[redacted]

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

D. RAY STRONG, as Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, the Castle Arch Opportunity Partners I, LLC Liquidating Trust and the Castle Arch Opportunity Partners II, LLC Liquidating Trust,

Plaintiff,

v.

KIRBY D. COCHRAN; JEFF AUSTIN; AUSTIN CAPITAL SOLUTIONS; WILLIAM H. DAVIDSON; DOUGLAS W. CHILD; CHILD, VAN WAGONER & ASSOCIATES, LLC, fka CHILD VAN WAGONER & BRADSHAW, PLLC; ROBERT CLAWSON; HYBRID ADVISOR GROUP; and DOES 1-50,

Defendants.

Civil Action No. 2:14-cv-00788-TC

REPLY IN SUPPORT OF MOTION OF DEFENDANTS [redacted] TO DISMISS THE AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(2)

Judge Tena Campbell

Magistrate Judge Evelyn J. Furse

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Defendant [redacted] (collectively, "[redacted]") hereby submit this Reply Memorandum (this "Reply") in support of the Motion to Dismiss the Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). This Reply responds to the Plaintiff's Opposition to the Motion (Dkt. 176) (the "Opposition or "Opp."). For the reasons stated in the original moving papers and declarations filed in support of the Motion, as well as the arguments and evidence submitted in support of this Reply, [redacted] respectfully renews his request that the Court grant the Motion and dismiss all of Plaintiff's alleged causes of action as neither the factual allegations in the Amended Complaint (substantially repeated in the Opposition without much, if any elaboration), fails to meet Plaintiff's burden to establish personal jurisdiction over [redacted] nor does [redacted] have the minimum contacts necessary for this Court to exercise personal jurisdiction.

INTRODUCTION

The Opposition relies on creative, but flawed legal arguments that are contradicted by legal authority in an attempt to conceal the issue raised by the Motion that the necessary "minimum contacts" exist with the State of Utah for this Court to exercise personal jurisdiction over [redacted]. Unsurprisingly, the Plaintiff fails to articulate supporting (or the contradictory) legal authority for its conclusory arguments. Rather, the Opposition fails as:

1. This **post-confirmation dispute** is not "related to the Bankruptcy Case" under 28 U.S.C. § 1334(b) as there is no "close nexus" to the confirmed bankruptcy plan or the bankruptcy proceeding as it does not affect "the interpretation, implementation, consummation, execution or administration of the confirmed plan." *See Valley Historic Ltd. P'ship v. Bank of New York*, 486 F.3d 831, 836-37 (4th Cir. 2007). The Federal Rules of Bankruptcy Procedure do not apply to this case, including Rule 7004 thereof.

2. Rule 7004 is otherwise inapplicable as this post-confirmation dispute is not an adversary proceeding.
3. Plaintiff completely **ignores, overlooks and/or violates** 28 § U.S.C. 157(a), each and every allegedly applicable Bankruptcy Rule and this Court's rules of practice further demonstrating that this case is not an adversary proceeding allowing reliance on Rule 7004.
4. Federal Rules of Bankruptcy Procedure are procedural rules adopted by the courts, not Congressional statutes that may modify substantive jurisdictional rights. *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction." Bankruptcy Rules were "prescribed by [the Supreme Court] for 'the practice and procedure in cases under title 11[,]'" and "**such rules 'do not create or withdraw federal jurisdiction**.'") (emphasis added).
5. "The clairvoyance demanded by plaintiff here of [redacted] is inconsistent with the doctrine of waiver." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981). Rather, [redacted] immediately noticed the Court and Plaintiff as soon as the jurisdictional issue arose, prior to the conclusion of briefing on the prior motion to dismiss. The defense of personal jurisdiction was not waived and the Motion is not barred by Rule 12(h) of the Federal Rules of Civil Procedure as the defense was "not then available" prior to the Amended Complaint such rule is qualified by Rule 12(g)(2). *See* 5C Charles A. Wright et al., Federal Practice & Procedure § 1388 (3d ed. 2014) ("A significant qualification on the application of Federal Rule 12(g) is that a party is only required to consolidate Rule 12 defenses and objections that are 'then available to the party.'").

Finally, both the Amended Complaint and the Opposition fails to meet Plaintiff's burden

to make a prima facie showing that "the **defendant's suit-related conduct** must create a **substantial connection** with the forum State," whereby, "the [minimum contacts] relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State" itself, "not the defendant's contacts with persons who reside there." *Walden v. Fiore,* 134 S. Ct. 1115, 1121-1122 (2014) (emphasis added) (emphasis in original). Critically, "**[e]ach defendant's contacts with the forum State must be assessed individually**" and cannot be "judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added). The Opposition fails to satisfy Plaintiff's "duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading." *Pytlik v. Prof'l Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989).

STATEMENT OF RELEVANT FACTS

I. [redacted] OBJECTS TO, AND REQUESTS THAT THE COURT DISREGARD, PLAINTIFFS PURPORTED FACTUAL BACKGROUND AND EVIDENCE OF ALLEGED CONTACTS

All of the purported "facts" and "evidence" relating to [redacted] that Plaintiff has submitted in his Opposition to the Motion is objectionable and should not be afforded any evidentiary weight.

A. Objections to Declaration of D. Ray Strong (Dkt. 177)

Specifically, [redacted] hereby object to the Declaration of D. Ray Strong (the "Strong Decl.") filed concurrently with the Opposition (see Dkt. 177) on the following grounds:

Paragraph No.	Objection
10. Attached hereto as **Exhibit A** are true and correct copies of the minutes of CAREIC's August 15, 2006 and December 5, 2007 board meetings held in Utah.	Lacks foundation (FRE 602); Irrelevant (FRE 402); Hearsay (FRE 802). **Summary:** Both meetings are unexecuted and

	neither demonstrates [redacted]'s attendance. In fact, the expense reports do not demonstrate that [redacted] travelled to Utah for the August 15, 2006 meeting and the December 5, 2007 misrepresents [redacted]'s attendance, when such minutes clearly state that the discussion was by Dr. Davidson, not [redacted].
11. Attached hereto as **Exhibit B** are true and correct copies of examples of correspondences between [redacted] and other CAREIC officers and directors regarding CAREIC board meetings.	Lacks foundation (FRE 602); Irrelevant (FRE 402); Hearsay (FRE 802). **Summary:** Correspondence, in performing functions, is irrelevant to demonstrate that [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah.
12. Attached hereto as **Exhibit C** are true and correct copies of examples of correspondences regarding [redacted]'s travel throughout the United States, and examples of [redacted]'s expense reports and reimbursements for travel, including travel to Utah.	Lacks foundation (FRE 602); Irrelevant (FRE 402); Hearsay (FRE 802). **Summary:** Expense reports are filled with missing pages (1 of 3, 2 of 4, etc.) demonstrating potential destruction of evidence. Alleged travel date of August 28, 2006 in Opposition is clearly false based on

	page 38 therein, wherein Plaintiff includes one page (rest missing) showing the cost of the flight was credited to another flight. Importantly, any travel-directed to any location other than Utah is irrelevant to demonstrate that [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah.
13. Attached hereto as **Exhibit D** are true and correct copies of correspondences relating to [redacted]'s involvement in Castle Arch Secured Development Fund.	Lacks foundation (FRE 602); Irrelevant (FRE 402); Hearsay (FRE 802). **Summary:** Irrelevant to demonstrate that [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah. Importantly, correspondence supports [redacted] Decl., ¶ 18 at Dkt. 163-1 that "CASDF was modeled, structured and designed to replicate a nearly identical offering, the IMH Secured Loan Fund, LLC ("IMH")."
14. Attached hereto as **Exhibit E** are true and correct copies of examples of correspondences between [redacted]nd other	Lacks foundation (FRE 602); Irrelevant (FRE 402); Hearsay (FRE 802); Argumentative; Vague;

CAREIC officers and directors relating to [redacted]'s involvement with the Tooele Property.	Improper Legal Conclusion (FRE 701). **Summary:** [redacted] being "copied" on correspondence is irrelevant to demonstrate that [redacted]s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah. Copies do not demonstrate active involvement in the acquisition, financing, development or investor correspondence related to Tooele.
15. [redacted], both individually and through his attorney, has significantly participated in this litigation. In addition to court filings and appearances, [redacted] has participated in this litigation in the following ways: a) On February 21, 2014, [redacted] participated in a global mediation held in Salt Lake City, Utah; b) [redacted] and I have participated in extensive settlement negotiations throughout the course of this litigation; c) [redacted] participated in various preliminary matters in the arbitration that I initiated after the Court compelled this case to arbitration	Irrelevant (FRE 402); Argumentative; Vague; Improper Legal Conclusion (FRE 701). **Summary:** Actions prior to filing lawsuit are irrelevant to waiver or any other allegation related to the Motion. Importantly, [redacted] immediately notified Plaintiff and the Court of the jurisdictional issues associated with this Motion upon Plaintiff filing leave to amend (prior to completion of the prior briefing). Additionally, the action was stayed as to [redacted] during the Arbitration, where [redacted] never even answered the Demand.

until I agreed to stay the arbitration while we discussed a potential settlement;	

B. Objections to Plaintiff's Factual Background

[redacted] further object to – and request that the Court disregard – various factual assertions in the Opposition that lack evidentiary foundation and are, in many instances, falsehoods.

1. Continued Improper Reliance on Generalized, Non-Individualized Allegations or Otherwise Irrelevant Factual Allegations

Important to the Motion, these allegations do not support this Court's exercise of specific, personal jurisdiction over [redacted] that requires [redacted]'s "suit-related conduct must create a substantial connection with the forum state" that [redacted] "*himself*' creates with" Utah itself, "not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122 (2014) (emphasis in original). Plaintiff continues to allege generalized (non-individualized) allegations similar to the Amended Complaint, the majority of which are without evidentiary support (or exhibits that do not support the allegation/representation). The unfounded factual contentions regarding [redacted] found in the Opposition include the following:

1. "After nearly three years of litigation before this Court[.]." (Docket No. 176, hereinafter "Opp." or "Opposition" at ii): Argumentative; Vague; Improper Legal Conclusion (FRE 701). False, as case was stayed from August 20, 2015 through January 30, 2017. (Docket No. 147, Order Granting Plaintiff's Motion to Amend).

2. "[redacted]…[was an] officer[], director[], and…participated in the management and otherwise controlled the Castle Arch Real Estate Investment Company, LLC ("CAREIC")[.]" (Opp. at ii, ¶ 1): Lacks Foundation/Personal Knowledge (FRE 602); Improper

Legal Conclusion (FRE 701); Hearsay (FRE 802). Plaintiff fails to support this allegation with any evidence, as required to support a prima facie showing of personal jurisdiction. Nonetheless, Plaintiff relies on generalized allegations of "management" for specific jurisdiction within Utah.

3. "In 2003, [redacted] was barred by the SEC from functioning as a promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. Because of this, it was determined that [redacted] would be denied the formal title of Board Member of CAREIC. Am. Compl. ¶¶ 25, 168-70." (Opp. at iii, ¶ 2): Prejudice, Confusion, Waste of Time (FRE 403); Irrelevant (FRE 402); Inadmissible Character Evidence (FRE 404); Argumentative; Vague; and Improper Legal Conclusion (FRE 701). Under binding authority in the Tenth Circuit, as this bar was initially decided by an administrative law judge. *See Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168 (10th Cir. 2016) (unconstitutional as SEC administrative law judges (ALJ) were 'inferior officers' whose appointments were required to comport with Appointments Clause). More importantly, this bar has no bearing on [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah.

4. "In truth and fact, [redacted] was 'one of the founders of CAREIC,' and he functioned as a de-facto director of CAREIC and directly and personally participated in the management of CAREIC, and its most important decisions. Am. Compl. ¶¶ 6, 25, 45, 202, 204. To conceal his involvement, [redacted]'s work was done 'behind the scenes.' Am. Compl. ¶ 45." (Opp. at iii, ¶ 3): Improper Legal Conclusion (FRE 701); Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Opinion on Ultimate Issue (FRE 704). Plaintiff fails to support this allegation with any evidence, as required to support a prima facie showing of personal

jurisdiction. Nonetheless, Plaintiff relies on this generalized allegation as a "de-facto director of CAREIC" to support its argument for specific jurisdiction within Utah. Importantly, while CAREIC operated over seven years from April 2004 through October 2011, Plaintiff supports this allegation with only one board meeting demonstrating any involvement by [redacted] therein, which each of these board meetings would be in Plaintiff's possession as the former bankruptcy trustee.

5. "As a de facto director, [redacted] regularly attended Board meetings— like a board member—and provided substantive advice and direction to the Company." (Opp. at iii, ¶ 4): Improper Legal Conclusion (FRE 701); Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Opinion on Ultimate Issue (FRE 704). Plaintiff fails to support this allegation with any evidence, as required to support a prima facie showing of personal jurisdiction. Nonetheless, Plaintiff relies on this generalized allegation as a "de facto director" to support its argument for specific jurisdiction within Utah. Importantly, while CAREIC operated over seven years from April 2004 through October 2011, Plaintiff supports this allegation with only one board meeting demonstrating any involvement by [redacted] herein, which each of these board meetings would be in Plaintiff's possession as the former bankruptcy trustee. In fact, of the two unexecuted board meetings attached to the declaration, the second one (December 5, 2007) does not demonstrate [redacted]'s attendance – the minutes clearly state the discussion (with [redacted]'s name therein) was by Dr. Davidson (not [redacted]).[1] Therefore, **this representation is clearly false**.

[1] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal") ("A lawyer shall not knowingly: (a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" UT R RPC Rule 3.3(a).

6. "Other Board meetings were held outside of California, in locations such as Jackson Hole, Wyoming and Whistler, British Columbia." (Opp. at iii, ¶ 4): Irrelevant (FRE 402); Lacks Foundation/Personal Knowledge (FRE 602). Plaintiff does not allege [redacted]'s attendance as such board meetings. The Motion relates to individualized allegations that support this Court's exercise of specific jurisdiction over [redacted] (i.e., [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah). Plaintiff fails to support this allegation with any evidence, as required to support a prima facie showing of personal jurisdiction. Nonetheless, Plaintiff relies on this generalized allegation as a "de-facto director of CAREIC" to support its argument for specific jurisdiction within Utah. Importantly, while CAREIC operated over seven years from April 2004 through October 2011, Plaintiff supports this allegation with only one board meeting demonstrating any involvement by [redacted] therein, which each of these board meetings would be in Plaintiff's possession as the former bankruptcy trustee. Further, both board meeting minutes are unexecuted, introduced by an individual without any ability to testify to the truth or accuracy thereof (FRE 602).

7. "[redacted] traveled extensively throughout the U.S., on CAREIC business. His expense reports show he made multiple trips: to New York, Chicago, West Palm, and Las Vegas." (Opp. at iii, ¶ 5): Irrelevant (FRE 402); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Lacks Foundation/Personal Knowledge (FRE 602). The Motion relates to individualized allegations that support this Court's exercise of specific jurisdiction over [redacted] (i.e., [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah). Plaintiff fails to support this allegation with any evidence, as required to support a prima facie showing of personal jurisdiction.

8. "He also routinely conducted business with CAREIC personnel, officers,

employees, and contractors/agents located in Utah. [redacted] Decl. ¶ 11." (Opp. at iii, ¶ 5): Lacks Foundation/Personal Knowledge (FRE 602); Irrelevant (FRE 402); Argumentative; Vague; Improper Legal Conclusion (FRE 701). Plaintiff improperly relies on a declaration of [redacted] that does not represent that he "routinely conducted business with CAREIC[.]"The Motion relates to individualized allegations that support this Court's exercise of specific jurisdiction over [redacted] (i.e., [redacted]'s "suit-related conduct" that allegedly "create[s] a substantial connection with" Utah). Interactions with CAREIC personnel, alone, does not support a prima facie showing of such conduct.

9. "[redacted] was extensively involved in sales and investor solicitation as CAREIC's Managing Director of Business Development. *See* Strong Decl. at Exh. D." (Opp. at iv, ¶ 6): Opinion on Ultimate Issue (FRE 704); Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802). Neither supporting Declaration nor exhibit demonstrate any interaction with an investor, a prospective investor or involvement in the investor solicitation process and thus, this representation alleging support therein is false.[2]

10. "The Castle Arch Secured Development Fund ("CASDF") was [redacted]'s brainchild. He proposed the idea to the rest of the Board, and he sold them on it as a funding mechanism CAREIC should use. He proposed the idea to the rest of the Board, and he sold them on it as a funding mechanism CAREIC should use. *See id*. [redacted] determined the structure of the CASDF offering and personally drafted much of its private placement memorandum ("PPMs"). Am. Compl. ¶¶ 6, 45, 204. *See id*. He supervised the drafting of the offering documents. When he circulated the first draft of these documents[.]" (Opp. at iv, ¶ 6): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague;

[2] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

Improper Legal Conclusion (FRE 701). To the contrary, the exhibits supports [redacted]'s prior declaration that CASDF was replicated by David Hunt based on a nearly identical offering, the IMH Secured Loan Fund, LLC. *See* [redacted] Decl. ¶ 18 (Dkt. 163-1). Importantly, Plaintiff fails to attach the origination of the Acrobat PDF (final, not first draft) copies of the CASDF PPM (and the duty of duty),[3] in their possession, which demonstrates that such documents originated with the attorney drafting the PPM, David Hunt. *Cf.* Opp. at v, ¶ 9 ([redacted] was in California, allegedly "personally drafted much of its private placement memorandum[,]" yet Plaintiff nonetheless claims that "[d]cuments soliciting investors (PPMs, 'Investor letters,' and the like) were generated in Utah."

11. "[redacted] also individually commented upon, revised, and approved the Series E PPM and the CAS PPM. Am. Compl. ¶¶ 199, 202; *see also* [redacted] Decl. ¶¶ 16-17 (admitting that [redacted] reviewed and provided input on PPMs)." (Opp. at iv, ¶ 7): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Opinion on Ultimate Issue (FRE 704). Plaintiff improperly relies on a declaration of [redacted] that does not provide any support that the he "revised" or "approved" the Series E PPM or any PPM. To the contrary, the referenced declaration states that "David Hunt, served as the securities counsel and drafted all of the PPMs during [[redacted]'s] tenure at CAREIC. Based on information and belief, Mr. Hunt was responsible for the drafting, disclosures, and securities law determinations in all the securities offering of CAREIC… **[[redacted]] did not draft the disclosure, material legal aspects of any PPM and did not possess the authority to approve any PPM**. Further, **[[redacted] did] not possess any authority** over David Hunt, such was solely within the realm of Kirby

[3] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

Cochran….[ ] was not involved in the real estate acquisitions or operations at CAREIC, and did not have the necessary knowledge to draft necessary disclosures for the PPMs." Decl., ¶ 16 (Dkt. 163-1) (emphasis added); *cf.* Opp. at v, ¶ 9 (was in California, allegedly "personally drafted much of its private placement memorandum[,]" yet Plaintiff nonetheless claims that "[d]cuments soliciting investors (PPMs, 'Investor letters,' and the like) were generated in Utah."

12. "It is true that the bulk of CAREIC's fundraising was in Illinois, California, and Arizona, but CAREIC did target Utah investors as well selling approximately $350,000 in CAREIC securities to Utah investors, giving rise to a damage claim of approximately $1.4 million from Utah investors alone. *See* Trustee's Initial Disclosures, attached hereto as Exhibit A." (Opp. at iv, ¶ 8): Opinion on Ultimate Issue (FRE 704); Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701). More importantly, there is no allegation or evidentiary support that participated in any fundraising in Utah to support this Court's exercise of personal jurisdiction (i.e., "CAREIC did target Utah investors").

13. "Although **CAREIC was, nominally, a California limited liability company**, many of its operations were conducted in Utah. Strong Decl. ¶ 7. Specifically, CAREIC's chief executive officer, Kirby Cochran, its chief financial officer, Douglas Child, its legal counsel, Dave Hunt, and its Controllers, Jad Howell and Glen Martinsen were all located in Utah. *Id.* CAREIC's finance and accounting functions were located and conducted in Utah. *Id.* at ¶ 8. Documents soliciting investors (PPMs, "Investor letters," and the like) were generated in Utah. See id. at ¶ 9. And, investors sent their money, and the documents they signed to memorialize their investment, to Utah to be processed and stored in CAREIC's files. *Id.*" (Opp. at iv-v, ¶ 9)

(emphasis added): Irrelevant (FRE 402); Lacks Foundation/Personal Knowledge (FRE 602); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Opinion on Ultimate Issue (FRE 704). This improper, false conclusion that CAREIC was a "nominal" California company contradicts binding legal authority and the various facts alleged in the Complaint. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760, 187 L. Ed. 2d 624 (2014) (domicile for personal jurisdiction over corporation is place of incorporation and principal place of business); *See* Black's Law Dictionary (10th ed. 2014), Nominal ("Existing in name only"); *Cf.* Am. Complaint at ¶ 19 (Geringer as President, member of Board, resided in and ran real estate operations out of California), ¶ 22, (Austin, as SVP, eventual CEO and member of Board, resided in and ran the Debtor's capital-raising activities out of California), ¶ 24 (Davidson was member of Board, served on various committees of the Board and eventual Chairman of CAREIC resided in Chairman), ¶ 32 (CAREIC was California LLC governed by an operating agreement providing governance under California law), ¶ 197 (all the relevant securities PPMs established that CAREIC's principal place of business was in California); *cf.* Opp. at v, ¶ 10 ("CAREIC's business… *developing real estate*[,]" which those operations were conducted out of California.) (emphasis in original). Importantly, this false conclusion is irrelevant to the Motion as it fails to allege any individual conduct against [redacted] to support to personal jurisdiction by this Court.

14. "Finally, CAREIC's business was (or was supposed to be) *developing real estate*. A significant portion of that real estate was in Utah. One of CAREIC's most significant so-called 'projects' was in Tooele, Utah. Between 2005 and 2008, CAREIC spent over $13 million in investor funds to acquire real estate and water in Tooele, Utah. Am. Compl. ¶ 82. A substantial portion of the Trustee's claims against [redacted] (and the other Directors) relates to their breaches of duty in acquiring and otherwise dealing with the Tooele Property. *See generally* Am. Compl.

¶¶ 73-97." (Opp. at v, ¶ 10): Irrelevant (FRE 402); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Opinion on Ultimate Issue (FRE 704). The acts and/or conduct of the company or others (without any evidentiary support), or otherwise generalized, non-individualized allegations (not [redacted] "himself creates with" Utah) do not support individual "suit-related" allegations against [redacted] to support specific jurisdiction.

15. "CAREIC compensated [redacted] well for his involvement, paying him nearly $21,000 per month. Am. Compl. ¶156 & Exh. 2. The payments from [redacted] originated in Utah." (Opp. at vi, ¶12): Prejudice, Confusion, Waste of Time (FRE 403); Irrelevant (FRE 402); Inadmissible Character Evidence (FRE 404); Argumentative; Vague; and Improper Legal Conclusion (FRE 701). Importantly, this deals with contacts with [redacted] not [redacted]'s contacts with Utah.

2. Attempts at Individualized Allegations

The following attempts at individualized allegations are not supported by competent proof in support, but nonetheless still fail to establish individualized allegations of [redacted]'s suit-related conduct to establish a substantial connection with Utah.

1. "[redacted] regularly attended Board meetings….At least two of these meetings took place in Utah. *See* Strong Decl. ¶ 10 & Exhibit A; see also [redacted] Decl. ¶¶ 7-8, 18." (Opp. at iii, ¶ 4): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Opinion on Ultimate Issue (FRE 704). Only one of the two meetings demonstrates any level of involvement by [redacted] (December 5, 2007 clearly states that the discussion was led by Dr. Davidson, not [redacted]),[4] while the expense reports contradict that [redacted] was in attendance in Utah at either meeting (*see* Strong Decl., Exh. C), and both are unexecuted. More importantly, involvement at

[4] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

one board meeting over seven years (from April 2004 through October 2011) that fails to demonstrate any suit-related conduct by [redacted] fails to demonstrate any contacts [redacted] himself created with Utah.

2. [redacted]'s expenses reports "show that he traveled to Utah multiple times on CAREIC business. Specifically, on January 19, 2005, March 3, 2005, August 28, 2006, September 18, 2006, November 9, 2006, and March 11, 2007. *See* Strong Decl. at Exh. C." (Opp. at iii, ¶ 5): Improper Legal Conclusion (FRE 701); Irrelevant (FRE 403); Lacks Foundation/Personal Knowledge (FRE 602). Alleged travel date of August 28, 2006 is clearly false based. *See* Strong Decl., Exh. C at p. 38 (shows Aug. 28, 2006 flight credit was used for another flight while Plaintiff conveniently excludes several pages related thereto).[5] Importantly, four days in Utah, especially unrelated to any suit-related conduct, do not demonstrate any contacts [redacted] himself created with Utah (an airplane trip to Utah alone does not in fact relate to the "suit-related conduct.").

3. "He also routinely conducted business with CAREIC personnel, officers, employees, and contractors/agents located in Utah…This included work related to CAREIC business that was in, and that affected Utah. *See* Strong Decl. at Exhs. B, C & E." (Opp. at iii, ¶ 5): Opinion on Ultimate Issue (FRE 704); Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Improper Legal Conclusion (FRE 701). The numerous pages of exhibits do not establish any suit-related conduct or any "substantial connection with" Utah that [redacted] "*himself*' creates with" Utah itself, "not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122 (2014) (emphasis in original).

4. "[redacted] was personally involved with CAREIC's Tooele Project from the

[5] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

outset." (Opp. at v, ¶ 11): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701). Not only is such conclusory allegation false, but neither the declaration nor voluminous pages of exhibits support this improper legal conclusion. *Cf.* Am. Compl. ¶ 140 ("Geringer operated unchecked by the Board to pursue infeasible and risky development projects that were imprudent and not properly disclosed"). Further, Plaintiff fails to contradict the sworn declaration of [redacted]. *See* [redacted] Declaration (Dkt. 163-1) ([redacted] "was not involved in the land acquisitions or real estate operations of CAREIC, including the acquisition, disposition, encumbrance, development, entitlement or encumbrance of any of the properties that CAREIC performed pre-acquisition due diligence, considered for purchase, considered for potential offer for purchase, determined to enter into a purchase and sale agreement, terminate any agreement, expand any acreage or land holdings, or decide to avoid pursuit thereof. [[redacted]] did not have the authority, even the input, to bind CAREIC with regard to any contracts, liabilities, obligations, or other matters relating to the acquisition, disposition, encumbrance, development, entitlement or encumbrance of any of the real properties for CAREIC and was never informed, empowered or led to believe [[redacted]] had any authority in relation thereto, including to oversee, supervise and/or control those individuals[.]").

5. "He was consulted about and approved the first commitment of investor funds that CAREIC made in Tooele. Strong Decl. at Exh. E… And, [redacted] sought out and obtained a $200,000 loan from CAREIC investor Nolan Higa, to allow CAREIC to close a purchase of Tooele water. *Id*. Without [redacted]'s actions, CAREIC did not have enough available cash to close the purchase. *Id*." (Opp. at v, ¶ 11): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Opinion on

Ultimate Issue (FRE 704). Importantly, **this is false** by the very pages provided in support – not only was [redacted] not involved in the solicitation of Higa, it was a mezzanine loan, not an investment by an investor in CAREIC Series E, CASDF or CAS, the alleged relevant securities offerings (*see* Am. Compl., ¶ 197), and the attached voluminous pages do not demonstrate any "approval," or any authority, by [redacted].[6] *See* Bankruptcy Case, Dkt. 679 (settlement of adversary claim against Higa discussing the relevant "promissory notes, one in favor of Nolan Higa in the principal amount of $100,000, and one in favor of Kimberlee Higa in the principal amount of $100,000" as well as other "equity interests"). Further, as provided in the same referenced adversary action, Higa was a California resident (as Plaintiff is well aware) and any interaction between [redacted], would have involved **contacts with California not Utah**.

6. "CAREIC specifically sought his permission and approval of the press release announcing the purchase" of the Tooele Project. "[redacted] was requested to provide comment and approval of a proposed restructuring of the FDIC loan on the Tooele Property." (Opp. at v, ¶ 11): Lacks Foundation/Personal Knowledge (FRE 602); Hearsay (FRE 802); Argumentative; Vague; Improper Legal Conclusion (FRE 701); Opinion on Ultimate Issue (FRE 704). False, voluminous pages of exhibits only show that [redacted] was copied on a few emails – it **neither shows any "commentary" nor "approval" by** [redacted].[7] Being the recipient of an email does not demonstrate "conduct" ("suit related" or otherwise with Utah). See Black's Law Dictionary, "conduct" (10th ed. 2014); *cf.* Am. Compl. ¶ 140 ("Geringer operated unchecked by the Board to pursue infeasible and risky development projects that were imprudent and not properly disclosed").

[6] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").
[7] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

7. [redacted] was specifically tasked with 'taking point on, detailing capital requirements for' the Tooele Project." (Opp. at v, ¶ 11): Irrelevant (FRE 402); Lacks Foundation/Personal Knowledge (FRE 602); Argumentative; Vague; Improper Legal Conclusion (FRE 701). False, this was created **AFTER** the acquisition of the Tooele Project (*see* pages 44-45), but **at the direction of Cochran**, to provide a single, aggregate report for his review on the information from various sources so that Cochran would have a single update to review. Importantly, sending this report at the request of [redacted], to Cochran directly, demonstrates only contacts with Cochran, contrary to the *Walden*. See also [redacted] Decl. ¶ 20 ("during certain periods fulfilled duties similar to a high level assistant or 'right hand man'" to Cochran).

II. PROCEDURAL HISTORY DEMONSTRATES LACK OF DELAY; NO WAIVER

Plaintiff's waiver argument ignores the procedural history of the case and [redacted]'s conduct after he filed a motion to amend the complaint on April 6, 2017 (after [redacted] filed his original motion to dismiss) that sought to drop the federal securities claims and moot [redacted]'s motion to dismiss. *See* Dkt. 118.

1. On **April 21, 2017**, [redacted] filed a Notice re: Dismissal with Prejudice of Federal Securities Claims pursuant to Magistrate Judge Furse's order at the Scheduling Conference held on April 12, 2017. Dkt. 134 (hereinafter, "Notice-Amend").[8] Therein, [redacted] stated that he was willing to stipulate to the dismissal of all federal securities claims, if among other items, "provided that Plaintiff stipulates that such dismissal is **without prejudice to any and all procedural rights** [redacted] **may have in responding to an amended complaint**[.]" *Id*. (emphasis added).

[8] Magistrate Judge Furse ordered that all defendants were to file a statement indicating whether they objected to the dismissal, with prejudice, of the federal securities claims currently alleged in the Complaint, but not in the proposed Amended Complaint that was submitted with the Trustee's Motion For Leave To Amend on April 6, 2017.

2. On **April 27, 2017**, [redacted] filed an Opposition to Plaintiff's Motion to Amend. Dkt. 140 ("Opp-Amend"). Therein, [redacted] "**noted that personal jurisdiction** is foreclosed by federal securities claims, but once dismissed, **becomes an issue that needs to be addressed**." Id. at 5. Therein, [redacted] argued that "Plaintiff chose the claims to bring these federal securities claims" and that he would be prejudiced (as demonstrated by this Opposition) as "[r]ather than even attempt to address the arguments made in these motions to dismiss, Plaintiff filed the Motion [to Amend], which will force [redacted] to restart the entire process of research and drafting at significant expense," including the present Motion.

3. On May 3, 2017, [redacted] filed Reply in Support of First Motion highlighting that such Reply was Limited in Scope based on Plaintiff's filing of the motion to amend. Dkt. 145 ("Limited Reply-MTD") ("amended complaint supersedes the original complaint and renders it of no legal effect"). However, [redacted] request leave to file a sur-reply containing supplemental legal arguments based on the Opposition" if the Court denies the motion to amend. *Id*. at 2. Further, the Limited Reply-MTD stated "[a]s provided in [redacted]'s Response to Amend, an amended complaint is subject to the same challenges as the original (*i.e.*, motion to dismiss, to strike, for more definite statement)." *Id*. at 3 n. 3.

ARGUMENT

I. POST-CONFIRMATION DISPUTE IS NOT "RELATED TO" THE BANKRUPTCY CASE

Plaintiff "simply overlooked" all legal authority, the post-confirmation status of the Bankruptcy Case and the Plan of Confirmation in arguing that this "Court has subject-matter jurisdiction over this case is a 'civil proceeding[] arising under title 11, or arising in or related to cases under title 11." Opp. at 1 (citing 28 U.S.C. § 1334(b) ("district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."). Thus, the Bankruptcy Rules do not apply and this is not a federal question case.

Unsurprisingly, Plaintiff fails to articulate any rationale or legal authority for its position that this case is one "arising under" title 11 or "arising in" or "related to" a case under title 11. 28 U.S.C. § 1334(b) – clear authority holds that this action is not related to the Bankruptcy Case and the Federal Rules of Bankruptcy Procedure do not apply to this case (Rule 7004 or otherwise).[9] While early cases, in the **pre-confirmation** context, addressing *related to* jurisdiction generally adopted the *Pacor* standard, which held that a bankruptcy court has *related to* jurisdiction, if the outcome could alter the debtor's rights, liabilities, options, or freedom of action. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994-95 (3d Cir. 1984). The mere fact that there were common issues between the bankruptcy case and the civil proceeding was not sufficient. *Id*. at 994.[10] *See also In*

[9] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

[10] *Pacor's* progeny looked to whether the proceeding "could conceivably have any effect on the estate administered in bankruptcy," which need not be *certain*, or even *likely*. *See, e.g., In re Guild & Gallery Plus*, 72 F.3d 1171, 1181 (3d Cir. 1996). Thus, if the outcome could "alter the debtor's rights, liabilities, options, or freedom of action or could affect the distribution to creditors," it is *related to*. *Guild & Gallery Plus*, 72 F.3d at 1178. It need not be against the debtor or the debtor's property. *See, e.g., In re Spillman Dev. Grp., Ltd*., 710 F.3d 299, 304-05 (5th Cir. 2013). However, absent an "effect on the arrangement, standing, or priorities of [the debtor's] creditors," or an "effect on the administration of the *estate*," *related to* jurisdiction does not exist. *Pacor*, 743 F.2d 984, 995-96.

re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990).[11]

However, there is no strong nexus between the bankruptcy and this action to support related to jurisdiction. The instant action was initiated by the "post-confirmation estate representative" of CAREIC, as the liquidating trustee of the trusts, whom was appointed by the Confirmation Order entered on June 7, 2013, more than one year before filing this action (on October 30, 2014). *See* Am. Compl., at 1-2 and ¶ 13. While 28 U.S.C. § 1334 "does not distinguish between pre-confirmation and post-confirmation jurisdiction[,]"courts "**curtail the reach of related to jurisdiction in the post-confirmation context**" to reflect the policy that a debtor should not indefinitely enjoy the protections of bankruptcy to the detriment of other actors in the economy. *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 106 (1st Cir. 2005)*; see also In re Gardner*, 913 F.2d at 1518 ("When property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction typically lapses"). In the post-confirmation context, there must be some strong nexus between proceeding and the bankruptcy to support an exercise of post-confirmation *related to* jurisdiction. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005). Thus, for a post-confirmation or post-discharge claim to be *related to* a bankruptcy case, it must affect an integral aspect of the bankruptcy process—**there must be a close nexus to a confirmed bankruptcy plan or the bankruptcy proceeding**. *Valley Historic Ltd. P'ship v. Bank of New York*, 486 F.3d 831, 836 (4th Cir. 2007) (*citing In re Resorts Int'l, Inc.*, 372 F.3d 154, 167 (3d Cir. 2004)). For a Chapter 11 case, the "close nexus" requirement would be satisfied if the post-confirmation proceeding in question **affected "the interpretation,**

[11] Proceedings "with an extremely tenuous connection to the estate should be excluded from the district court's related to jurisdiction." *See, e.g., In re Salem Mortg. Co.*, 783 F.2d 626, 634 (6th Cir. 1986). Moreover, a non-debtor's assignment to a debtor or trustee in bankruptcy of a claim against another non-debtor will not, by itself, give rise even to *related* to jurisdiction over the claim. *In re Stonebridge Techs., Inc.*, 430 F.3d 260, 266-67 (5th Cir. 2005).

implementation, consummation, execution or administration of the confirmed plan." *Valley Historic*, 486 F.3d at 836-37 (emphasis added).

Valley Historic is instructive, where the debtor filed its Chapter 11 after notice of default by the Bank of New York ("BNY"), which funded an acquisition and renovation of a property. *Valley Historic*, 486 F.3d at 834. The confirmed plan provided for the payment of claims through its post-confirmation income, with the bankruptcy court to retain jurisdiction over the anticipated adversary proceeding against BNY, but **did not provide for the use of any recovery from the adversary proceeding**. *Id*. After confirmation, the debtor brought an adversary proceeding for breach of contract and tortious interference against BNY, alleging BNY's pre-petition conduct drove it into bankruptcy, which BNY moved to dismiss for lack of subject matter. *Id*. The Court affirmed the district court's finding that no "related to" or "arising in" jurisdiction after the debtor's plan of reorganization was confirmed. *Id*. at 835. The Court found:

> [S]elf-evident that a claim, like the Debtor's breach of contract claim, that pre-dates the filing of the Chapter 11 case cannot be said to have arisen within that case, and whether it caused the bankruptcy is immaterial. Indeed, if causation were a sufficient touchstone, then any debt would confer "arising in" jurisdiction. However, the very purpose of bankruptcy is to discharge or restructure the debt that has caused the bankruptcy. Nor is it sufficient to establish "arising in" jurisdiction that a claim, like the Debtor's tortious interference claim, arises during the pendency of the Chapter 11. Here, **the Debtor's claims bear only a coincidental relationship to the Debtor's bankruptcy case**. They would have existed whether or not the Debtor filed bankruptcy.
>
> ….
>
> [N]o conceivable bankruptcy administration purpose to be served by the Debtor's adversary proceeding because the Plan made no provision for the use of any recovery from the adversary proceeding but instead provided for the satisfaction of the Debtor's obligations "entirely from the post-petition rents and earnings of the Debtor through the operation of its real estate."

Id. at 836-37. The facts are similar here, including that the Confirmed Plan transfers all the bankruptcy estate to the Trusts and then segregates the recovery of the Individual Claims from the remaining beneficiaries thereof. *See* Bankruptcy Case, Dkt. 701.

II. RULE 7004 INAPPLICABLE AS NOT AN ADVERSARY PROCEEDINGS

Assuming arguendo, that this Court has subject matter jurisdiction pursuant to Section 1334(b),[12] Plaintiff mischaracterizes, by oversimplification, that Rule 7004 applies (and any purported nationwide service) even if "the Federal Rules of Bankruptcy apply to this case."[13] Opp. at 1 ("this Court has personal jurisdiction over [redacted] under Rule 7004(f) of the Federal Rules of Bankruptcy Procedure, which [redacted] has simply overlooked."). Contrary to Plaintiff's unsupported legal conclusions (or improper reliance on the cases cited), "related to" or a "non-core" subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) is not automatically determinative of the application of the Rule 7004 – this case is not an adversary proceeding under the plain language of Part VII of the Bankruptcy Code as required to enable Rule 7004 thereof. *See* Fed. R. Bankr. P. 7001 ("An adversary proceeding is governed by the rules of this Part VII" listing ten, specific enumerated adversary proceedings); *see, e.g., In re Staker*, 525 F. App'x 811, 814 (10th Cir. 2013) (unpublished) ("adversary proceeding specified in Rule 7001, which means an adversary proceeding in the bankruptcy court, not an adversarial state-court proceeding."); *see also Diamond Mortg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1241 (7th Cir. 1990) (relied on by Plaintiff, but for argument that Rule 7000(d) applicable to "non-core but 'related to' proceeding.). Thus, while Plaintiff cites *Celotex* to argue that the Court of Appeal "appl[ied] Fed. R. Bankr. P. 7004(f) to a case with 'related to' jurisdiction[,]'" *see* Opp. at 1, *Celotex* stands in stark contrast to the instant action as the case fits within the four corners of the traditional mold of an adversary proceeding under the following specific enumerated provisions:

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[12] [redacted] neither admits nor waives any defense based on subject matter for purposes of this Motion. "[S]ubject- matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

[13] The Opposition ignores that [redacted]'s Motion is based on the lack of personal jurisdiction under Rule 12(b)(2), not one for lack of subject matter jurisdiction under Rule 12(b)(1). *See* Motion at 1.

1. **Fed. R. Bankr. P. 7001(10) ("a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452"):** Owens filed the appeal to "challenge the district court's denial of its motion to remand" (i.e., whether or not the claim was properly removed) where Owens "contended that equitable grounds such as comity and the state court's expertise in questions of state law warranted remand. *See* 28 U.S.C. 1452(b)." *In re Celotex Corp.*, 124 F.3d 619, 623–24 (4th Cir. 1997).[14]

2. **Fed. R. Bankr. P. 7001(6) ("a proceeding to determine the dischargeability of a debt"):** "Rapid's claim against the Celotex bankruptcy estate was principally based upon a written agreement…, wherein Celotex's predecessor in interest, …agreed to indemnify Rapid's predecessor in interest,…for all liabilities and defense costs arising out of [a] merger… subsequent transfer of all Old Carey's assets to New Carey[.]" *Celotex Corp.*, 124 F.3d at 623.

3. **Fed. R. Bankr. P. 7001(8) ("a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination"):** Both Owens and Rapid filed proofs of Claim in the Celotex bankruptcy estate but the "Confirmed Plan neither allowed nor disallowed Owens' claim for contribution against the Celotex bankruptcy estate." *Celotex Corp.*, 124 F.3d at 624 (4th Cir. 1997).

4. **Fed. R. Bankr. P. 7001(1)** (subject to certain exceptions "a proceeding to recover money or property"): "Owens filed a complaint…for contribution[,]" which if Owens prevailed, Celotex "'would immediately become liable to Rapid as its contractual and common law indemnitor.'" *Celotex Corp.*, 124 F.3d at 622–23.[15]

Finally, unlike [redacted], both Owens and Rapid consented to jurisdiction by filing proofs of claim in the Celotex bankruptcy estate and thus submitted to the *in rem* jurisdiction. *See United States v. Gurley*, 434 F.3d 1064, 1068–69 (8th Cir. 2006).

III. IF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPLY TO THIS CASE, WHY HAS PLAINTIFF IGNORED THEM AND RELATED RULES OF PRACTICE?

Plaintiff concludes, without any legal support, that the entirety of "the Federal Rules of Bankruptcy Procedure apply to this case." *See* Opp. at 1; Am. Compl. ¶ 15)). But, this disjointed argument skips over a critical statutory step. While Section 1334(b) "confers 'original, but not exclusive' jurisdiction of 'all civil proceedings' that arise under or in Title 11 or are related to

[14] Arguably, such "equitable grounds" may be considered "a proceeding to obtain an injunction or other equitable relief[.]"Fed. R. Bankr. P. 7001(7).
[15] *See also Diamond Mortg. Corp.*, 913 F.2d at 1241 ("Diamond and Obie charge, essentially, that the Barron and Jaffe Attorneys' malpractice led to substantial losses and eventual bankruptcy. Presumably, Diamond and Obie now seek to recoup these losses.").

Title 11 cases on the district courts[,]"[16] Section 157(a) provides that "[d]istrict courts may provide that [such Title 11 cases] shall be referred to the bankruptcy judges for the district.'" *In re Armstrong*, 305 B.R. 381, at *2 (B.A.P. 10th Cir. 2004) (unpublished).

This Court "has entered a general order of reference by local rule. D.U. Civ. R. 83–7.1[,]" which mandates that if Section 1334(b) applies, then such case originates in the Bankruptcy Court (not this Court). Rule 83-7.1 provides, pursuant to 28 U.S.C. § 157(a), that "any and all cases under Title 11…are referred to the bankruptcy judges for the District of Utah for consideration and resolution[.]" DUCivR 83-7.1. To "withdraw [the] **adversary proceeding**… referred to the bankruptcy court under 28 U.S.C. § 157(a) [,]" Plaintiff was required to file in the Bankruptcy Court a motion to withdraw the reference pursuant to 28 U.S.C. § 157(d) and Fed. R. Bank. P. 5011.[17] *See* DUCivR 83-7.4.[18] Such withdrawal motion must be filed within 21 days "after the proceeding is commenced" and "must certify that" withdrawal is mandatory or appropriate. *Id.*[19] The bankruptcy judge, not this Court, determines whether or not it is core or non-core. DUCivR 83-7.5 ("**only if a bankruptcy judge so determines**") (emphasis added).

While Plaintiff relies on equity to argue waiver by [redacted], equity should estop Plaintiff from this creative, but false, "Hail Mary" argument – it is inconsistent with several of his prior filings. *See* Dkt. 1 (cover sheet providing complaint was original proceeding under based on

[16] *In re Madsen*, 517 B.R. 385, *3 (B.A.P. 10th Cir. 2014) (unpublished).
[17] *Cf.* DUCivR 83-7.2 (procedures for removal to the bankruptcy court)
[18] Further, if "the Federal Rules of Bankruptcy Procedure apply to this case" as inventively argued, then he must file a motion pursuant to Rule 5005 for hearing with this Court. *See* Fed. R. Bank. P. 5011(a) (withdrawal motion "heard by a district judge.").
[19] 28 U.S.C.A. § 157(d) ("The district court may withdraw…on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

federal securities law); Dkt. 5, 26, & 32 (summons issued pursuant Fed. R. Civ. P. 4, not Fed. R. Bankr. P. 7044); Dkt. 24 (Ex Parte Motion for Entry of Authorizing Alternative Service under Fed. R. Civ. P. 4 despite being unnecessary under Fed. R. Bankr. P. 7004); Dkt. 80-1 (proposed scheduling order providing for ADR, when not applicable to adversary actions). *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001).

IV. BANKRUPTCY RULES ARE PROCEDURAL NOT JURISDICTIONAL

Plaintiff misrepresents [redacted]'s Motion to argue that "[redacted] acknowledges, when a **federal…rule** provides nationwide service of process, the Court looks to the defendants contact's with the United States as a whole rather than the defendant's contacts with the forum state." Not only does Plaintiff's argument misrepresent the Motion (*cf*. Motion at 25-26 discussing only "statutory authority" under the federal securities law), but also Plaintiff fails to recognize clear, adverse authority from the Supreme Court that contradicts Plaintiff's outdated cases relied upon, *see generally* Opp. at 1-3, and their argument that court rules, such as the Federal Rules of Bankruptcy Procedure, trump or abrogate [redacted]'s jurisdictional due process rights – this is an avenue for Congress alone.[20] The plain language of the authority granted to the courts confirms that the Bankruptcy Rules prescribed by the Supreme Court **"shall not abridge, enlarge, or modify any substantive right."** 28 U.S.C.A. § 2075 (emphasis added). "Over the last ten years, the Supreme Court has clarified the difference between jurisdictional and nonjurisdictional, claim-processing rules." *In re Indu Craft, Inc*., 749 F.3d 107, 112 (2d Cir. 2014); *see also Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 301–02 (4th Cir. 2017) ("The Supreme Court has 'cautioned, in recent decisions, against profligate use of the term' jurisdictional,…and has expressed increasing reluctance to characterize procedural

[20] *See* Rules of Prof. Conduct, Rule 3.3 (entitled "Candor Toward the Tribunal").

rules as jurisdictional bars.") (citations omitted).

The "requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules, see Rule Proc. 7001(6), which are "procedural rules adopted by the Court for the orderly transaction of its business" that are "not jurisdictional." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271–72 (2010) (*quoting Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (alternations in original). Bankruptcy Rules were "prescribed by [the Supreme Court] for 'the practice and procedure in cases under title 11[,]'" *Kontrick*, 540 U.S. at 453 (quoting 28 U.S.C. § 2075), and "**such rules 'do not create or withdraw federal jurisdiction**.'" *Id*. (citations omitted) (emphasis added). "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Id*. at 452. The Opposition ignores the Supreme Court's wise advice that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id*. at 455.

V. DEFENDANTS' MOTION TO DISMISS IS NOT BARRED BY RULE 12(G)(2): UNAVAILABLE DEFENSES CANNOT BE WAIVED

Plaintiff argues that [redacted]'s Motion is barred by Rule 12(g)(2) of the Federal Rules of Civil Procedure that prohibits [redacted] from raising personal jurisdiction as a defense because he did not raise personal jurisdictional challenges in conjunction with his motion to dismiss filed on March 21, 2017. *See* Opp. at 5-8 ("sought to dismiss, among other claims, the Federal Securities Claims[,] [where], he devoted 15 pages of his 20-page argument section to the Federal Securities Claims."). Although Rule 12(h)(1) generally provides that a "party waives any defense" of lack of personal jurisdiction by failing to advance that defense in a motion to dismiss under Rule 12(b), Rule 12(g)(2) contains a critical qualification: the waiver rule applies only to "a defense or

objection **that was available to the party**." Fed. R. Civ. P. 12(g)(2) (emphasis added). *See* 5C Charles A. Wright et al., Federal Practice & Procedure § 1388 (3d ed. 2014) ("A significant qualification on the application of Federal Rule 12(g) is that a party is only required to consolidate Rule 12 defenses and objections that are 'then available to the party.'"). If a **defense was not available at the time** the Rule 12(b)(6) motion was filed, but is rendered **newly available** through—as relevant here—an amended complaint changing the underlying jurisdictional allegations, the waiver provision of Rule 12(h)(1)(A) do not apply.

Thus, "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) (defendant could raise lack of personal jurisdiction after filing answer where intervening precedent first indicated that "such a defense might exist"). The "clairvoyance demanded by plaintiff here of [redacted] is inconsistent with the doctrine of waiver." *Id*. ("(A)n effective waiver must, as was said in *Johnson v. Zerbst*, 304 U.S. 458, 464 (58 S.Ct. 1019, 1023, 82 L.Ed. 1461) (1938), be one of a 'known right or privilege '") (*quoting Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967)).

Courts have broadly followed this approach, finding that a party may assert a new defense following an initial motion to dismiss if there have been material subsequent legal developments. *See, e.g., Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (intervening change in law permitted a defendant to raise "a new objection to the District Court's" exercise of personal "jurisdiction over it," even though the case was already on appeal); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983) (personal jurisdiction defense not waived when it "was not available at the time" defendants "made their first defensive move").

A. Opposition Based on One Unpublished Opinion Clearly Distinguishable and Ignores Relevant, Published Opinions

Plaintiff relies on an outlier, unpublished memorandum opinion from the Northern District of Texas, Dallas Division, in violation of this Court's Rules of Practice to support its entire application of Rules 12(g)(2) and 12(h)(1) to [redacted]'s Motion. See Opp. 6-7 (*citing and quoting Orthoflex, Inc. v. ThermoTek, Inc.*, Case No. 2:11-cv-0870, 2013 U.S. Dist. LEXIS 72883, at *6-8 (N.D. Tex. May 23, 2013) (**unpublished**)).

First, Plaintiff's use and reliance is in violation of this Court's Rules of Practice and should be disregarded.[21] Critically, while permitted, such "[u]npublished decisions are not precedential[.]" DUCivR 7-2(a). Here, Plaintiff ignores the requirement that "[c]itation to unpublished opinions must include an appropriate parenthetical notation stating that it is an unpublished decision." DUCivR 7-2(b). *See* Opp. at 7 (no "appropriate parenthetical notation" following citation). Second, upon appropriate research and candor, the Opposition mischaracterizes the case as it is clearly factually distinguishable case with a complicated procedural history. Based on the delay of approximately two years after a related party already briefed, argued and was granted a motion to dismiss for personal jurisdiction, more than one year after the Plaintiff made a motion to amend to add a RICO claim and its nationwide service (not voluntarily dismiss), one year after the defendant already briefed, argued and was granted a Rule 12(b)(6) motion, one year after the defendant filed an answer (see docket), the district court found that defendant waived its personal jurisdiction argument as the "'purpose of the Rule 12(h)(1) automatic waiver provision is to encourage the consolidation of motions and discourage

[21] DUCivR 1-2 ("The court, on its own initiative, may impose sanctions for violation of these civil rules."); *see also* DUCivR 7-1(a)(1)(B) ("Failure to comply with the requirements of this section may result in sanctions[.]").

the dilatory device of making them in a series.'" *See Orthoflex, Inc.*, at *1.[22]

In contrast, **two published opinions cases actually addressing similar circumstances find no waiver and the Motion is timely**. In *McIntyre's Mini Computer Sales*, the district court held that "application of the general rule [under Rule 12(g)] inappropriate" in similar circumstances to the instant case:

> When this action was first filed, this court had federal question jurisdiction over the subject matter, as the bulk of the claims arose under RICO, and there was not complete diversity between the parties. RICO authorizes nationwide service of process on defendants. 18 U.S.C. § 1965(d). Where Congress has provided for nationwide service of process, the "minimum contacts" analysis set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny becomes inapposite, and due process requires only that the defendant have minimum contacts with the United States….
>
> Defendant Hanson is a Massachusetts corporation, and obviously has the requisite minimum contacts within the United States to allow this court to exercise personal jurisdiction over it pursuant to 18 U.S.C. § 1965(d). Thus, this court is persuaded by the defendant's argument that **the defense of absence of personal jurisdiction was not available to it when the original Rule 12(b)(6) motion was filed.** The issue of personal jurisdiction in the form of minimum contacts with the forum **only became available as a defense when the plaintiff dismissed the sole nondiverse party, and also decided not to oppose Hanson's motion to dismiss the RICO claims**, reducing the action to a diversity case involving state claims. Thus Hanson's supplemental motion to dismiss is not barred by Rule 12(g), and the court now turns to the merits of the personal jurisdiction issue.

[22] The case was initiated by the "Orthoflex Plaintiffs" brought suit against ThermoTek in Chicago, Illinois in 2010 and Thermotek subsequently brought a state court in Texas, which was removed to federal court. As filed, Thermotek's complaint only included state law claims and no RICO claim authorizing nationwide service. *See ThermoTek, Inc. v. WMI Enterprises, LLC*, No. 3:10-CV-2618-D, 2011 WL 1485421, at *1 (N.D. Tex. Apr. 19, 2011) (unpublished). In April 2011, the Court dismissed "without prejudice ThermoTek's action against WMI for lack of in personam jurisdiction[.]" *Id*. (WMI was organized by Wilford). Both cases were consolidated and the TCS entities were eventually added entities managed/organized by Wilford. *See Orthoflex, Inc. v. ThermoTek, Inc*., No. 3:10-CV-2618-D, 2012 WL 2864510, at *1 (N.D. Tex. July 12, 2012) (unpublished) ("ThermoTek alleges that WMI manufactured the wraps, while TCS, Inc. and TCS, LLC were formed to sell the wraps manufactured by WMI, in direct competition with ThermoTek."). On February 9, 2012, the Orthoflex Plaintiffs brought a motion to dismiss the complaint, including the RICO claims, which was granted. *Id*. at *2-4, 8.

McIntyre's Mini Computer Sales Grp., Inc. v. Creative Synergy Corp., 644 F. Supp. 580, 585–86 (E.D. Mich. 1986). Following a bench trial, the District Court of Delaware ruled on a post-trial brief raising "the defense of lack of personal jurisdiction" when "[s]hortly before trial, [plaintiff] voluntarily dismissed its claims under Sections 11, 12 and 15 of the Securities Act." *Tracinda Corp. v. DaimlerChrysler AG*, 364 F. Supp. 2d 362, 366 and 389 (D. Del. 2005), *aff'd*, 502 F.3d 212 (3d Cir. 2007) ("leaving for trial the common law fraud claim and the claims under the Exchange Act."). In *sua sponte* finding that defendant Gentz's "challenge to the Court's personal jurisdiction is timely[,]" the Court concluded that "Gentz could not, in good faith, raise the defense of lack of personal jurisdiction until Tracinda dismissed its claims under the Securities Act." *Id*. at 389. In a well-reasoned opinion, the Court was faced with the dismissal of claims under the nationwide service provisions under the Securities Act, but retention of claims under similar nationwide service provisions of the Exchange Act, whereby it analyzed the former under traditional minimum contacts analysis under the Fourteenth Amendment (raised in Gentz's post trial brief) and latter under the Fifth Amendment. *Id*. at 389-91. Under the timely personal jurisdiction argument based on minimum contacts under the Fourteenth Amendment, the Court found that "the contacts alleged by Plaintiffs[,]" similar to the disputed allegations against [redacted], are **not "sufficient to establish personal jurisdiction** over" Gentz. *Id* at 391.

B. Opposition Ignores Procedural History of Case and Plaintiff's Intervening Conduct

Plaintiff's argument completely ignores the procedural history of the case and the fact that he, on his own initiative, **filed a motion to amend** the complaint on April 6, 2017, **after** [redacted] **filed his First Motion and prior to filing any opposition thereto**, which sought to address [redacted] (and others) motions by "eliminate[ing] the federal securities fraud claims." Dkt. 118 at 3; *see also* SOF, § II. Thus, when the Plaintiff filed his Amended Complaint, it effectively introduced a new pleading, since its prior pleading was previously dismissed as a

matter of law. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) ("The propriety of allowing a pleading alteration depends not only on the state of affairs prior to amendment but also on what happens afterwards. **Accordingly, Rule 15 both conveys the circumstances under which leave to amend shall be granted and directs how the litigation will move forward following an amendment**.") (emphasis added); *see also King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An **amended complaint supersedes the original complaint and renders it of no legal effect** unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.") (emphasis added); *see also* Opp.-Amend (Dkt. 140) and Limited Reply-MTD (Dkt. 145). Rule 12(g)(2) does not apply under these circumstances, and the Court has the discretion to permit a motion that has merit. *See, e.g., SCO Grp., Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1150-51 (D. Utah 2005) (determining that the court could review the merit of the motion despite an earlier Rule 12 motion and despite the apparent prohibition of Rule 12(g)).[23] Here, [redacted] is "**asserting these issues so that they can be ruled on before further time and money need be spent on other issues in the case**." Id. at 1151.

VI. PLAINTIFF FAILS TO MEET BURDEN OF PRIMA FACIE SHOWING OF JURISDICTION

Plaintiff resorts to the same misguided reliance on generalized, non-individualized allegations (as discussed in the Motion) that fails to support a prima facie showing that "the **defendant's suit-related conduct** must create a **substantial connection** with the forum State," whereby, "the [minimum contacts] relationship must arise out of contacts that the 'defendant

[23] *Id*. ("The court's previous order on Novell's first motion to dismiss and SCO's motion to remand obviously triggered the filing of Novell's present motion because it acknowledged that there was a substantial question regarding copyright ownership. Even if there was some factual basis for the motion when the prior motion was brought, the motion does not appear to be brought for purposes of delay. In fact, Novell **appears to be asserting these issues so that they can be ruled on before further time and money need be spent on other issues in the case**. Therefore, whether or not the court's previous order may have triggered the present motion, the court concludes it can properly analyze the merit's of Novell's motion.").

himself' creates with the forum State" itself, "not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 134 S. Ct. 1115, 1121-1122 (2014) (emphasis added) (emphasis in original). Critically, "**[e]ach defendant's contacts with the forum State must be assessed individually**" and cannot be "judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added).

In the Motion, [redacted] controverted the allegations in the Amended Complaint and Plaintiff responds once again with "mere conclusory allegations," as opposed to "well pled facts" that do not even satisfy the requirements to establish personal jurisdiction. *See* Motion at 9.[24] Rather, **Plaintiff "has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading**." *Pytlik v. Prof'l Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989) (emphasis added). *See* Statement of Relevant Facts, § I.

VII. IMPROPER REQUEST FOR JURISDICTIONAL DISCOVERY SHOULD BE DISREGARDED

As a threshold matter, Plaintiff's "request" is a mislabeled motion,[25] which DUCivR 7-1(b)(1)(A) specifically states that "[n]o motion, including but not limited to cross-motions and motions pursuant to Fed. R. Civ. P. 56(d), may be included in a response or reply memorandum. Such motions must be made in a separate document." As such, Plaintiff's request for stay and limited jurisdictional discovery is not only unauthorized, it is specifically prohibited by the applicable rules and the same should thus be summarily denied. *See* DUCivR 7-1(a)(1); *see also Nelson v. Bulso*, 149 F.3d 701, 705–06 (7th Cir. 1998) (affirming denial for jurisdictional discovery when court required request to be filed as a formal motion). "In the absence of an

[24] The Court need not draw inferences in plaintiff's favor nor accept as true "mere conclusory allegations," as opposed to "well pled facts." *Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987).
[25] *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order [that] must be made by motion")

explicit, supported motion for discovery, this court cannot say that the district court abused its discretion in denying the request." *See World Wide Ass'n of Specialty Programs & Sch. v. Houlahan*, 138 F. App'x 50, 52 (10th Cir. 2005) (unpublished) ("Plaintiff apparently made a general request for discovery in its response to defendant's dismissal motion.").[26]

Second, Plaintiff quotes the Tenth Circuit's opinion to argue that he should automatically "be allowed discovery on the factual issues raised by" the Motion. Opp at 19 (*quoting Budde v. Ling-Temco-Vought*, 511 F.2d 1033, 1035 (10th Cir. 1975)). "**Conveniently, [Plaintiff] omits the next sentence in *Budde* stating**, '[t]he trial court, however, is vested with broad discretion and should not be reversed unless discretion is abused.'" *Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd.*, 385 F.3d 1291, 1298–99 (10th Cir. 2004) (emphasis added). Here, Plaintiff fails "to convince us of its legal entitlement to jurisdictional discovery and, more specifically, that it [would be] prejudiced by the district court's denial of its motion for discovery." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189–90 (10th Cir. 2010); *see also Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016) ("It is not enough for the plaintiffs to show that denial of discovery deprived them of discovering some fact; they must show that they were prejudiced by the absence of that fact.").

CONCLUSION

For the reasons stated in the Motion and this Reply, [redacted] respectfully requests that

[26] *See also Sampson v. Delta Air Lines, Inc.*, No. 2:12-CV-244 TS, 2013 WL 6409865, at *5 (D. Utah Dec. 9, 2013) (unpublished) ("A party seeking additional discovery should file an 'explicit, supported motion for discovery.' Due to the general nature of Plaintiffs' request for discovery, the Court is left guessing as to the potential probative value of the evidence Plaintiffs seek to discover. This puts the parties and the Court at a disadvantage.") (citations omitted); *see generally Parlant Tech. v. Bd. of Educ. of City Sch. Dist. of City of New York*, No. 2:12-CV-417-BCW, 2013 WL 1438726, at *3 (D. Utah Apr. 9, 2013) (unpublished) (**relied upon by Plaintiff** specifically ruling on "Alternative Motion for Discovery").

the Court dismiss Plaintiff's Amended Complaint for lack of personal jurisdiction.

EVANS & KOB, PC

DATED: July 31, 2017

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Counsel to Defendants [redacted]

-and-

[redacted]

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

[redacted]

[redacted]

and I hereby certify that I have mailed the document by United States Mail, first-class postage prepaid, to the following non-CM/ECF participants:

(No manual recipients)

/s/ Brett G. Evans