[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.

JEFF AUSTIN; AUSTIN CAPITAL SOLUTIONS; WILLIAM H. DAVIDSON; ROBERT D. GERINGER; ROBERT D. GERINGER, P.C.; FINE ARTS ENTERTAINMENT; ROBERT CLAWSON; HYBRID ADVISOR GROUP; and JOHN DOES 1-50,

Defendants.

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

[redacted]'S OBJECTION TO EVIDENCE IN PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON SECOND CLAIM FOR RELIEF

Judge Tena Campbell

Magistrate Judge Evelyn J. Furse

Pursuant to Local Rule DUCivR 7-1(b)(1)(B), Defendants [redacted] (collectively, "[redacted]") respectfully submit this Objection to Evidence in Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment on Second Claim for Relief.[1]

PRELIMINARY STATEMENT

Plaintiff's obvious attempt to cure an impossibly vague Motion replete with faulty legal analysis by filing a Reply that is nearly double the length of the initial Motion pushes the boundaries of traditional understanding of reply briefs. The Reply's voluminous nature, its reliance on new evidence and new arguments and general disregard for evidence submitted in [redacted]'s Opposition highlight the inadequacy of the Motion. The Reply's "unfocused blunderbuss" attack demonstrates the impropriety of these "shotgun approach[es]" to reply briefs typically addressed in appellate proceedings. This court should not "review issues raised for the first time in a reply brief" for obvious reasons – "[i]t robs the [defendant] of the opportunity to demonstrate that the record does not support an [plaintiff's] factual assertions and to present an analysis of the pertinent legal precedent that may compel a contrary result." *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (internal citations omitted); *see also Donner v. Nicklaus*, 778 F.3d 857, 864 (10th Cir. 2015) ("the defendants raised the timeliness argument for the first time in a reply brief. That was too late because the District of Utah does not allow parties to assert new arguments in a reply brief…Because this argument was raised for the first time in Rios' reply brief, the argument is waived.") (internal citations omitted).

[1] Pursuant to DUCivR 7-1(a)(4), [redacted] incorporates the objections of Mr. Geringer. Dkt. 293.

GENERAL OBJECTION TO EVIDENCE

[redacted] objects to the majority of the documents attached to the declarations of Plaintiff on the basis that Plaintiff has failed to establish the authenticity of the documents nor laid the foundation for their admissibility through the testimony of a fact witness. In a summary judgment motion, documents authenticated through personal knowledge must be attached to an affidavit that meets the requirements of Fed. R. Civ. P. 56(c)(4) and the affiant must be a person through whom the exhibits could be admitted into evidence. Fed. R. Civ. P. 56(b)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

OBJECTIONS TO EVIDENCE ADVANCED IN PLAINTIFF'S REPLY

Allegation and Evidence in Support	Objection to Evidence
1. "None of the evidence that Geringer cites for this statement supports it. Geringer cites pages 30-31 of the December 19, 2012 deposition of Kirby Cochran. In that deposition, Cochran explained his real estate experience before CAREIC. He testified that such experience was "[p]urchasing my own homes, as well as developing a ranch in Wyoming." Depo. of K. Cohran, Trustee's Appendix of Evidence Volume 1 ("Apx. v.1"), Dkt. 221-1 at 251-52." Reply at 6.	**Mischaracterizes Testimony/Misleading (Fed. R. Evid. 403)**. Cochran testified that after purchasing nearly 1,000 acres, he "had roads built, a house built, changed zoning, platted lots, sold lots."

2. "In his declaration, Austin states that since 1978, he has "purchased and sold and held over a dozen properties." Austin Decl. at ¶ 6. This does not constitute 27 years of real estate experience." Reply at 7.	**Mischaracterizes Declaration/Misleading (Fed. R. Evid. 403)**. Austin did not declare (nor did Geringer claim) that he "27 years of real estate experience," but rather (amongst other related statements): "Since 1978, [Austin] purchased and sold and held over a dozen properties with the use of partnerships and limited liability companies. [Austin] also used similar business structures for a general land acquisition, including one with Defendant Robert Geringer, apartments, houses and commercial buildings[;]" and "Specifically, [Austin] had invested in several real estate projects prior to joining Castle Arch Real Estate Investment Company ("CAREIC"), including a five-unit apartment building, a two-unit duplex (both in Huntington Beach, CA), and two rental homes in Phoenix, AZ. Along with these properties, [Austin] had additional rental units in Phoenix, and properties in San Diego, Torrance, and Irvine, CA." "Prior to leaving the high-tech industry, [Austin] started my first real estate company with my wife in or around 2001 or 2002 called J&B Property Management… Thereafter, in or around 2003 or 2004, the name was changed to Austin Capital Solutions." Dkt. 250-1 at ¶¶ 6-7, 9
3. "Indeed, Austin did not have significant experience in real estate development before joining CAREIC. Austin's 2012 resume does not list any real estate experience. Rather, it says that his "entire career of 24 years has	**Misleading (Fed. R. Evid. 403)** – Resume reflects experience "prior to joining Castle Arch," not 2012 (P.Apx, v2 at 422) and appears to be focused on employment opportunities in a

been spent involved and associated with the High Tech ERP Industry" and highlights his experience with software and telecommunications companies. Austin Resume, Trustee's Appendix of Evidence Volume 2 ("Apx. v.2"), Dkt. 221-2 at 426-27." Reply at 8.	"career…with the High Tech ERP Industry" and his experience tied thereto. (*Id*. at 426). **Rule of Completeness (Fed. R. Evid. 106)** – part of other correspondence related to post-bankruptcy management of the debtor required for context. (*see, e.g., id*. at 422-24; *see also id*. at 12 (Plaintiff declaring "April 12, 2012 email from J. Austin to A. Affleck [that] attaches Mr. Austin's resume"). In addition, such correspondence intentionally omits Austin's profile that provides (among other information): Mr. Austin, age 55, has over 30 years of experience in real estate, sales, marketing and business info-structure. Mr. Austin has been extremely successful in building and growing companies to high levels of performance through his strong ability to attract highly professional individuals, strategic partners and building relationships with successful entrepreneurs and enterprises worldwide. His industry experience ranges from: real estate, construction, financial organizations to high tech and services corporations worldwide. Mr. Austin most recent endeavors have been leading Castle Arch through the initial capitalization of Castle Arch, Castle Arch Opportunity Partners, specifically in the bulk REO/Foreclosure Residential Industry. Leading equity capital raises required for master community projects in Kingman, Arizona, Smyrna Tennessee, Tooele, Utah and Star Valley, Wyoming. Mr. Austin along with his experience in running organizations has been intimately involved with Castle Arch's Property

	Development Projects. Along with his responsibilities at Castle Arch, Mr. Austin is a successful Real Estate Investor including transactions in Limited Real Estate Partnerships, Multi-unit and Residential Properties and Bulk REO/foreclosure markets. Mr. Austin comes to the team with a vast array of experience and knowledge pertaining to professional sales and the real estate industry. *See, e.g. id.* at 424, 426 (BATES numbers skip two pages). **Not Authenticated (Fed. R. Evid. 901)** – Plaintiff has not produced evidence to support its genuineness, including the temporal characteristics of the resume. While the Tenth Circuit does "not require an affidavit to authenticate every document submitted for consideration at summary judgment," this neither satisfies any exceptions nor was it produced by Austin. *See Law Co. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1170 (10th Cir. 2009). **Hearsay (Fed. R. Evid. 801)** – not made or adopted by [redacted] (or Geringer); not authorized or in representative capacity by [redacted] and not made during alleged conspiracy. *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1249 (10th Cir. 2013) ("In order

	to qualify as an admission by a party-opponent, Plaintiffs must establish that it was made by the party or that the party adopted or authorized it. Fed.R.Evid. 801(d)(2).”).
4. “And at the time Austin joined CAREIC, he “was retired and investing [his] own money in real estate.” Email from Austin to Affleck (Apr. 12, 2012) (Apx. v.2 at 422).” Reply at 8.	**Irrelevant (Fed. R. Evid. 401)** – Austin’s status as retired while investing in real estate does not make the fact that “Austin had over 27 years of experience in real estate, sales, marketing and business infrastructure” more or less probable. **Rule of Completeness (Fed. R. Evid. 106)** – *see supra* Objection No. 3. **Not Authenticated (Fed. R. Evid. 901)** – *see supra* Objection No. 3. **Hearsay (Fed. R. Evid. 801)** – *see supra* Objection No. 3.
5. “He also admitted, that in 2005, he was still trying to learn real estate development. Email from J. Austin to R. Geringer (Aug. 29, 2005) (Apx. v.2 at 429).” Reply at 8.	**Irrelevant (Fed. R. Evid. 401)** – evidence, by its plain language, relates to a potential acquisition in Kingman in 2005 (*i.e.*, CAK) that is irrelevant to the securities offerings in question to the Motion (CAS, CAREIC Series E and CASDF). **Misleading (Fed. R. Evid. 403)** – Mischaracterizes evidence as Austin did not admit he “still trying to learn real estate

	development," but rather the email discusses various planning and zoning data points from the City of Kingman and presents analysis of acquisition terms (price per acre) and rationale thereof and that he was "trying hard to learn this stuff and any feedback positive or negative is welcome." **Rule of Completeness (Fed. R. Evid. 106)** – Email evidence does not include the "[a]attached…prospectus from the City of Kingman Planning and Zoning Department" or any further correspondence preceding or responding for necessary context. **Hearsay (Fed. R. Evid. 801)** – *see supra* Objection No. 3.
6. "Moreover, any implication that Austin had 27 years of real estate experience is directly contrary to Geringer and Child's sworn testimony. *See* March 1, 2013 Trial Transcript (Apx. v.1 at 938-39) (Child testifying that none of the other founders of Castle Arch had raw land development expertise)." Reply at 9.	**Irrelevant (Fed. R. Evid. 401)** – founders' specialized expertise/experience with "raw development expertise" does not make generalized "real estate experience" of Austin more or less probable. **Misleading (Fed. R. Evid. 403) –** No claim or declaration that "Austin had 27 years of real estate experience."

7. "In a May 12, 2008 letter CAREIC's auditors informed the audit committee and board of directors that the opposite was true and that it was a reportable condition. ("The Bouwhuis Letter") (Apx. v.2 at 525)." Reply at 9.	**Improper Opinion (Fed. R. Evid. 701, 702) without Foundation (Fed. R. Evid. 602)** – Bouwhuis, Morrill & Company has never been disclosed by Plaintiff as an expert, no qualifications have been presented and such is not "based on sufficient facts or data." See P.Apx. at 525 ("Our observations were formed as a by-product of our audit procedures which ***did not include a comprehensive review*** for the purpose of submitting detailed recommendations.") (emphasis added); *id*. ("This report is intended solely for the information and use of the Audit Committee, management, and others within the Company and is not intended to be and should not be used by anyone other than these specified parties."). **Hearsay (Fed. R. Evid. 801) –** out of court statement without authentication or other exception **Misleading/Prejudicial (Fed. R. Evid. 403)** – no evidence to demonstrate recipient of the letter and in fact, [redacted] declared he did not receive it. Further, this evidence of "undisputed fact"

	directly contradicts Plaintiff's evidence and alleged "undisputed fact" that the board had control and oversight of CAREIC.
8. "Austin complained that he and the rest of CAREIC's board was frustrated because Geringer failed to share material information. J. Austin Overview of Castle Arch ("Austin Memo") (Apx. v.2 at 440); *see also* Aug. 4, 2009 Interview of K. Cochran Vo. 2 at 9 ("Cochran Interview") (Apx. v.1 at 1327) (explaining that Geringer "did not want to share his information about any of the projects")." Reply at 9-10.	**Hearsay (Fed. R. Evid. 801)** – *see supra* Objection No. 3. Further, the Cochran is clearly not statements by an opposing party – Cochran is no longer a "party" in the case. **Lacks Foundation (Fed. R. 602)/Not Authenticated (Fed. R. Evid. 901)** – declaration supporting "Cochran Interview" does not satisfy the minimum standards to demonstrate admissibility. *See* Fed. R. Civ. P. 56(b)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").
9. "[redacted] was a promoter. *See* infra Part III.E.3." Reply at 11. "A "promoter" is "[a]ny person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the	**Misleading/Mischaracterizes Declaration (Fed. R. Evid. 403) –** Prior declaration states that "contrary to the allegations made in the Amended Complaint, **I do not consider myself a founder**. On information and belief, each of the founders received common units in CAREIC, which I did

business or enterprise of an issuer. . .” 17 C.F.R. § 230.405. [redacted] admits that he was involved at CAREIC’s founding by introducing Kirby Cochran to Robert Geringer, Declaration of [redacted] In Support Of Motion to Dismiss The Amended Complaint (“First [redacted] Decl.”), at ¶ 19, Dkt. 163-1.” Reply at 42 n. 11.	not receive and would have been entitled to as a founder of CAREIC. Rather, I purchased preferred units in CAREIC, similar to the alleged assigning investors.” Dkt. 163-1 at ¶ 19 (emphasis added); *see also* C.Apx. 21-23, 38. **Improper Legal Conclusion**
10. “[redacted] was far more than an assistant to Cochran. Through the end of 2008, [redacted] was one of CAREIC’s most highly paid individuals. In 2006, his salary was raised to over $20,000 per month. [redacted] Addendum (Apx. v.2 at 567). And between 2004 and 2008, only Geringer and Cochran received more compensation from CAREIC than [redacted]. *See* Decl. D. Ray Strong (“Strong Decl.”) at ¶ 20 (Apx. v.2 at 18-19).”	**Fraudulent Misrepresentation to Court (Fed. R. Evid. 403) –** Plaintiff and his counsel fraudulent misrepresent that “between 2004 and 2008, only Geringer and Cochran received more compensation from CAREIC than [redacted].” *See, e.g.* Reply at 55 n. 18 (“[redacted] is correct that the Trustee did not mention the salary of Andrew Feola.”); *see also* Reply at 20-21 (discussion of Feola contract and citation to Executed Feola Consulting Agreement (Dkt. 254-1 at 119-21) **Foundation (Fed. R. Evid. 602)/No Authentication (Fed. R. Evid. 901)** – Plaintiff has no “first hand knowledge” of the evidence, documents, or facts. *See* Fed. R. Civ. P. 56(b)(4) (“An affidavit or declaration used to support or

	oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). **Irrelevant, Immaterial (Fed. R. Evid. 401)/Prejudicial (Fed. R. Evid. 403)** – compensation has no or little probative value of control or role **Hearsay (Fed. R. Evid. 801)** – out of court statement without any exception
11. "[redacted] also regularly attended CAREIC board meetings and participated in management, and management decisions. See Email from B. Davidson to B. Warwick, K. Cochran, J. Austin, [redacted], R. Geringer, D. Child (Apx. v.2 at 458); Aug. 15, 2006 Board Meeting Minutes (Apx. v.2 at 416) (stating that [redacted] provided "a report on financial institutions"); Email from K. Cochran to B. Davidson, R. Geringer, [redacted], D. Child, B. Warwick, J. Austin (Apx. v.2 at 460); Email from [redacted] to R. Geringer (Apx. v.2 at 462); Email from [redacted]	**Misleading (Fed. R. Evid. 403)** – Plaintiff presents numerous emails that [redacted] was "copied" on, not demonstrative of attendance, participation or otherwise. The majority of the emails do not demonstrate any action, inaction, involvement, participation, thoughts, statements or otherwise by [redacted]. **Rule of Completeness (Fed. R. Evid. 106) –** Plaintiff presents numerous emails that [redacted] was "copied" on, not board meeting minutes associated that do not demonstrate attendance. **Foundation (Fed. R. Evid. 602)/No Authentication (Fed. R. Evid. 901)** – Plaintiff

[redacted] to B. Ventimiglia, K. Cochran (Apx. v.2 at 550); July 16-17, 2007, see Email from A. Jordan (Apx. v.2 at 464) (transportation information for Jackson Hole board meeting); Email from B. Davidson to K. Cochran, J. Austin, R. Geringer, D. Child, D. Hunt, [redacted], B. Warwick (Apx. v.2 at 466-67); Email from K. Cochran to B. Davidson, [redacted], D. Child, J. Howell, D. Hunt, B. Warwick (Apx. v.2 at 535); Feb. 19, 2008 Board Meeting Minutes (Apx. v.2 at 419-20) ([redacted]led discussion on secured development fund); Email from D. Child to K. Cochran, R. Geringer, J. Austin, [redacted], B. Warwick, D. Hunt (Apx. v.2 at 469-70); Email from H. Matheson to J. Austin, R. Geringer, K. Cochran, [redacted], D. Child, B. Warwick, B. Davidson (Apx. v.2 at 472); Email from W. Davidson to R. Geringer, K. Cochran, J. Austin, D. Hunt, [redacted], B. Warwick (Apx. v.2 at 474); Email from R. Geringer to K. Cochran, W. Davidson, J. Austin, [redacted], D. Child, D.	has no "first hand knowledge" of the evidence, documents, or facts. *See* Fed. R. Civ. P. 56(b)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). **Hearsay (Fed. R. Evid. 801)** – out of court statements, not by [redacted], with no other exception to hearsay.

Hunt, B. Warwick (Apx. v.2 at 516); Email [redacted] to K. Cochran (Apx. v.2 at 518-19)." Reply at 11-12.	
12. "[redacted] was deeply involved in CAREIC's securities offerings. He provided substantive comments on numerous offerings that exceed the scope of simply having a relationship with the printer. *See* Email from D. Hunt to K. Cochran, R. Geringer, [redacted], J. Howell, K. DeMordaunt (Apx. v.2 at 477) (discussing issues relating to the Kingman offering and that he had discussed many of the issues with [redacted] and that [redacted] "had very good, investor oriented input); Email from [redacted] to J. Austin, R. Geringer (Apx. v.2 at 479); Email from A. Davis to R. Tanimoto, S. Gough, C. Carillo, K. Tsukamoto, B. Grundy, C. Cushman (Apx. v.2 at 521); Email from [redacted] to R. Geringer, D. Hunt (Apx. v.2 at 481-83) (discussing comments to the CAS offering with [redacted] providing material suggestions); Email from J. Austin to [redacted]	**Misleading (Fed. R. Evid. 403)** – Plaintiff presents numerous emails that [redacted] was "copied" on, not demonstrative of participation or substantive involvement. The majority of the emails do not demonstrate any action, inaction, involvement, participation, thoughts, statements or otherwise by [redacted]. **Foundation (Fed. R. Evid. 602)/No Authentication (Fed. R. Evid. 901)** – Plaintiff has no "first hand knowledge" of the evidence, documents, or facts. *See* Fed. R. Civ. P. 56(b)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). **Hearsay (Fed. R. Evid. 801)** – out of court statements, not by [redacted], with no other exception to hearsay. *See also* [redacted]'s R.SUF No. 23-24 (Dkt. 251).

[redacted], D. Hunt, R. Geringer, D. Child, K. Cochran (Apx. v.2 at 486) ([redacted] commenting on structure of CAS offering); Email from [redacted] to R. Geringer (Apx. v.2 at 488-89). And [redacted] was the principal architect of CASDF. See Email from [redacted] to K. Cochran (Apx. v.2 at 552) ([redacted] pitching Cochran idea of "asset backed structured notes" which would provide "construction[] capital" to CAREIC"); Email from [redacted] to D. Hunt, D. Child, W. Davidson, J. Austin, K. Cochran, R. Geringer (Apx. v.2 at 491-93) (proposing that CAREIC create a development fund); Email from [redacted] to R. Geringer (Apx. v.2 at 495) (presenting Geringer with draft CASDF Executive Summary); CASDF Executive Summary (Apx. v.2 at 497-506); Email from [redacted] to K. Cochran (Apx. v.2 at 554-55) (requesting J. Howell to perform an internal analysis of CASDF); Email from [redacted] to K. Cochran, D. Child, J. Howell, R.	

Geringer, B. Davidson, B. Warwick, J. Austin (Apx. v.2 at 540) (officially announcing CASDF to CAREIC's board and attaching copies of the CASDF PPM, Executive Summary, and other documents)." Reply at 12-13.	
13. "[redacted]'s involvement with CASDF was not limited to providing the idea of a fund similar to the IMH structure to Mssrs. Hunt and Cochran. The paragraph of [redacted]'s declaration that Austin cites to support this fact states that [redacted] sent a copy of the IMH offering to Cochran and Hunt and that Hunt drafted the PPM. But it does not state that Case 2:14-cv-00788-TC-EJF Document 285 Filed 10/12/18 Page 28 of 103 [redacted]'s involvement with CASDF was limited to that. [redacted] Decl. at ¶ 18 (Dkt. 163-1 at 6). [redacted] pitched the idea for CASDF to Cochran (Apx. v.2 at 552), and then to Geringer, (Apx. v.2 at 491-93). He provided Geringer with a CASDF Executive Summary and asked to discuss it further,	**Misleading (Fed. R. Evid. 403)** – Plaintiff misleads content of declaration that states: Contrary to the allegations made by Plaintiff that I was "the designer of CASDF and its PPM," "determined the structure of this offering," and "personally drafted substantial portions of the offering documents," CASDF was modeled, structured and designed to replicate a nearly identical offering, the IMH Secured Loan Fund, LLC ("IMH"). I received a copy of the PPM of IMH through an acquaintance (not in the State of Utah), was aware through "word of mouth" and through former colleagues that IMH's structure was favorable to due diligence personnel in analysis at broker-dealers. I sent a copy a copy of IMH to both Kirby Cochran and David Hunt as a potential structure to consider in potential future offerings by CAREIC. David Hunt drafted the PPM, and based on my recollection, it is substantially similar in structure and characteristics to the its model as provided in the IMH PPM." *See* Dkt. 163-1 at ¶ 18. Evidence submitted to support Plaintiff's allegation that "[redacted] pitched the idea for CASDF…to Geringer"

(Apx. v.2 at 495), CASDF Executive Summary (Apx. v.2 at 497-506), and he asked another CAREIC employee to conduct an internal analysis of CASDF. (Apx. v.2 at 554-55). And [redacted] formally announced CASDF to the other members of CAREIC's board, telling them that it "feels like a birth announcement." See (Apx. v.2 at 540)." Reply at 17-18.	actually refutes the allegation. *See* C. Apx. 30-31 (Declaration ¶ 53). **Full and Complete (Fed. R. Evid. 106)** – if full and complete, would not demonstrate that [redacted] "pitched the idea for CASDF to Cochran;" such email attached three different public prospectuses sponsored and advised by UBS that had no relation to CASDF (similarly, the executive summaries were created, not [redacted]). **Irrelevant/Immaterial (Fed. R. Evid. 401)/Prejudicial** – internal analysis had nothing to do with the PPM of the CASDF, the offering to investors and not created by [redacted] **Foundation (Fed. R. Evid. 602)/Not Authenticated (Fed. R. Evid. 901)** – CASDF Executive Summary is not authenticated (created by Hunt, not [redacted]).
14. "But CAREIC's board of directors had significant powers as well, including power over CAREIC's president. *See* CAREIC Operating Agreement ¶ 3.16(a) (Apx. v.2 at	**Misleading (403)** – Cited evidence contradicts statement: The president shall be **subordinate to the chief executive officer of the Company**, if one has been appointed, and, **subject to the chief executive officer's direction**, shall have general charge of the business, affairs, and property of the Company and general supervision over its

84); Response to Geringer SOF ¶ 8, Part III.C.2.d. infra." Reply at 19.	officers, employees, and agents….The president shall not have power to bind or obligate the company without written authorization from the chief executive officer or majority consent from the board of directors. The president shall perform all duties normally incident to the office of president of a limited liability company, and shall exercise such other powers and perform such other duties as from time to time may be assigned to him or her by the chief executive officer. P. Apx. v2 at 84 (emphasis added). Further, this evidence of "undisputed fact" directly contradicts Plaintiff's evidence and alleged "undisputed fact" that the board **did not oversee Geringer (the President)**. **Irrelevant/Immaterial (401)** – board's power, subject to CEO, is irrelevant/immaterial; all power vested with CEO and requires CEO consent. **Disregarded Evidence (DUCivR 56-1(d))** – evidence does not dispute [redacted]'s undisputed fact and should be disregarded.
15. "The Bankruptcy Court was not asked to determine powers of CAREIC's board and its officers and those issues were not relevant to the issue before the Court and were not litigated." Reply at 19.	**Foundation (602)** – Plaintiff provides no evidence or the basis for such statement. Significantly, Plaintiff provides absolutely no citation to evidence in support of this statement,

	likely because it is not true, nor is it relevant or material to this motion. *See* DUCivR 56-1(b)(3). **Immaterial/Irrelevant (401)** – Bankruptcy Court made such conclusion of fact and not subject to dispute.
16. "The testimony that [redacted] cites to state that CAREIC's board was an advisory board is misleading. In testifying at a trial regarding a claim brought by Andrew Feola, Hunt was asked if CAREIC's board was "a governing board or an advisory board?" He responded that "[i]t was an advisory—I don't know how to construe it." May 23, 2011 Trial Transcript (Dkt. 254-3 at 163)." Reply at 20	**Misleading (Fed. R. Evid. 403)** – Plaintiff mischaracterizes the testimony by omission. *See* C.Apx. at 1121-1126.
17. "Moreover, Cochran is not the one who approved Feola's contract. Geringer approved Feola's contract unilaterally. It was not approved by Cochran or CAREIC's board or signed by Cochran. See Email from Hunt (Reply Apx. at 181) (explaining that Feola's "compensation was never agreed upon by the board and there was no resolution" and that the agreement "as never presented to the CEO	**Hearsay (801)** – these are out of court statements and no exception applies **Foundation (602)/Authenticity (901)** – Plaintiff has no first hand knowledge of the content or to declare to its authenticity.

for signature"); Executed Feola Consulting Agreement (Dkt. 254-1 at 119-21) (signed by Geringer, not Cochran); Email from D. Hunt (Reply Apx. at 178-79) (explaining circumstances relating to the Feola consulting agreement); Jan. 24, 2012 Notes from D. Hunt re Geringer (Dkt. 254-2 at 40) (stating that "Geringer signed the Feola contract without proven actual written authority")." Reply at 20-21.	
18. "The portion of the Amended Disclosure Statement that [redacted] cites states that "CAREIC was managed by Compensated Directors and Officers, comprised principally of Kirby D. Cochran . . . Robert D. Geringer . . . Douglas W. Child. . . and Jeff Austin. William Warwick and William H. Davidson, as well as several other Persons served as Directors of CAREIC at various times prior to the Petition Date." Amended Disclosure Statement at 7 (C.Apx.0367) (emphasis added). This list was clearly not an exhaustive list." Reply at 21.	**Misleading (403)** – Plaintiff mischaracterizes the evidence. Plaintiff completely ignores a material part of the evidence: the definition of "Insider Equity Interests" and the **exhaustive list** of "Insiders" holding such "Insider Equity Interests" on Exhibit D to the Disclosure Statement <u>that does not</u> include [redacted]. See C. Apx. at 366 ("Some of the Equity Securities issued by the Consolidated Legacy Debtors are "<u>Insider Equity Interests</u>" which are Equity Securities held by "**<u>Insiders</u>**" of the Debtor, including its former management.") (emphasis in original) (emphasis added).

19. "Moreover, it does not take into account that [redacted] occupied a similar position as to an officer or director. See Response to [redacted] SOF ¶ 4." Reply at 22.	**Foundation (602)** – Plaintiff provides no evidence or the basis for such statement (SOF ¶ 4 is only an improper conclusion of law without any evidentiary support). Significantly, Plaintiff provides absolutely no citation to evidence in support of this statement, likely because it is not true, nor is it relevant or material to this motion. *See* DUCivR 56-1(b)(3).
20. "As [redacted]'s cited authority explains, "regardless of position or status in the company" no "employees, consultants, senior management or board members" could send correspondences to interested investors or sign offerings without approval from Cochran or Hunt. Email from Cochran to [redacted], Austin, Carillo, and Grundy (Dkt. 254-1 at 144)." Reply at 22.	**Incomprehensible (403)** – Plaintiff appears to support [redacted]'s statement, not dispute it.
21. "None of the evidence cited shows any condescension. Instead, it reflects that Hunt valued [redacted]'s comments and wished for [redacted] to continue making such comments. See also Email from D. Hunt (Apx. v.2 at 477) (noting that Hunt "discussed several . . .	Misleading (403) – Plaintiff mischaracterizes the evidence through omission/ignoring material portions of the cited evidence. *See, e.g.* C. Apx. at 154 (Hunt's document entitled "**Problems with [redacted]**," wherein Hunt states that [redacted]: (i) provides little value; (ii) delegates

items . . . with Robert C. He, as usual, had very good investor oriented input.")." Reply at 23.	all responsibility; (iii) takes all credit; (iv) shifts all blame; (v) relies totally on politicking to get ahead; and (vi) questions his ethics based on the securities bar). Immaterial/Irrelevant (401) – Email cited has no relation to the securities at issue in matter (no probative value) and is not full and complete in itself.
22. "In addition to the August 15, 2006, October 22, 2007, and February 19, 2008 board meetings, [redacted] participated in board meetings on June 6, 2006, March 13, 2007, May 15, 2007, July 16-17, 2007, December 5, 2007, and June 17, 2008. See Response to Geringer SOF ¶ 7." Reply at 24.	**Misleading (403)** – email documentation does not demonstrate attendance; emails only show [redacted] was "copied" on emails that in some way related to, schedule or discussed a board meeting. **Hearsay (801), Foundation (602), Authentication (901)** – out of court statements in emails by other individuals that have not been adopted by [redacted] are hearsay, with no exceptions. **Disregarded Evidence (DUCivR 56-1(d))** – evidence does not dispute [redacted]'s undisputed fact and should be disregarded.
23. "[redacted] also had spending authority equivalent to Geringer, Austin, and Child.	**Full and Complete (106)** – document discusses an attachment that "give[s] the ability" without

Email from J. Howell to K. Cochran (Apx. v.2 at 456).” Reply at 25.	including the attachment; the attachment is necessary to understand what such spending authority was derived from, any limitations or even if such restricted spending authority was effectuated. **Hearsay (801), Foundation (602), Authentication (901)** – out of court statements in emails by other individuals that have not been adopted by [redacted] are hearsay, with no exceptions. Plaintiff has no first hand knowledge to admit such evidence or authenticate its veracity. **Immaterial/Irrelevant (401)/Prejudicial (403)** – speculative, spending power that may or may not have been effectuated has limited probative value of [redacted]’s actual control of CAREIC **Disregarded Evidence (DUCivR 56-1(d))** – evidence does not dispute [redacted]’s undisputed fact and should be disregarded.
24. “[redacted] cites to no evidence in the record demonstrating that he notified Cochran of his SEC ban. Moreover, Hunt’s opinion as to [redacted]’s innocence or whether his SEC	**Misleading (403)** – [redacted] provided evidence that Hunt was notified of SEC ban. *See* C.Apx.318-46.

ban must be disclosed to investors is immaterial. See infra Part III.C.1.e.ii." Reply at 26.	**Improper Legal Conclusion** – statement that Hunt's opinion is immaterial is neither a fact nor a correct statement of the law.
25. "In the 10-K, the auditors stated that in their opinion, the "financial statements were free of material misstatement." 2008 Form 10-K at 13 (Apx. v.1 at 179). It does not mention or opine on reportable conditions. Nevertheless, the auditor's opinion as to whether CAREIC's 2007 and 2008 financial statements accurately represent CAREIC's financial position is immaterial to the Motion. The Trustee's claim is based on misstatements and omissions in the PPMs, not the audited financial statements." Reply at 27.	**Incomprehensible (401/403)** – If the "reportable conditions" did not or could not result in material misstatements, then such statement (or evidence?) calls into question whether there was an omission or if it was material.
26. "The CEO certification is not a problem." Reply at 27.	**Incomprehensible (401/403)** – Is "not a problem" an objection, argument, legal conclusion, statement of fact?
27. "The Trustee pointed out that [redacted] was one of CAREIC's first employees and was around the Company at the critical time	**Disregarded Evidence (DUCivR 56-1(d))** – Improper attempt to incorporate allegations in Background section of Motion, not Plaintiff's Statement of Undisputed Facts and should be

of CAREIC's formation. See Motion at 21-22[.]" Reply at 54 (emphasis removed).	disregarded. DUCivR 56-1(b)(3) requires that the "moving party must cite with particularity the evidence in the Appendix of Evidence that supports each factual assertion." *See also* DUCivR 56-1(b)(2) ("Factual summaries in the background section need not be limited to undisputed facts and need not cite to evidentiary support.").
28. "Cochran and Geringer both confirm that [redacted] took steps in founding and organizing CAREIC. Cochran states that [redacted] provided the initial introduction to Geringer, because Cochran was "interested in starting a real estate company." Depo. of K. Cochran (Apx. v.1 at 276). Geringer's testimony is to the same effect. February 28, 2013 Trial Transcript (Apx. v. 1 at 714)." Reply at 55.	**Mischaracterizes Testimony/Misleading (403)** – Plaintiff mischaracterizes the evidence as neither testify that "[redacted] took steps in founding and organizing CAREIC," only that they Cochran and Geringer met through [redacted]'s initial introduction. **Irrelevant/Immaterial (401)** – [redacted]'s initial introduction does not make it more or less probable that he was a control person, that he was significantly involved in CAREIC, its operation or its securities offerings. **Disregarded Evidence (DUCivR 56-1(d))** – evidence does not dispute [redacted]'s undisputed fact and should be disregarded.

29. "[redacted]'s compensation is listed in the "Business Unit" labeled "Board." [Dkt. 254-1 at 85-89.] That is, [redacted] is grouped in financial documents with CAREIC's other board members and officers—Austin, Child, Cochran, Geringer, Davidson, and Warwick. Id." Reply at 56.	**Fed. R. Civ. P. 56(c)(2)** – cited spreadsheet cannot be presented in a form to establish the actual substance alleged, that [redacted] was a member of the board, purely pursuant to a spreadsheet of unknown origin. **Hearsay (801), Foundation (602) and Authentication (901) –** Plaintiff has no first hand knowledge to authenticate the document cited (spreadsheet of unknown origin) and it is hearsay without any applicable exceptions. **Disregarded Evidence (DUCivR 56-1(d)) –** evidence does not dispute [redacted]'s undisputed fact and should be disregarded. **Prejudicial (403)** – only one document, drafted or created by an unknown person, lists or otherwise includes [redacted] in any category of "board" and the prejudicial effect outweighs its probative value.
30. "The Trustee pointed out that throughout [redacted]'s time at CAREIC he was deeply involved in management. He participated in Board meetings. He attended management calls. He had significant project	**Disregarded Evidence (DUCivR 56-1(d)) –** Improper attempt to incorporate allegations in Background section of Motion, not Plaintiff's Statement of Undisputed Facts and should be disregarded. DUCivR 56-1(b)(3) requires that the

responsibilities. See Motion at 22-24… For instance, to show that [redacted] was involved in CAREIC management, the Trustee provided contemporaneous documents (board minutes and emails) showing that [redacted] attended nearly half of the board meetings held before he resigned from CAREIC (nine of the twenty meetings for which there are minutes). See Motion at 22." Reply at 56.	"moving party must cite with particularity the evidence in the Appendix of Evidence that supports each factual assertion." *See also* DUCivR 56-1(b)(2) ("Factual summaries in the background section need not be limited to undisputed facts and need not cite to evidentiary support.").
31. "The Board minutes often show substantive action by [redacted]. For instance, the August 15, 2006 minutes reflect that "[redacted] provided a report on financial institutions, including an update on FBR, GFA, the New York office and other money raising activities." Dkt. 254-1 at 55. The December 5, 2007 Board minutes reflect a discussion "on funding source development and planning, including the secured development fund proposed by [redacted], institutional rated bonds proposed by Robert Geringer, retail high yield bonds, and a distressed debt fund proposed by Kirby	**Mischaracterization/Misleading (403)** – [redacted] is mentioned in only three of the meetings (not "often" as approximately 10%). **Hearsay (801), Foundation (602) and Authentication (901) –** Plaintiff has no first hand knowledge to authenticate or verify [redacted]'s attendance, involvement or otherwise.

Cochran with a stated preferred return." Dkt. 254-1 at 73. The February 19, 2008 minutes reflect that "[redacted] led a discussion of the development fund, and projections." Dkt. 254-1 at 75." Reply at 57.	
32. [redacted] along with the disclosed Board members was invited to weigh in on important financial decisions of the Company. Email from W. Davidson to R. Geringer, K. Cochran, J. Austin, D. Hunt, [redacted], B. Warwick (Apx. v.2 at 474)." Reply at 58.	**Mischaracterization/Misleading (403)** – The cited evidence does not show that [redacted] was "invited to weigh in" or more importantly, that [redacted] did so "weigh in." **Hearsay (801), Foundation (602) and Authentication (901) –** Plaintiff has no first hand knowledge to authenticate, provide foundation or admit such hearsay.
33. "They also memorialize [redacted]'s substantive participation. *See* Email from D. Hunt to K. Cochran, R. Geringer, [redacted], J. Howell, H. Matheson, K. DeMordaunt regarding Kingman deal (Apx. v.2 at 477) ("There are several items that need to be tightened up in the Kingman deal. I discussed several of these items this morning with [redacted] He, as usual, had very good, investor oriented input")	**Irrelevant/Immaterial (401) –** cited evidence relates to Kingman, not the securities at issue in Plaintiff's Motion. **Mischaracterization/Misleading (403)** – evidence does not demonstrate "substantive participation." **Hearsay (801), Foundation (602) and Authentication (901) –** Plaintiff has no first hand knowledge to authenticate, provide foundation or admit such hearsay.

(emphasis added); Email from [redacted] to J. Austin, R. Geringer (Apx v.2 at 479) (providing comments on Austin's Kingman presentation materials)." Reply at 58-59.	
34. "Finally, the Trustee relied on contemporaneous documents (emails and other correspondence) to show that [redacted] substantively participated in the design, structure, and language of many of CARIEC's securities offerings, and that he was particularly deeply involved in the CASDF offering. *See* Motion at 24-26." Reply at 59 (emphasis omitted).	**Disregarded Evidence (DUCivR 56-1(d))** – Improper attempt to incorporate allegations in Background section of Motion, not Plaintiff's Statement of Undisputed Facts and should be disregarded. DUCivR 56-1(b)(3) requires that the "moving party must cite with particularity the evidence in the Appendix of Evidence that supports each factual assertion." *See also* DUCivR 56-1(b)(2) ("Factual summaries in the background section need not be limited to undisputed facts and need not cite to evidentiary support.").
35. [redacted]'s idea was the genesis of the CASDF offering. [redacted] Decl. ¶ 52 (Dkt. 254-1)." Rely at 60.	**Misleading (403) –** Plaintiff mischaracterizes the declaration, wherein [redacted] states: IMH was the result of the same request from Cochran. IMH appeared to fit the specifics identified by Cochran and I was through "word of mouth" and through former colleagues that IMH's structure was favorable to due diligence personnel in analysis at broker-dealers. At Cochran's request and through contacts, Geringer met with [] IMH and acquired a copy of the IMH

	PPM and offering documents. Geringer sent a copy of the IMH PPM to me. *See* Exhibit 21. Upon receipt, I sent a copy of the full IMH PPM to Cochran as well as to Hunt so that Hunt could use copy the features of the IMH PPM for what would eventually become CASDF. Thus, "genesis" was IMH, not [redacted].

EVIDENTIARY OBJECTIONS TO ADDITIONAL DOCUMENTS SUBMITTED BY PLAINTIFF

Document 1: Findings of Fact and Conclusions of Law in Support of Order Granting Chapter 11 Trustee's Motion to Substantively Consolidate CAOP Managers, LLC; Castle Arch Kingman, LLC; Castle Arch Smyrna, LLC; Castle Arch Secured Development Fund, LLC; Castle Arch Star Valley, LLC and Castle Arch Real Estate Investment Company, LLC, at ¶ 44. (Reply at 14-15, 21).	**Irrelevant/Immaterial (401)** – decision to substantively consolidate deals with treatment of creditors, not issues relevant to the Motion. **Misleading (403) –** Findings were not authored by the Bankruptcy Court, but rather by an uncontested motion by Plaintiff. Reply Apx. 5-7. Further, Plaintiff cites to the Bankruptcy Court findings as evidence that CAREIC never developed their projects (Reply at 14); however, CAREIC was not in the business of real estate development, but rather in the business of acquiring raw land to entitle and resell to developers (not the subsequent development stage).

Document 2: Order Granting Chapter 11 Trustee's Motion to Substantively Consolidate CAOP Managers, LLC, Castle Arch Kingman, LLC, Castle Arch Smyrna, LLC, Castle Arch Secured Development Fund, LLC, Castle Arch Star Valley, LLC, and Castle Arch Real Estate Investment Company, LLC. (Reply at 33-34).	**Incomprehensible, Irrelevant, Misleading (401, 403)** – CAREIC's decision to substantively consolidate deals with treatment of creditors and the post-petition oversight and maintenance of the bankruptcy estate, not its pre-petition activities. Thus, substantive consolidation has nothing to do with primary violators, alter ego or similar misleading characterizations by Plaintiff. **Disregarded Evidence (DUCivR 56-1(d))** – evidence does not dispute [redacted]'s undisputed fact and should be disregarded. **Improper Legal Conclusion**
Document 9: Email from J. Howell to D. Child dated June 5, 2008	[redacted] cannot locate a reference to Document 9 in the Reply and as such cannot determine the context, the evidentiary value or objections thereto.
Document 10: Email from D. Hunt to J. Austin dated March 27, 2012 (Reply at 21, 55)	*See* Objection No. 6.
Document 11: Email from K. Cochran to B. Warwick, B. Davidson, J. Austin, [redacted], and D. Child dated January 27, 2009.	[redacted] cannot locate a reference to Document 11 in the Reply and as such cannot determine the context, the evidentiary value or objections thereto.

CONCLUSION

WHEREFORE, [redacted] respectfully request this Court exclude from its consideration the objectionable evidence cited above.

EVANS & KOB, PC

DATED: November 7, 2018

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Counsel to Defendants [redacted]

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018, 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]

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