

Heidi G. Goebel, 10343  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
Telephone: (801) 323-5000  
Facsimile: (801) 355-3472  
Email: [heidi.goebel@chrisjen.com](mailto:heidi.goebel@chrisjen.com)

Ommid C. Farashahi (*admitted pro hac vice*)  
Jason P. Minkin (*admitted pro hac vice*)  
Brian J. Watson (*admitted pro hac vice*)  
BATESCAREY LLP  
191 N. Wacker, Suite 2400  
Chicago, IL 60606  
Telephone: (312) 762-3100  
Facsimile: (312) 762-3200  
Email: [ofarashahi@batescarey.com](mailto:ofarashahi@batescarey.com)  
[jminkin@batescarey.com](mailto:jminkin@batescarey.com)  
[bwatson@batescarey.com](mailto:bwatson@batescarey.com)

*Attorneys for Plaintiff*  
*AXIS Surplus Insurance Company*

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

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AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

v.

ROBERT D. GERINGER; KIRBY D.  
COCHRAN; ROBERT CLAWSON;  
DOUGLAS W. CHILD; JEFF AUSTIN;  
WILLIAM H. DAVIDSON; WILLIAM J.  
WARWICK; WILLIAM GRUNDY; and  
KEITH GREEN,

Defendants.

**AXIS' OPPOSITION TO THE  
TRUSTEE'S MOTION TO INTERVENE**

Civil Case No. 2:14-cv-000244-DAK

Judge Dale A. Kimball

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Plaintiff, AXIS Surplus Insurance Company (“AXIS”), by and through its undersigned counsel, submits the following memorandum in opposition to the Motion to Intervene (Dkt. No. 36) filed by D. Ray Strong (the “Trustee”), as the post-confirmation estate representative of the Castle Arch Real Estate Investment Company, LLC, CAOP Managers, LLC, Castle Arch Kingman, LLC, Castle Arch Secured Development Fund, LLC, Castle Arch Smyrna, LLC, Castle Arch Opportunity Partners I, LLC and Castle Arch Opportunity Partners II, LLC, and the Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, and the Castle Arch Opportunity Partners I, LLC Liquidating Trust, and the Castle Arch Opportunity Partners II, LLC Liquidating Trust.

### **INTRODUCTION**

The Trustee filed a Motion to Intervene in this interpleader action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure (the “Motion”). The Trustee seeks to collect \$200,000 from the interpleaded policy proceeds by asserting the rights of Defendant William Warwick, which the Trustee claims were assigned to him pursuant to a settlement agreement. Under Rule 24(a)(2), a party can intervene only if he has a “direct, substantial, and legally protectable interest” interest in the property that is the subject of the action which cannot be adequately represented by the existing parties. The assignment from Mr. Warwick to the Trustee, however, is conditioned on Bankruptcy Court approval and the entry of an order in the Bankruptcy Court barring certain claims against Mr. Warwick – events which may never happen. Therefore, the Trustee does not have any present interest in the policy or the policy proceeds, much less a direct, substantial or legally protectable interest in the interpleaded funds.

Moreover, Mr. Warwick will adequately represent the purported interest the Trustee seeks to assert via assignment because Mr. Warwick's interest in the policy proceeds remains unless or until the condition in the settlement agreement occurs. Accordingly, the Trustee has no basis to intervene in this interpleader. The Trustee's Motion should be denied.

### **RELEVANT FACTS**

On April 2, 2014, AXIS filed the instant interpleader to resolve competing claims to the remaining proceeds of AXIS Policy No. EAN756858/01/2010 (the "Policy") asserted by the nine Defendants named in this action.<sup>1</sup> The Defendants, as former directors, officers, or employees of Castle Arch Real Estate Investment Company, LLC, are Insureds under the Policy.<sup>2</sup> The Trustee is not an Insured under the Policy and has no direct interest in the Policy proceeds.<sup>3</sup> On May 6, 2014, the Trustee executed a purported settlement agreement with Defendant William Warwick (the "Settlement Agreement") pursuant to which Mr. Warwick assigned his rights under the Policy to the Trustee.<sup>4</sup> The Settlement Agreement, however, is conditioned upon approval by the U.S. Bankruptcy Court for the District of Utah pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and the entry of a bar order to prevent certain claims from being asserted against Mr. Warwick.<sup>5</sup> On May 30, 2014, the Trustee filed a motion to approve the Settlement Agreement under Rule 9019.<sup>6</sup> Pursuant to a Notice of Opportunity for Hearing, parties have

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<sup>1</sup> Dkt. No. 1.

<sup>2</sup> Dkt. No. 36, Ex. A to Strong Declaration, Section III at p. 4 and Endorsement No. 17 at p. 3.

<sup>3</sup> *Id.*, Endorsement No. 17 at p.3; Bankruptcy Case No. 11-35082, Dkt. No. 883.

<sup>4</sup> Dkt. No.36, Strong Declaration at ¶ 8; Settlement Agreement ¶ 1.b.

<sup>5</sup> Settlement Agreement ¶ 2.

<sup>6</sup> Bankruptcy Case No. 11-35082, Dkt. No. 925.

until June 20, 2014 to object to the Settlement Agreement, and the Bankruptcy Court will address the Settlement Agreement at a hearing on June 30, 2014.<sup>7</sup> As such, the Settlement Agreement has not been approved (and may never be approved) by the Bankruptcy Court and the Court has not entered (and may never enter) the requested bar order.

On June 4, 2014, the Trustee filed his Motion to Intervene in order to assert the rights of Mr. Warwick under the Policy. On the same day, the Trustee and Mr. Warwick also filed a Joint Motion for Summary Judgment seeking \$200,000 in policy proceeds pursuant to the Settlement Agreement.<sup>8</sup>

#### ARGUMENT

The Trustee's Motion is brought pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Rule 24(a)(2) provides:

- (a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
  - (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Thus, under Rule 24(a)(2), the moving party must demonstrate: (1) that the motion was timely; (2) that he has an interest relating to the property or transaction that is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the his ability to protect his interest; and (4) that his interest is not adequately represented by existing parties.

*City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996);

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<sup>7</sup> Bankruptcy Case No. 11-35082, Dkt. No. 930.

<sup>8</sup> Dkt. No. 37.

*San Juan County, Utah v. U.S.*, 503 F.3d 1163 (10th Cir. 2007). Further, under Rule 24(c), a motion to intervene must be “accompanied by a pleading that sets out the claim or defense for which intervention is sought.”

As an initial matter, the Trustee’s motion to intervene should be denied as procedurally deficient because it is not accompanied by a pleading as required by Rule 24(c). The Trustee’s motion fails substantively as well because he has not met his burden under Rule 24(a)(2). As discussed below, the Trustee does not have a present interest in the Policy or its proceeds because the assignment is based on future events which are uncertain to occur. Moreover, the Trustee’s interest is adequately represented by Mr. Warwick, who is an existing party.

**1. The Trustee Has No Interest In The Policy Or Its Proceeds**

Courts in the Tenth Circuit require an intervening party to establish a “direct, substantial and legally protectable interest” in order to intervene in an action. *Tudor Ins. Co. v. 1st Nat’l Title Ins. Agency, LLC*, 281 F.R.D. 513, 516 (D. Utah 2012) (denying third party claimant’s motion to intervene in an insurance coverage case where the claimant’s interest in the policy was based on events that had not occurred).

Here, the Trustee does not have a “direct, substantial and legally protectable interest” in the Policy or its proceeds. The Settlement Agreement, and thus the assignment, is conditioned upon events that have not occurred and may never occur. Section 1.b. of the Settlement Agreement states:

Upon execution of this Agreement, Warwick will assign to the Trustee any and all rights Warwick has under the AXIS Insurance Policy, including any right to pursue a bad faith claim.

Section 2 of the Settlement Agreement provides in part:

This Agreement is conditioned on, and is subject to the Court's entry of an Order in the Bankruptcy Case approving this Agreement pursuant to Federal Rule of Bankruptcy Procedure 9019. This Agreement is further conditioned on and is subject to, the Court's entry of a Contribution Bar Order barring any other person, party or entity from seeking contribution or indemnity from Warwick in connection with any Claims, Causes of Action, or Individual Claims asserted by the Trustee against others...In the event that the Court does not issue an Order approving this Agreement and a Contribution Bar, or if such Order is appealed and reversed, then: (a) this Agreement shall be null and void and shall be of no force or effect; ... and (c) to the degree possible, the Parties shall be in the same position they were in as though this Agreement had never been executed.

The Trustee filed his motion to approve the Settlement Agreement under Rule 9019 of the Federal Rules of Bankruptcy Procedure.<sup>9</sup> If the Bankruptcy Court does not approve the Settlement Agreement or enter a bar order, the Settlement Agreement and the assignment will be null and void. Objections to the Settlement Agreement may be filed until June 20, 2014 and a hearing to address the Settlement Agreement is scheduled on June 30, 2014.<sup>10</sup> The Bankruptcy Court has not yet granted the Trustee's motion to approve the Settlement Agreement and may never do so. Because the Trustee has no present interest in the policy or its proceeds, he cannot establish the "direct, substantial and legally protectable interest" required under Rule 24(a)(2). Accordingly, the Trustee's Motion should be denied.

**2. Mr. Warwick Adequately Represents The Trustee's Purported Interest**

Under Rule 24(a)(2), the intervening party bears the burden to show that the representation by the existing parties is inadequate. *See Tudor Ins. Co.*, 281 F.R.D. at 518. Representation is adequate when the objective of the party seeking intervention is identical to

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<sup>9</sup> Bankruptcy Case No. 11-35082, Dkt. No. 925.

<sup>10</sup> Bankruptcy Case No. 11-35082, Dkt. No. 930.

that of one of the parties. *Id.* at 519 (holding that intervention is not warranted where third party claimant and insured share identical interests with respect to coverage under E&O policy).

As discussed above, the Settlement Agreement, and thus the assignment, is contingent on Bankruptcy Court approval and the entry of the bar order. Unless and until the Bankruptcy Court issues those Orders, Mr. Warwick has a strong interest in protecting his rights under the Policy. In fact, Mr. Warwick is asserting those rights in the joint motion for summary judgment he recently filed along with the Trustee.<sup>11</sup>

Although the Trustee claims that the existing parties cannot enforce or protect the interest he seeks to assert, the Trustee offers no explanation why Mr. Warwick cannot do so. The Trustee cannot meet his burden under Rule 24 through conclusory allegations such as these. *Tudor Ins. Co.*, 281 F.R.D. at 518 (rejecting conclusory allegations that existing party may not adequately represent intervening party's purported interest). Because the Trustee has failed to meet his burden of showing that Mr. Warwick will not adequately represent his alleged interests, the Trustee's motion should be denied.

### CONCLUSION

WHEREFORE, for the foregoing reasons, AXIS Surplus Insurance Company requests that this Court deny the Trustee's Motion to Intervene, and strike the Joint Motion for Summary Judgment to the extent that it is brought by the Trustee.

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<sup>11</sup> Dkt. No. 37.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of June, 2014.

BATESCAREY LLP

/s/ Ommid C. Farashahi

Ommid C. Farashahi

Jason P. Minkin

Brian J. Watson

*Attorneys for AXIS Surplus Insurance Company*



**CERTIFICATE OF SERVICE**

I hereby certify that, on June 18, 2014, **AXIS' OPPOSITION TO THE TRUSTEE'S MOTION TO INTERVENE** was filed with the United States District Court for the District of Utah via the CM/ECF system, and that a copy of the foregoing is similarly being served via electronic mail on counsel designated to accept service on behalf of the named defendants who have not entered an appearance in this action.

/s/ Brian J. Watson  
Brian J. Watson