc. and Longview Financial Holding, Inc. ("Longview") in the above-referenced matter.

Pursuant to the instructions of Justice Marks' clerk this morning, I am writing to set forth a proposed discovery schedule in this matter. Longview proposes the following schedule:

August 17, 2012:	Deadline for Castle Arch Real Estate Opportunity Partners III, LLP ("CAOP III"), CASCA Managers, LLC, Castle Arch-SocalAvalar Opportunity Fund, LLC ("CASCA"), Calto Managers Lease-to-Own Income Fund, LLC ("CALTO"), Flobridge, LLC, William Davidson, Kirby Cochran, Douglas Child, Jeff Austin and Philip Polich (the "Non-Debtor Defendants") and Longview to serve follow-up document requests and interrogatories;
August 17, 2012:	Deadline for service of document requests and interrogatories relating solely to the counterclaims asserted by defendants Castle Arch Real Estate Company, LLC ("CAREIC"), Castle Arch Opportunity Partners I, LLC ("CAOP I"), Castle Arch Opportunity Partners II, LLC ("CAOP II") and Castle Arch Opportunity Partner Managers, LLC against Longview, i.e., the Castle Arch Defendants' second, eighth, tenth and fourteenth counterclaims;
September 17, 2012:	Deadline to respond to all document requests and interrogatories;
September 17, 2012:	Deadline for filing motions for commissions to take out of state depositions of non-party witnesses;
October 31, 2012:	Deadline for subpoenaing and taking non-party depositions other than Robert Geringer and William Warwick;
November 30, 2012:	Deadline for noticing and taking all party depositions and depositions of Robert Geringer and William Warwick;
November 30, 2012:	Deadline for filing Note of Issue; and
December 31, 2012:	Deadline for filing dispositive motions.

By this letter, I am requesting that Mr. Mitchell confer with Messrs. Davidson, Cochran, Austin, Child, Polich and Warwick and provide me with their availability for deposition in New York during November. In addition, I ask that Mr. Mitchell provide me with names and dates for the depositions of the corporate designees of defendants CAOP III, CASCA, Casca Managers, CALTO, Calto Managers and Flobridge during December.

I anticipate that the depositions of Messrs. Cochran, Child and Austin will take 2 full days each, and that the depositions of the other individual defendants will take one day or less. My preference is that we take depositions on consecutive days if possible.

I have confirmed that Mr. Schultz is available for deposition in New York as the corporate designee of each of the plaintiffs on November 29 and November 30, 2012.

Please provide me with any comments that you may have to this proposed schedule as soon as possible.

Very truly yours,

Bruce A. Schoenberg

BAS/s

EXHIBIT B

Jessica D. Mikhailevich
DORSEY & WHITNEY LLP
51 W. 52nd Street
New York, New York 10019
Telelephone: (212) 425-9300
E-mail: mikhailevich.jessica@dorsey.com

Attorneys for D. Ray Strong, Chapter 11 Trustee for Castle Arch Real Estate Investment Company, LLC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- X

LONGVIEW FINANCIAL GROUP, INC. and LONGVIEW FINANCIAL HOLDING, INC.,

Index No. 600904/2010

Plaintiffs,

-against-

NOTICE OF APPEARANCE

CASTLE ARCH REAL ESTATE INVESTMENT COMPANY, LLC, CASTLE ARCH SECURED DEVELOPMENT FUND, LLC, CASTLE ARCH KINGMAN, LLC, CAOP MANAGERS, LLC, CASTLE ARCH OPPORTUNITY PARTNERS I LLC, CASTLE ARCH OPPORTUNITY PARTNERS II, LLC, CASTLE ARCH OPPORTUNITY PARTNERS III, LLC, CASCA MANAGERS, LLC, CASTLE ARCH-SOCAL AVALAR OPPORTUNITY FUND, LLC, CALTO MANAGERS, LLC, CASTLE ARCH LEASE-TO-OWN INCOME FUND, LLC, CASTLE ARCH SMYRNA, LLC CONIX, INC., FLOBRIDGE, LLC, WILLIAM DAVIDSON, KIRBY D. COCHRAN, ROBERT D. GERINGER, DOUGLAS W. CHILD, JEFF AUSTIN, WILLIAM WARWICK and PHILIP POLICH,

Defendants.

---------- X

PLEASE TAKE NOTICE that the undersigned hereby appears as attorney for D. Ray Strong, Chapter 11 Trustee for Castle Arch Real Estate Investment Company, LLC in the above-

captioned matter, and requests that all notices given or required to be given in this case, and all papers served or required to be served in this case, be given and served at the offices, addresses and numbers as follows:

Peggy Hunt Scott A. Cummings DORSEY & WHITNEY LLP Kearns Building 136 South Main Street, Suite 1000 Salt Lake City, Utah 84101-1685 Telephone: (801) 933-7360 Facsimile: (801) 933-7373 Email: hunt.peggy@dorsey,com Email: cummings.scott@dorsey.com	Jessica D. Mikhailevich DORSEY & WHITNEY LLP 51 W. 52nd Street New York, New York 10019 Telephone: ((212) 415-9200 Facsimile: (212) 953-7201 Email: mikhailevich.jessica@dorsey.com

Respectfully submitted by,

Dated: July 24, 2012

DORSEY & WHITNEY LLP

By: */s/Jessica D. Mikhailevich*
Jessica D. Mikhailevich

Jessica D. Mikhailevich
DORSEY & WHITNEY LLP
51 W. 52nd Street
New York, New York 10019
Telephone: (212) 415-9200

-and-

Peggy Hunt
Scott A. Cummings
DORSEY & WHITNEY LLP
Kearns Building
136 South Main Street, Suite 1000
Salt Lake City, Utah 84101-1685
Telephone: (801) 933-7360

Attorneys for D. Ray Strong, Chapter 11 Trustee for Castle Arch Real Estate Investment Company, LLC

TO:

Bruce A. Schoenberg, Esq.
SCHRADER & SCHOENBERG, LLP
Attorneys for Plaintiffs Longview Financial Group, Inc. and Longview Financial Holding, Inc.
711 Third Avenue, Suite 1803
New York, New York 10017

Gary Stahl, Esq.
CROWELL & MORING, LLP
Attorney for Defendant Conix, Inc.
590Madison Avenue
New York, New York 10022-2524

Clyde Mitchell, Esq.
CLAUGUS & MITCHELL, LLP
110 Wall Street, Suite 2700
New York, New York 10005