

[REDACTED]
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[REDACTED]
[REDACTED]

Brett G. Evans (Cal. Bar No. 244213)
EVANS & KOB, PC
155 N. Riverview Dr., Suite 304
Anaheim, CA 92808
Telephone: (657) 210-2114
Email: brett@eklawpc.com
Admitted Pro Hac Vice

Counsel to Defendants [REDACTED]

**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

**DEFENDANT [REDACTED]
SUPPLEMENTAL BRIEF IN
RESPONSE TO COURT'S ORDER
REGARDING SECTION 108(A)
BRIEFING**

Judge Tena Campbell

Magistrate Judge Evelyn J. Furse

Defendants [REDACTED] (collectively, [REDACTED]”) respectfully submit this brief in response to the Court’s Order for Additional Briefing, Docket 317.¹

INTRODUCTION

Plaintiff’s conclusory argument that the securities claims are not time-barred because Section 108(a) of the Bankruptcy Code extended the applicable statute of limitations by two years is not only unsupported by any legal authority, but also contradicted by every legal authority interpreting its application. Rather, the extension of time provisions of Section 108(a) **do not apply** to claims brought by a post-confirmation liquidating trust purporting to act on behalf of only some of the creditors (assigning investors), not that of the Consolidated CAREIC Debtors.

The problem is that the Plaintiffs in this action are standing in the shoes of one or more creditors, not the Debtors, and are asserting rights that these creditors may have pursuant state law. Section 108, however, only applies when a trustee is standing in the shoes of the debtor not one or more creditors.

The statute is explicit in that it applies to save and preserve a statute of limitations only where the cause of action sought to be asserted by the trustee is a claim that the debtor could have brought.

In re Everfresh Beverages, Inc., 238 B.R. 558, 572 (Bankr. S.D.N.Y. 1999) (citations omitted).

RELEVANT BACKGROUND AND FACTS

1. Securities fraud claims (“Investor Claims”) were **“formerly owned by investors”** that Plaintiff alleges that the Liquidating Trust now “owns each of the securities fraud claims”

¹ Pursuant to DUCivR 7-1(a)(4), [REDACTED] incorporates the arguments of the other defendants.

through default assignments (the “Assigning Investors”) through the Plan of Confirmation. MSJ at 11-12, 35.

2. Investor Claims are **not Bankruptcy Estate** claims of CAREIC, but claims “held by Persons in their own right as either creditors of or Investors in the Debtors” that are “may not necessarily be property of the Estates within the meaning of Section 541 of the Bankruptcy Code[.]” *See In re Castle Arch Real Estate Inv. Co., LLC*, No. 11-35082 (Bankr. D. Utah) (hereinafter, “CAREIC BK Case”), Plan of Liquidation, ECF 701 at 39.

3. Investor Claims were assigned to Liquidating Trust, not CAREIC Bankruptcy Estate. *Id.* (“assigned to the relevant Liquidation Trust[.]”).²

4. Assignment of Investor Claims occurred “upon confirmation of the Plan” after the plan was confirmed on June 7, 2013 (Confirmation Order) and nearly two years after CAREIC filed its bankruptcy petition on October 17, 2011. CAREIC BK Case, Plan of Liquidation, ECF 701 at 39.

5. Estate of the Debtor (CAREIC) was separately transferred to the Liquidating Trust as “Retained Claims and Actions” and never included the Investor Claims. The estate of CAREIC was consolidated with CAK, CAOP Managers, CAS, CASDF and CASV “as a result of the Consolidation Order” on February 8, 2013 to comprise “all assets of the Consolidated Legacy Debtors” that the bankruptcy “[t]rustee, the Debtors and/or the Estates has or may have as of the Confirmation Date...were transferred to the Liquidating Trust after its confirmation” as

² *See also* CAREIC BK Case, Transcript of Confirmation Hearing, ECF 1397 at 20 (trust assets include both “the retained claims and actions, including actions that belong to the estates” as well as those “assigned to the liquidating trusts by the investors.”); *id.* at 11 (“assignment of claims held by individual investors to liquidating trust,” correcting misrepresentation that such claims were assigned “to the estate”).

“Retained Claims and Actions” (not the separate and distinct Investor Claims that were separately assigned, not transferred to the Liquidating Trust). *See, e.g., id.* at 45-56.

6. Investor Claims are **solely for the benefit of the Assigning Investors with all distributions payable to such assignors**, not the Bankruptcy Estate, the entirety of its creditors, or other specific creditors of CAREIC. *See CAREIC BK Case*, Liquidating Trust Agreement, ECF 677-1 at 9 (“The ‘Individual Claims’ of holders of Preferred Legacy Interests that are assigned to the Legacy Trust under the Plan are held solely for the benefit of those Legacy Trust Beneficiaries making the assignment and net liquidation proceeds of such Individual Claims by the Legacy Trust will be disbursed to such Legacy Trust Beneficiaries.”).

7. Plaintiff is **not a fiduciary** to the Assigning Investors and he shall be immune from all liability from Assigning Investors (and all other Liquidating Trust Beneficiaries) except for claims arising out of recklessness, willful misconduct or gross negligence. *Id.* at 17-18; *see also* CAREIC BK Case, Order Confirming Plan, ECF 705 at 7.

ARGUMENT

I. SECTION 108(A) IS NOT APPLICABLE TO INVESTOR CLAIMS PURSUANT TO ITS PLAIN LANGUAGE

The plain language of Section 108, and cases thereon, demonstrate that its applicability is strictly limited to: (i) claims owned by the debtor, (ii) that were owned and existed by the debtor prior to filing the bankruptcy petition and (iii) brought by a bankruptcy trustee (or similar fiduciaries to the bankruptcy estate) on behalf of the estate (not a creditor). Section 108(a) provides, in relevant part:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which *the debtor may commence an action*, and such period has not expired *before the date of the*

filing of the petition, *the trustee may commence* such action only before the later of--

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief.

11 U.S.C. § 108(a) (emphasis added). The statute’s “clear purpose is to afford bankruptcy trustees extra time to assess and pursue potential assets of the debtor’s estate.” *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 519 (5th Cir. 2009); *see also Estate of Carr ex rel. Carr v. United States*, 482 F. Supp. 2d 842, 850 (W.D. Tex. 2007) (“The legislative history to section 108(a) indicates that it was intended to permit the Trustee, **when he steps into the debtor's shoes**, an extension of time to take action that is required to preserve the debtor's rights.”) (emphasis added) (citing H.R. REP. 95-595, 318, 1978 U.S.C.C.A.N. 5963, 6275).³

II. INVESTOR CLAIMS NEVER OWNED BY DEBTOR CAREIC

Bankruptcy Code s 108(a) only applies to pre-filing causes of action belonging to the debtor. “Bankruptcy Code § 108(a) refers to pre-filing causes of action belonging to the debtor and not to a cause of action created by the Bankruptcy Code.” *In re Downtown Inv. Club III*, 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988); *see also Matter of Princeton-New York Inv'rs, Inc.*, 219 B.R. 55, 58 (D.N.J. 1998) (“By its express language, § 108(a) only applies to causes of action that the debtor owned prior to filing the bankruptcy petition.”); *Everfresh Beverages, Inc. Charterhouse Group International, Inc.*, 238 B.R. 558, 572 (Bankr. S.D.N.Y. 1999) (“statute is explicit in that it applies...only where the cause of action sought to be asserted by the trustee is a claims that the debtor could have brought.”).

³ Section 108(a) “extends any statute of limitation for **commencing or continuing an action by the debtor** for two years after the date of the order for relief, unless it would expire later.” H.R. REP. 95-595, 318, 1978 U.S.C.C.A.N. 5963, 6275 (emphasis added).

Here, the Investor Claims **NEVER** belonged to the debtor (CAREIC), but rather were claims that belonged to third-party investors as of the date of filing the bankruptcy petition. *See* Facts at 1-3, 6.

III. INVESTOR CLAIMS COULD NOT BE OWNED BY DEBTOR AT TIME OF CAREIC'S BANKRUPTCY FILING

CAREIC, or the consolidated legacy debtors, could not have owned or maintained securities law claims “before the date of the filing of the petition” for bankruptcy on November 17, 2011. “[B]y its express terms, [Section 108(a)] applies only to actions which the debtor could commence pre-petition.” *In re Dry Wall Supply, Inc.*, 111 B.R. 933, 935 n. 2 (D. Colo. 1990); *see also Lehman Bros. Holdings v. Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1196 (W.D. Wash. 2011) (“courts have held that the extension of time to file suit provided by section 108(a)(2) applies only to claims that the debtor could have brought prior to or on the date of the bankruptcy filing.”). “By its terms § 108(a) only applies to extend time for actions which the debtor had on the date of filing the bankruptcy petition. **Causes of action unrelated to debtor claims acquired by the trustee postpetition are not protected by § 108.**” *In re Ward*, 42 B.R. 946, 950 (Bankr. M.D. Tenn. 1984) (emphasis added). In *Ward*, the court found that the bankruptcy trustee “acquired the lien by assignment...a judgment creditor of the debtor[, but] [s]ince the debtor never had any cause of action with respect to the lien, the trustee can not employ § 108(a) to extend the state limitation on enforcement.” *Id.*

Similarly, in *Sender*, the US District of Colorado found:

Bankruptcy law does not extend the statute of limitations on these [creditor's fraud and other] claims because [Section 108(a)] of the code only extends the filing period for claims that could have been brought by the debtor, in this case *Lifeblood*. Since *Sender's* claims on behalf of the Opt-in trust were assigned to him after the date of the bankruptcy petition, the extended statute of limitations does not apply to these claims...So the inquiry for these claims is whether they

accrued within the statutory period prior to Sender's filing his complaint" without any extension under the Bankruptcy Code.

Sender v. Mann, 423 F. Supp. 2d 1155, 1166 (D. Colo. 2006) (citations omitted). Thus, even assuming that the Investor Claims were transferred to estate of CAREIC before assignment, the Investor Claims were not assigned until after June 7, 2013, nearly two years after filing the bankruptcy petition. *See* Facts at 4.

IV. INVESTOR CLAIMS CANNOT BE PART OF THE DEBTOR'S ESTATE

Section 108(a) only applies to a trustee's (or DIP) commencement of "an action on behalf of the debtor's estate" as its "clear purpose is to afford bankruptcy trustees extra time to assess and pursue potential assets of the debtor's estate." *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 517–19 (5th Cir. 2009); *In re Radcliffe's Warehouse Sales, Inc.*, 31 B.R. 827, 830 (Bankr. W.D. Wash. 1983) (Section 108(a) "governs commencement of actions by the trustee on behalf of the estate." (emphasis added)).

The bankruptcy estate "includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' This includes causes of action, which are considered property of the bankruptcy estate 'if the claim existed at the commencement of the filing and the debtor could have asserted the claim on his own behalf under state law.'" *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014) (internal citations omitted). However, "[i]n order for a cause of action to be considered 'property of the estate,' the claim must be a 'general one, with no particularized injury arising from it.' On the other hand, if the claim is specific to the creditor, it is a 'personal' one and is a legal or equitable interest only of the creditor. A claim for an injury is personal to the creditor if other creditors generally have no interest in that claim." *Id.* (citations omitted).

Here, the Investor Claims are particular injuries of the Assigning Investor. *See* Facts at 1-3. In fact, the benefits and distributions are solely attributable to such Assigning Investors. *Id.* at 6.

V. PLAINTIFF IS NOT TRUSTEE (OR SIMILAR) THAT MAY UTILIZE SECTION 108

Although the statute specifically limits its applicability to claims that could be brought by a bankruptcy trustee, Section 108(a) has generally been applied equally to claims brought by a debtor in possession acting on behalf of all creditors of the estate.⁴ The courts, however, have been careful not to extend Section 108(a) to parties other than these defined fiduciaries of the estate, particularly in a post-confirmation context. For instance, the Fifth Circuit has ruled that Section 108(a) does not extend to claims brought by a creditor against a third-party surety, even though judgment and payment to the creditor would ultimately reduce claims against the bankruptcy debtor's estate. *American Bank v. C.I.T. Construction Inc. of Texas*, 944 F.2d 253 (5th Cir. 1991) (“*American*”). In *American*, the court found that “the purpose of section 108(a) dictates the conclusion that its rights extend only to trustees and debtors-in-possession, and not to creditors...because both trustees and debtors-in-possession have a fiduciary obligation to ‘**all the creditors of the bankrupt**’ [and] any ‘recoveries realized’ by a trustee or debtor-in-possession ‘**become part of the estate** for the benefit of the creditors.’ ” *Id.* at 260 (emphasis added) (citations omitted). The *American* court further noted that the creditor's position there, “resembles that of a post-confirmation debtor attempting to obtain the two year extension of section 108(a) to further its own interests” and that “[p]ost-confirmation debtors are not entitled

⁴ *See, e.g.*, 11 U.S.C. § 1107(a) (debtor in possession has rights of a trustee under the Bankruptcy Code).

to the tolling provision of section 108(a) because their interests diverge from those of creditors of the bankruptcy estate.” *Id.*

Further, in *Natco*, the court refused to extend the provisions of Section 108 to a post-confirmation reorganized debtor. The court noted that such debtors “are not subject to the control of the bankruptcy court and are not fiduciaries of their creditors.” *Natco Indust., Inc. v. Fed. Ins. Co.*, 69 B.R. 418, 419 (S.D.N.Y. 1987). In particular, the court focused on the fact that “while recoveries from **a lawsuit brought by a trustee or debtor in possession during the pendency of the bankruptcy proceeding** would accrue to the **benefit of the creditors as a whole**, recoveries from the instant action, brought by a post-confirmation debtor, would vest solely in the debtor.” *Id.* (emphasis added). The *Natco* court, thus, refused to extend the protections of Section 108(a) to a **post-confirmation plaintiff who did not represent the interests of all the creditors of the Debtor.**

Here, Plaintiff is not a fiduciary and represents the benefits and the distributions are to be provided to the Assigning Investors, not the entirety of the Liquidating Trust. *See* Facts at 6-7.

CONCLUSION

WHEREFORE, for the foregoing reasons, [REDACTED] respectfully requests that the Court find that Section 108(a) does not apply to the securities claims.

EVANS & KOB, PC

DATED: March 12, 2019



Brett G. Evans (Cal. Bar No. 244213)
155 N. Riverview Dr., Suite 304
Anaheim, CA 92808
Telephone: (657) 210-2114
Facsimile: (888) 956-7890
Email: brett@eklawpc.com

Admitted Pro Hac Vice

Counsel to Defendants [REDACTED]
[REDACTED]

-and-

[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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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:

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/s/ Brett G. Evans