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AUGUST B. LANDIS

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

| | | |
|-----------------------------------|---|--------------------------------|
| In re |) | Case No. BK-S-12-12349-MKN |
| |) | |
| American West Development, Inc. |) | Chapter 11 |
| |) | |
| |) | |
| Debtor. |) | |
| <hr/> | | |
| The Acting United States Trustee, |) | Adversary Proceeding No. _____ |
| Plaintiff |) | |
| vs. |) | |
| American West Development, Inc. |) | |
| |) | |
| Defendant |) | |
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**COMPLAINT SEEKING (I) TO REVOKE CONFIRMATION ORDER (ECF. NO. 853),¹
PURSUANT TO 11 U.S.C. § 1144 AND FED. R. BANKR. P. 7001(5), BECAUSE SUCH
ORDER WAS PROCURED BY FRAUD AND (II) TO REVOKE DEBTOR'S
DISCHARGE PURSUANT TO 11 U.S.C. § 1144(2)**

1. August B. Landis, the Acting United States Trustee for Region 17 (the “Acting United States Trustee” or “Plaintiff”), solely in his capacity as the Acting United States Trustee,

¹ Unless otherwise noted, all ECF references are to the chapter 11 bankruptcy case of American West Development, Inc., (Bankr. D. Nev.; March 1, 2012; Case No. 12-12349—MKN).

1 hereby files his Complaint against American West Development, Inc. (the “Debtor” or
2 “Defendant”), and alleges as follows:
3

4 **INTRODUCTION**

5 2. The root of Plaintiff’s Complaint is the commission of a fraud upon the Court by
6 Debtor and its director, president, secretary, treasurer, agent, statutory insider under 11 U.S.C. §
7 101(31), principal fact witness and officer of the Court, Robert M. Evans (“Evans”).
8

9 3. Under governing Circuit law, fraud upon the court has two branches: (1) an
10 attempt to subvert the integrity of the Court through an unconscionable scheme or plan designed
11 to influence the Court improperly in its decision-making process and (2) a fraud committed by an
12 officer of the Court that prevented the Court from performing in the usual manner its impartial
13 task of adjudging cases that are presented for adjudication.
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15 4. Establishment of either branch establishes that a fraud upon the Court has been
16 committed.

17 5. Fraud upon the Court, in turn, provides a basis for revoking an order of
18 confirmation pursuant to 11 U.S.C. § 1144 and revoking a reorganized debtor’s discharge
19 pursuant to 11 U.S.C. § 1144(2).
20

21 6. The *Order Confirming Debtor’s First Amended Chapter 11 Plan of*
22 *Reorganization (Dated October 15, 2012)* (the “Confirmation Order”), (ECF No. 853), should be
23 revoked pursuant to 11 U.S.C. § 1144 because the Confirmation Order was procured by fraud on
24 the part of Debtor and Evans within the meaning of 11 U.S.C. § 1144.
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1 7. Because the Confirmation Order was procured by fraud on the part of Debtor and
2 Evans, Debtor's *discharge* under 11 U.S.C. § 1141 of the Bankruptcy Code should also be
3 revoked pursuant to 11 U.S.C. § 1144(2).
4

5 **JURISDICTION AND VENUE**
6

7 8. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.
8 §§ 157(a) and 1334.

9 9. This adversary proceeding constitutes a core proceeding under 28 U.S.C. §§
10 157(b)(2)(A), (J) and (L).
11

12 10. Venue properly lies in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

13 11. The Acting United States Trustee has standing to bring the Complaint, prosecute
14 this adversary proceeding and qualifies as a party in interest within the meaning of 11 U.S.C. §
15 1144 pursuant to Section 307 of the Bankruptcy Code and governing law in this Circuit. *See*
16 *Stanley v. McCormick, Barstow, Sheppard, Wayte & Carruth (In re Donovan Corp.)*, 215 F.3d
17 929, 930 (9th Cir. 2000) (stating that "The United States Trustee may be heard on any issue in
18 any case or proceeding under title 11."); *see also In re South Beach Securities, Inc.*, 606 F.3d
19 366, 371-372 (7th Cir. 2010) (holding that the United States Trustee qualifies as a party in
20 interest for purposes of objecting to plan confirmation).
21

22 12. To the extent it applies and pursuant to the requirements of L.R. 7008.1(a), the
23 Acting United States Trustee consents to entry of final orders or judgment by the bankruptcy
24 judge if it is determined that the bankruptcy judge, absent consent of the parties, cannot enter
25 final orders or judgment consistent with Article III of the United States Constitution.
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1 **PARTIES**

2
3 13. August B. Landis is the Acting United States Trustee for Region 17 and brings
4 this Complaint solely in that capacity.

5 14. Upon information and belief, Debtor and Defendant American West
6 Development, Inc. is a corporation organized under the laws of the State of Nevada, with its
7 headquarters and principal place of business in Las Vegas, Nevada.

8
9 15. On March 1, 2012, Debtor filed with this Court a voluntary petition for relief
10 under chapter 11 of the Bankruptcy Code. (ECF No. 1).

11 **FACTUAL ALLEGATIONS**

12
13 *The involvement of Evans and Moore in the City Crossing, 1 LLC bankruptcy case*

14 16. Evans and James L. Moore (“Moore”), the court appointed future claims
15 representative in Debtor’s bankruptcy case, (ECF No. 189), were involved in the chapter 11
16 bankruptcy case of City Crossing 1, LLC (Bankr. D. Nev.; Case No. 08-15780-BAM).

17
18 17. According to a disclosure statement filed in that case, (Case No. 08-15780-BAM;
19 ECF No. 70), Evans received nearly \$10 million in net loan proceeds. (Case No. 08-15780-
20 BAM; ECF No. 70; pg. 31 of 139).

21
22 18. When asked about this particular transaction in the City Crossing 1, LLC
23 bankruptcy during a Rule 2004 examination conducted in the chapter 7 bankruptcy case of
24 William Walter Plise, Evans asserted his rights under the Fifth Amendment to the United States
25 Constitution against self-incrimination.

1 19. For his part, Moore filed a declaration in support of the chapter 11 debtor's
2 motion seeking a voluntary dismissal of the City Crossing 1, LLC bankruptcy. (Case No. 08-
3 15780-BAM; ECF No. 188).

4
5 20. Moore testified in his declaration that the voluntary dismissal of the City Crossing
6 1, LLC bankruptcy was being sought because the debtor in that case, according to Moore, was
7 administratively insolvent on a cash basis. (Case No. 08-15780-BAM; ECF No. 188; pg. 2 of 2;
8 ¶ 3).

9 *Invocation of the Fifth Amendment by both Stipp and Evans in the Plise Bankruptcy*

10
11 21. As reflected in the Rule 2004 examination transcripts of Mitchel D. Stipp
12 (“Stipp”), the attorney employed by Field Law, Ltd. (“Field Law”) that appeared to act most
13 often in Debtor’s bankruptcy case on behalf of the future claims representative Moore, and
14 Evans attached to the *Declaration of Victoria L. Nelson, Esq. in Connection with the Acting*
15 *United States Trustee’s Objection to (I) Debtor’s Motion for Final Decree [Docket No. 962] and*
16 *(II) Debtor’s Amended Motion for Final Decree to Close Case [Docket No. 963]* (the “Nelson
17 Declaration”), (ECF No. 988), both Stipp and Evans have asserted their rights under the Fifth
18 Amendment to the United States Constitution against self-incrimination on such questions as
19 whether these two gentlemen know one another, or whether they know Moore or Jon E. Field.
20

21 22. For instance, when Stipp was asked whether he knew either Moore or Jon Field,
22 Stipp asserted his right against self-incrimination under the Fifth Amendment to the United
23 States Constitution. Stipp also asserted his right against self-incrimination under the Fifth
24 Amendment to the United States Constitution when asked if he was familiar with a CPA by the
25 name of Robert Evans.
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1 23. Similarly, when Evans was asked whether he knew Moore, Evans asserted his
2 right against self-incrimination under the Fifth Amendment to the United States Constitution.
3 When Evans was asked whether he knew Stipp, Evans asserted his right against self-
4 incrimination under the Fifth Amendment to the United States Constitution.
5

6 24. Evans's invocation of his rights against self-incrimination under the Fifth
7 Amendment to the United States Constitution in the Plise Bankruptcy Case, (Bankr. D. Nev.;
8 Case No. 12-14724-LBR), stands in stark contrast to the material affirmative misrepresentations
9 and material misrepresentations by omission committed by Evans in connection with the
10 disclosure statement approval and plan confirmation processes in Debtor's bankruptcy case.
11 (ECF Nos. 56, 721 and 816).
12

13 *The repeated failures of Evans and Debtor to make full, candid and complete disclosure*
14 *of Evans's connections to, and business dealings with, Moore and Stipp*

15 25. It was clear from the outset of Debtor's case that Moore was intended by Debtor
16 to serve as the future claims representative in this case. (ECF No. 34; pg. 12 of 13).
17

18 26. Debtor and Evans failed to make full, candid and complete disclosure of Evans's
19 connections to, and dealings with, Stipp and Moore in both the motion seeking Moore's
20 appointment and Evan's declaration in support of Debtor's First-Day Motions. (ECF Nos. 34
21 and 56).
22

23 27. Moore's declaration of disinterestedness was filed by Debtor. (ECF No. 185).
24

25 28. In Moore's declaration of disinterestedness, Moore testified that he did not have
26 any connection with, among other persons or entities, Debtor's directors or officers. (ECF No.
27 185; pg. 2 of 5; ¶ 4).
28

1 29. Upon information and belief, Evans and Debtor knew that this statement was
2 false.

3 30. Evans, as an officer of the Court, was duty-bound to bring this matter to the
4 Court's attention and correct the record.
5

6 31. Evans's duty in this regard took on heightened significance because it was clear
7 from the outset of Debtor's bankruptcy case that Moore, as future claims representative, would
8 represent and stand in judgment for parties that were not before the court in the form of absent
9 class members. The Court's duty to scrutinize Moore's candidacy was, therefore, heightened, as
10 was the duty of Debtor and Evans to make full, candid and complete disclosure.
11

12 32. Instead, the record in Debtor's bankruptcy case does not disclose any effort on the
13 part of Evans to bring this matter to the Court's attention.

14 33. Indeed, when Moore later testified during cross examination at the January 15,
15 2013 confirmation hearing on Debtor's first amended plan of reorganization, (ECF Nos. 714 and
16 784), to the effect that he had known Evans for the better part of a generation, Debtor and Evans
17 once again did nothing to discharge their duties to make full, candid and complete disclosure
18 with respect to Evans's dealings with Moore and Stipp.
19

20 34. Indeed, making matters worse, Debtor, not Stipp nor Field Law, sought to
21 rehabilitate Moore's testimony on re-direct examination, including through the use of leading
22 questions, without the benefit of any additional disclosures on the part of Evans.
23

24 35. As an officer of the Court, Evans was under an affirmative obligation to make
25 full, candid and complete disclosure of his connections to, and dealings with, Moore and Stipp.
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1 36. Instead, Evans and Debtor did nothing to correct the record and discharge their
2 duties in this regard.

3 37. In its order appointing Moore as future claims representative, the Court made
4 clear that Moore's participation in Debtor's bankruptcy case would be subject to the
5 requirements of 11 U.S.C. §§ 327-331 and Federal Rules of Bankruptcy Procedure 2014-2017.
6 (ECF No. 189; pg. 3 of 4).

7 38. The Court also subjected Moore to the express condition precedent to his service
8 as future claims representative that Moore file a statement of disinterestedness containing the
9 disclosures required by Federal Rule of Bankruptcy Procedure 2014. (ECF No. 189; pg. 3 of 4).

10 39. The Court also employed a negative notice procedure whereby Moore's
11 appointment would be approved only upon the expiration of a notice period during which parties
12 in interest could review Moore's statement of disinterestedness under Federal Rule of
13 Bankruptcy Procedure 2014 and file any objections they may have. (ECF No. 189; pg. 3 of 4).

14 40. The moment the Court entered this order, Debtor was under an affirmative
15 obligation as the applicant seeking Moore's appointment, (ECF Nos. 34 and 56), and to disclose
16 all connection with persons and entities covered by Bankruptcy Rule 2014(a), including Evans's
17 connections to, and dealings with, Moore and Stipp.

18 41. Again, both Debtor and Evans failed to make full, candid and complete
19 disclosures in this regard.

20 42. Debtor's master disclosure statement accompanying Debtor's first amended
21 chapter 11 plan of reorganization, also failed to make full, candid and complete disclosure of
22 Evans's connections to Moore and Stipp. (ECF No. 721).

1 43. It was imperative that Debtor and Evans disclose Evans's connections with Moore
2 and Stipp in this iteration of Debtor's disclosure statement. (ECF No. 721).

3 44. At a minimum, as part of the requirement under 11 U.S.C. §§ 1125(a) and
4 1129(a)(2), holders of future construction defect claims needed to know about Evans's
5 connections to, and dealing with, Moore and Stipp in order to determine whether (1) to vote for
6 or against Debtor's first amended plan of reorganization, (ECF Nos. 714 and 784), and (2)
7 whether to make a so-called "Cash Out Election" or to have their claims administered by the
8 construction defect trust established pursuant to the plan.
9

10 45. In addition, it was imperative for Debtor and Evans to make full, candid and
11 complete disclosure of Evans's connections to Moore and Stipp because Debtor sought entry of
12 an order authorizing Moore to release the direct claims of future construction defect claimants
13 against non-debtor third parties. Such authority, in turn, was central to the Debtor's theory of
14 consent under which such releases were later justified by Debtor at the January 15, 2013 plan
15 confirmation hearing.
16

17 46. In addition, Evans's connections to, and dealings with, Stipp and Moore needed to
18 be disclosed in order for the Court to assess Debtor's good faith in proposing its plan of
19 reorganization as required by 11 U.S.C. § 1129(a)(3).
20

21 47. Exhibit I to Debtor's disclosure statement, (ECF No. 721), purported to disclose
22 the affiliations of individuals referenced in 11 U.S.C. § 1129(a)(5)(A)(i). (ECF No. 721; pg. 8 of
23 280).
24

1 48. According to Exhibit I to Debtor’s disclosure statement, Evans would serve as
2 President, Secretary, Treasurer and Director of American West Development, Inc. as reorganized
3 debtor. (ECF No. 721-1; pg. 440 of 447).

4
5 49. Moore would serve as trustee of the newly created construction defect trust.

6 50. The failure on the part of Evans and Debtor to make full, candid and complete
7 disclosure of Evans’s connections to, and dealings with, Moore and Stipp deprived creditors,
8 parties in interest and, most importantly, the Court of material information relevant to the Court’s
9 determination under 11 U.S.C. § 1129(a)(5)(A)(ii) whether the continued service of Evans and
10 Moore as contemplated by Exhibit I to Debtor’s disclosure statement was consistent with the
11 interests of creditors, equity security holders and public policy.

12
13 *Evans’s affirmative misrepresentations and misrepresentations by omission as to*
14 *material facts in his declaration in support of confirmation of Debtor’s first amended*
15 *chapter 11 plan of reorganization. (ECF No. 816).*

16 51. Evans filed a declaration in support of Debtor’s first amended chapter 11 plan of
17 reorganization.

18 52. Evans made the affirmative misrepresentation that the non-debtor third party
19 releases had been negotiated by Debtor and Moore “in good faith and at arms’-length.” (ECF
20 No. 816; pg. 3 of 7; ¶ 7). From an objective standpoint, this affirmative misrepresentation
21 concerned a material fact. In addition, Evans’s affirmative misrepresentation was made with
22 actual fraudulent intent because (1) Evans knew that this statement was false based upon his
23 connections to, and dealings with, Moore that, according to Moore, spanned the better part of a
24 generation, (2) Evans was under an affirmative duty to disclose this information to the court as
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1 part of the disclosure statement approval and plan confirmation processes, and (3) Evans failed
2 to do so.

3 53. As it pertained to Moore, Evans also made a material affirmative
4 misrepresentation when he stated that the construction defect trust would be administered by
5 well-qualified fiduciaries. (ECF No. 816; pg. 6 of 7; ¶ 22).

7 54. The Court has since entered an order to the effect that Moore's appointment
8 should not have been approved in the first place. (ECF No. 1012; pg. 4 of 6; lines 14-16).

9 55. Evans also made a material affirmative misrepresentation when he stated that
10 Debtor's good faith was evidenced by its request for the appointment of Moore as future claims
11 representative. (ECF No. 816; pg. 3 of 7; ¶ 8).

13 56. In addition to making these material affirmative misrepresentations, Evans also
14 misrepresented material facts by omission. Once again, Evans Failed to make full, candid and
15 complete disclosure of his connections to, and dealings with, Stipp and Moore. (ECF No. 816).

17 *Fraud upon the Court Committed by Evans as Officer of the Court that prevented the*
18 *Court from performing in the usual manner its impartial task of adjudging cases that*
19 *are presented for adjudication, including whether Debtor's plan satisfied the*
20 *requirements of 11 U.S.C. § 1129(a)*

21 57. The willful, intentional and deliberate misconduct, affirmative misrepresentations,
22 misrepresentations by omission and fraud upon the Court perpetrated by Evans, standing alone,
23 are sufficient to revoke the Confirmation Order under 11 U.S.C. § 1144 and revoke Debtor's
24 discharge under 11 U.S.C. § 1144(2) because they establish that (1) a fraud upon the Court was
25 committed by Evans as an officer of the Court that (2) prevented the Court from performing in
26 the usual manner its impartial task of adjudging cases that are presented for adjudication.

1 amended chapter 11 plan of reorganization met the requirements of 11 U.S.C. § 1129(a) and
2 whether Debtor, as plan proponent, met the requirements of 11 U.S.C. § 1129(a)(2).

3 64. Evans, therefore, perpetrated a fraud in connection with confirmation of Debtor's
4 first amended plan of reorganization and entry of the Confirmation Order through affirmative
5 misrepresentations and misrepresentations by omission of material facts in the disclosure and
6 confirmation processes.

7
8 65. Evans's affirmative misrepresentations and misrepresentations by omission of
9 material facts in the disclosure and confirmation process impaired the Court's ability to perform
10 its impartial task of adjudging cases by making an independent determination whether the
11 requirements of 11 U.S.C. § 1129(a) had been satisfied.

12
13 66. Evans made the affirmative misrepresentations and misrepresentations by
14 omission of material facts in the disclosure and confirmation process with actual fraudulent
15 intent because he had knowledge, including reckless disregard, of the falsity of his affirmative
16 misrepresentations, and Evans's misrepresentations by omission were intentional.

17
18 67. These acts by Evans impeded the Court's ability to discharge its independent
19 duties with respect to (1) scrutinizing Moore's fitness to serve as future claims representative,
20 stand in judgment and speak for, otherwise represent and, most importantly for plan confirmation
21 purposes, release the direct claims of absent class members of the class of future construction
22 defect claimants in this case against non-debtor third parties and (2) making an independent
23 determination regarding Debtor's compliance, as plan proponent, with 11 U.S.C. § 1129(a)(2)
24 and (3) whether Debtor's first amended chapter 11 plan or reorganization otherwise satisfied the
25 requirements of 11 U.S.C. § 1129(a).
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1 68. All of Evans's acts in this case are, in addition, properly imputed to Debtor
2 because of, among other reasons, the principal-agent relationship between Debtor and Evans.

3 69. Upon information and belief, in addition to having Evans's acts imputed to
4 Debtor, the Debtor either knew or should have known of Evans's misconduct.
5

6 70. Indeed, the record of this case discloses that Debtor has undertaken affirmative
7 steps that would have had the effect of shielding Evans's misconduct from this Court's scrutiny.
8 For example, despite having actual knowledge of Evans's invocation of his rights under the Fifth
9 Amendment to the United States Constitution in the chapter 7 bankruptcy case of William Walter
10 Plise (Bankr. D. Nev.; Apr. 23, 2012; Case No. 12-14724—LBR), on such questions as whether
11 he even knows Moore or Stipp, Debtor filed a motion to close its bankruptcy case without
12 bringing this fact to the Court's attention.
13

14 71. Had Debtor and Evans made the full, candid and complete disclosures required of
15 them, the Court would not have confirmed Debtor's first amended plan of reorganization and
16 entered the Confirmation Order because Debtor would not have been able to carry its burden of
17 establishing that its first amended plan of reorganization satisfied the requirements of 11 U.S.C.
18 §§ 1129(a)(1), 1129(a)(2), 1129(a)(3) and 1129(a)(5).
19

20 72. Judged from an objective standard, Plaintiff contends that Evans's knowledge
21 regarding his connections to, and dealing with, Moore and Stipp were material to Court's
22 consideration of whether the alleged consent given by Moore was valid and formed part of the
23 body of reasonably adequate information under 11 U.S.C. § 1125(a) that creditors would want to
24 know in order to make an informed judgment about the merits of Debtor's first amended plan of
25 reorganization.
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1 73. Evans's knowledge regarding his connections to, and dealings with, Moore and
2 Stipp were also material to the Court's ability to make an independent determination whether
3 Debtor's first amended plan of reorganization satisfied the requirements of 11 U.S.C. §§
4 1129(a)(1), 1129(a)(2), 1129(a)(3) and 1129(a)(5).
5

6 74. For these reasons, the Confirmation Order should be revoked under 11 U.S.C. §
7 1144, and Debtor's discharge should be revoked under 11 U.S.C. § 1144(2).
8

9 **COUNT 1**

10 **REVOCATION OF (1) CONFIRMATION ORDER (ECF NO. 853) AND DEBTOR'S**
11 **DISCHARGE PURSUANT TO 11 U.S.C. §§ 1144 AND 1144(2)**
12

13 75. Paragraphs 1 through 74 of this Complaint are incorporated into this paragraph by
14 this reference in their entirety.
15

16 76. Had Debtor and Evans made full, candid and complete disclosure of Evans's
17 connections to, and dealings with, Moore and Stipp, Debtor's first amended plan of
18 reorganization, (ECF Nos. 714 and 784), would not have satisfied the requirements of 11 U.S.C.
19 §§ 1129(a)(1), (a)(2), (a)(3) and (a)(5).
20

21 *11 U.S.C. §§ 524(e) and 1129(a)(1)*

22 77. Debtor's first amended plan of reorganization included provisions that purported
23 to release direct claims of creditors, including the creditor constituency purportedly represented
24 by Moore, Stipp and Field Law, against non-debtor third parties.
25

26 78. Debtor's justification for such releases was that they did not run afoul of
27 governing Circuit law that bars non-debtor third party releases in chapter 11 plans, pursuant to 11
28

1 U.S.C. §§ 524(e) and 1129(a)(1), because the releases were alleged by Debtor to be the product
2 of consent validly given by each of the respective parties to such releases. Debtor's justification
3 included Moore's agreement to release the direct claims of the constituency he purportedly
4 represented throughout Debtor's bankruptcy case. Indeed, it was Debtor through its solicitation
5 procedures motion that sought to empower Moore to release the direct claims of future
6 construction defect claimants in this case.
7

8 79. Given Debtor's justification of consent as the basis for the non-debtor third party
9 releases included in Debtor's amended chapter 11 plan of reorganization, Plaintiff contends that
10 Debtor and Evans were under an affirmative legal duty and were otherwise obliged to disclose
11 the connections and business dealings between Evans, Moore and Stipp. Such information was
12 material to the Court's consideration of whether the alleged consent was valid in the first place.
13 Neither Debtor nor Evans disclosed this information to the Court in a timely manner.
14

15 80. Plaintiff contends that Moore's alleged consent to release the direct claims of
16 holders of future construction defect claims against non-debtor third parties as part of Debtor's
17 first amended plan of reorganization was not valid because the Court never would have approved
18 Moore to serve as the future claims representative in this case had Debtor and Evans made full,
19 candid and complete disclosure of Evans's connections to, and business dealings with, Moore
20 and Stipp, let alone authorized him to release the direct claims of future construction defect
21 claimants.
22

23 81. Debtor and Evans had personal knowledge and were in possession of material
24 information related to Debtor's proffered justification of consent for the non-debtor third party
25 releases included in Debtor's first amended plan of reorganization that would have influenced
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1 the Court's consideration and determination of the plan's merits under 11 U.S.C. §§ 524(e) and
2 1129(a)(1) had it been timely disclosed.

3 82. Judged from an objective standard, Plaintiff contends that Evans's knowledge
4 regarding his connections to, and dealing with, Moore and Stipp were material to Court's
5 consideration of whether the alleged consent given by Moore was valid and formed part of the
6 body of reasonably adequate information under 11 U.S.C. § 1125(a) that creditors would want to
7 know in order to make an informed judgment about the merits of Debtor's first amended plan of
8 reorganization.
9

10 83. Debtor and Evans acted with actual fraudulent intent in terms of representing that
11 the release of non-debtor third parties granted by Moore was the product of valid consent.
12

13 *11 U.S.C. § 1129(a)(2) and Debtor's materially defective disclosure statement*

14 84. By failing to make full, candid and complete disclosure of Evans's connections to,
15 and dealings with, Moore and Stipp, Debtor's disclosure statement was materially defective.
16

17 85. Evans signed the disclosure statement. (ECF No. 721).

18 86. As an officer of the Court, he was under an affirmative duty to disclose his
19 connections to, and dealings with, Moore and Stipp. Such information was material to creditors,
20 other parties in interest and the Court.

21 87. At a minimum, holders of future construction defect claims need to be made
22 aware of these connection as part of Debtor's duty to provide adequate information under 11
23 U.S.C. § 1125(a) in order for such claim holders to make an informed judgment regarding
24 whether to vote for or against the plan, as well as whether to make the cash out election.
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1 88. Debtor and Evans made these material misrepresentations by omission with actual
2 fraudulent intent because Evans had knowledge of his connections to, and dealing with, Moore
3 and Stipp, Evans was under an affirmative legal duty to disclose such connections, and Evans
4 failed to do so.
5

6 89. Therefore, had the Court had the benefit of this information at the time of the
7 confirmation hearing on January 15, 2013, Plaintiff respectfully submits that Debtor would not
8 have been able to carry its burden of establishing that Debtor, as plan proponent, satisfied the
9 requirements of 11 U.S.C. § 1129(a)(2).
10

11 *11 U.S.C. §§ 1129(a)(3) and 1129(a)(5)*

12 90. Evans's failure to disclose his connections to and dealings with Moore and Stipp
13 also constitutes a material misrepresentation by omission in connection with Debtor's burden of
14 establishing that Debtor's plan was proposed in good faith as required by 11 U.S.C. § 1129(a)(3)
15 and the continued service of Moore and Evans in their contemplated capacities satisfied the
16 requirements of 11 U.S.C. § 1129(a)(5)(A)(ii).
17

18 91. Evans expressly linked Debtor's good faith to seeking Moore's appointment as
19 future claims representative. Given (1) Evans's knowledge of his connections to Moore and (2)
20 the Court's entry of an order indicating that Moore's appointment should not have been
21 approved, (ECF No. 1012), Plaintiff contends that the Court would not have been able to make a
22 finding of good faith under 11 U.S.C. § 1129(a)(3) had Evans and Debtor made full, candid and
23 complete disclosure.
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1 92. Similarly, Debtor would not have been able to carry its burden of establishing that
2 the continued service of Evans and Moore would have satisfied the requirements of 11 U.S.C. §
3 1129(a)(5)(A)(ii).

4 93. Evans and Debtor acted with fraudulent intent because they knew of Evans's
5 connections to Moore and Stipp, they were under an affirmative duty to disclose such
6 connections and they failed to do so.

7 94. The Court entered the Confirmation Order and found that Debtor's plan satisfied
8 the requirements of 11 U.S.C. § 1129(a) due to the material affirmative misrepresentations and
9 material misrepresentations by omission on the part of Evans.

10 95. But for these misrepresentations, Debtor's plan would not have been confirmed.

11 96. Therefore, Plaintiff respectfully requests entry of an order and judgment revoking
12 the Confirmation Order, pursuant to 11 U.S.C. § 1144 and revoking Debtor's discharge pursuant
13 to 11 U.S.C. § 1144(2).

14 97. **WHEREFORE**, the Acting United States Trustee respectfully requests that the
15 Court enter an order and judgment (1) revoking the Confirmation Order (ECF No. 853) pursuant
16 to 11 U.S.C. § 1144, (2) revoking Debtor's discharge pursuant to 11 U.S.C. § 1144(2), and (3)
17 for such other and further relief as the Court deems to be justified under the circumstances.

18 Dated: August 12, 2013

19 Respectfully submitted,

20 August B. Landis
21 The Acting United States Trustee

22 By: /s/ Athanasios E. Agelakopoulos
23 Athanasios E. Agelakopoulos
24 Attorney for the Acting United States Trustee