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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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 NON-PARTY' LIQUIDATING TRUSTEE'S RULE 56(D) MOTION, DEFNDANT WARWICK'S JOINDER, AND DEFENDANT GERINGER'S DECLARATION "PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(D)"** Civil Case No. 2:14-cv-000244-DAK District Judge Dale A. Kimball

I. INTRODUCTION

Non-party D. Ray Strong (the "Trustee") has already filed a 39-page, 124-footnote opposition to AXIS' summary judgment motion,[1] in addition to the 11-page opposition filed by Defendant Robert Geringer.[2] Nevertheless, the Trustee claims that he still has four theories of summary judgment opposition which he has yet to fully explore, and for which he needs more discovery from AXIS than the substantial amount he has already received. Defendants Geringer and Warwick also seek to delay this action on the same grounds as the Trustee, mostly to seek discovery on potential claims they speculate they may have against AXIS.[3] AXIS respectfully requests that the Court reject these efforts to delay a ruling on AXIS' summary judgment motion for the following reasons:

1. The Trustee is not a party to this action for the reasons stated in AXIS' opposition to the Trustee's motion to intervene. Accordingly, the Trustee has no standing to invoke Rule 56(d).
2. The Trustee, Geringer, and Warwick (the "Non-Movants") have not shown by affidavit that non-speculative evidence exists that is "essential" to their opposition to AXIS' summary judgment motion.

[1] Dkt. No. 63. Defendant William Warwick has adopted the Trustee's Motion. *See* Dkt. No. 66.

[2] Dkt. No. 64.

[3] Defendant Warwick has filed a joinder adopting the Trustee's Rule 56(d) motion without offering any additional argument. *See* Dkt. No. 67. Defendant Geringer has not filed a Rule 56(d) motion, but he has filed a document styled a declaration "pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Motion for Summary Judgment." Dkt. No. 65. Geringer's filing appears to be an attempt to piggy-back on the Trustee's motion, and seeks to delay this action on the same grounds as the Trustee. Because the Trustee, Geringer, and Warwick all seek a delay under Rule 56(d) on identical grounds, AXIS submits this brief as a response in opposition to all three of their filings, and respectfully requests that the Court deny or strike all three for the reasons offered herein.

3. AXIS has already provided substantial documentation on the subjects on which the Non-Movants claim to need still further discovery, including producing the entirety of AXIS' underwriting file.
4. Discovery related to the Non-Movants' speculative claims against AXIS is irrelevant to their summary judgment opposition, because a court does not lose jurisdiction over an interpleader action simply because of the existence of claims against the interpleading plaintiff.
5. The Non-Movants cannot defeat interpleader by asserting that the interpleader fund should be greater than the unexhausted Policy limits that AXIS has deposited with the Court.
6. The Non-Movants' arguments regarding the scope of AXIS' requested injunction are simply a re-hash of their other, meritless arguments regarding independent claims against AXIS, and in any event, the Trustee admits that he does not oppose AXIS receiving a discharge and injunction as to the unexhausted limits deposited with the Court.
7. The Non-Movants need no discovery relating to a potential laches defense because the history of this matter leading up to the interpleader filing is well-known to all sides.

II. BACKGROUND

AXIS issued to Castle Arch Real Estate Investment Company, LLC ("CAREIC") a Private Equity and Venture Capital Fund Liability Policy, Policy No. EAN/756858/01/2010 (the "Policy").[4] As originally issued, the Policy contained a maximum aggregate Limit of Liability of

[4] Dkt. No. 41-1.

$5 million for the Policy Period[5] of December 20, 2010 to December 20, 2011. Per Endorsement Nos. 15 and 16 to the Policy, which were purchased by CAREIC and effective on December 20, 2011 and December 31, 2011, respectively, the Policy Period was extended from December 20, 2011 to January 20, 2012.[6] On October 17, 2011 and October 20, 2011, respectively, Castle Arch filed petitions for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. As a result of negotiations between the Insureds, their insurance brokers, and AXIS, the Policy was ultimately endorsed to, among other things: (1) further extend the Policy Period from January 20, 2012 to January 20, 2013; (2) amend the Limit of Liability to provide a maximum aggregate Limit of Liability of $1 million for the January 20, 2012 to January 20, 2013 Policy Period; and (3) eliminate entity coverage for bankrupt CAREIC and its affiliated subsidiaries, thus providing coverage only to Insured Individuals for Non-indemnifiable Loss. (Endorsement Nos. 17 and 18 to AXIS Policy).[7]

On February 14, 2012, after the Insured Individuals purchased their extension of coverage, the Official Committee of Unsecured Creditors filed a motion for appointment of a Chapter 11 Trustee.[8] On May 3, 2012, the Bankruptcy Court appointed D. Ray Strong as the Chapter 11 Trustee of Castle Arch.[9]

On November 27, 2013, the Defendants filed a comfort motion with the Bankruptcy Court asking the court to authorize AXIS' payment of Defense Costs.[10] In opposition to the comfort motion, the Trustee argued, without citing any factual or legal authority, that the motion

[5] Capitalized terms that are not specifically defined herein are defined in the Policy.

[6] Dkt. No. 41-1 at 45-46.

[7] Dkt. No. 41-1 at 47-57.

[8] *In re*: *Castle Arch Real Estate Investment Co*., Bankr. No. 11-35082 JTM, Dkt. No. 58 (Bankr. D. Utah).

[9] *Id*., Dkt. No. 215.

[10] *Id*., Dkt. No. 863.

should be denied because the Policy's limit of liability was reduced to $1 million, and entity coverage was eliminated, without notice to anyone, including the Bankruptcy Court.[11] In their reply brief, the Defendants, including Defendants Warwick and Geringer, rejected this argument on the grounds that notice was not necessary, and no case law exists that would require notice. The Defendants represented to the Bankruptcy Court that there was no nefarious reason behind their decision to reduce the Policy limit and eliminate entity coverage, and that any suggestion by the Trustee to the contrary was frivolous.[12] The Bankruptcy Court rejected the Trustee's arguments and entered an order on January 9, 2014 which authorized AXIS to advance Defense Costs under the Policy.[13]

On February 21, 2014, the Defendants and AXIS participated in a mediation with the Trustee in attempt to reach a global settlement to resolve all of the Trustee's claims. The parties were unable to reach a global settlement.[14]

On March 13, 2014, AXIS advised the Defendants that payment of Defense Costs submitted as of that date would reduce the Policy's $1 million limit of liability to $589,661.61 and requested that the Defendants consent to payment to their respective counsel. The Defendants, including Defendants Geringer and Warwick, unanimously consented in writing to AXIS' payment of the Defense Costs.[15]

On March 21, 2014, after discussions with the mediator made it clear that a global settlement could not be achieved, AXIS proposed to the Defendants that the Remaining Policy

[11] *Id*., Dkt. No. 869.

[12] *Id*., Dkt. No. 876 at 8-9.

[13] *Id*., Dkt. No. 885.

[14] Choi Decl., Dkt. No. 41-1, ¶ 7; Dkt. No. 20, Davidson Answer ¶ 31; Dkt. No. 21, Warwick Answer ¶ 31; Dkt. No. 34, Austin, Grundy, and Green Answer ¶ 31; Dkt. No. 35, Cochran Answer ¶ 31.

[15] *See* Ex. F to Declaration of Brian Watson ("Watson Decl."), Dkt. No. 76-1.

Proceeds be divided equally among them to defend and/or settle the Trustee's claims against them, in attempt to treat the Defendants equally under the Policy. As of March 31, 2014, the response deadline, Mr. Warwick and all other Defendants, with the exception of Mr. Geringer, agreed to this proposal.[16] Mr. Geringer's objection to AXIS' proposal to equally divide the proceeds created a dispute between the Defendants (i.e., competing claims) over how to use the remaining proceeds. On April 2, 2014, two days later, AXIS filed this action (the "Interpleader") to resolve the Defendants' competing claims, and AXIS later deposited the remaining Policy proceeds with the Court.

On April 15, 2014, almost two weeks after AXIS filed the Interpleader, the Trustee issued a subpoena duces tecum seeking all documents for the period through January 17, 2013 which relate to the Policy, Castle Arch, and the Defendants in the Interpleader.[17] On May 9, 2014, AXIS produced all documents responsive to the Trustee's subpoena, which included AXIS' entire underwriting file, which contained the documents in AXIS' custody pertaining to the Policy and its extensions.[18] Notwithstanding AXIS' response to the original subpoena, the Trustee purported to issue yet another subpoena to AXIS in this action, which is the subject of AXIS' contemporaneously filed motion to quash.[19]

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[16] *See* Watson Decl., Dkt. No. 41-3, ¶ 4 and Ex. A; Dkt No. 20, Davidson Answer ¶¶ 35-36; Dkt No. 21, Warwick Answer ¶¶ 35-36; Dkt No. 34, Austin, Grundy, and Green Answer ¶¶ 35-36; Dkt No. 35, Cochran Answer ¶¶ 35-36.; Dkt No. 62, Geringer Answer, ¶¶ 35-36.

[17] *See* Bankruptcy Court Subpoena, Trustee Rule 56(d) Motion, Ex. B, Dkt. No. 63-2 at 14-20.

[18] *See* AXIS Subpoena Response, Trustee Rule 56(d) Motion, Ex. D. Dkt. No. 63-2 at 25-30.

[19] *See* Interpleader Subpoena, Trustee Rule 56(d) Motion, Ex. E., Dkt. No. 63-2 at 32-38.

III. ARGUMENT

A. The Trustee Is A Non-Party Without Standing To Seek Relief Under Rule 56(d)

As a preliminary matter, the Court should strike the Trustee's Rule 56(d) motion purely because the Trustee is not a party to the Interpleader and has no direct, substantial, and legally protectable interest in the funds which are the subject of the Interpleader.[20] Geringer's declaration and Warwick's joinder, which are derivative of the Trustee's motion, should similarly be stricken. Even if the Trustee were a party, which he is not, his motion would still have to be denied on the merits for the reasons below, which apply equally to all three of the Non-Movants including the Trustee.

B. The Non-Movants Have Failed To Show Via Affidavit That Evidence Exists That Would Prevent Summary Judgment

Federal Rule of Civil Procedure 56(d) provides the Court with discretion to defer a motion for summary judgment if the nonmovant shows by affidavits that it requires discovery "essential"—not merely helpful—"to justify its opposition." The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment.[21] The granting of a Rule 56(d) delay "does not operate automatically."[22] Although the nonmovant's Rule 56(d) affidavit need not contain evidentiary facts, it must explain why facts precluding summary judgment cannot be presented. This includes identifying the probable facts not available and what steps have been taken to obtain these facts.[23] In this circuit, the nonmovant also must explain how additional time will enable

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[20] *See* AXIS Opp'n to the Trustee's Motion to Intervene, Dkt. No. 45.

[21] *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (affirming denial of delay under Rule 56(d), formerly Rule 56(f), where nonmovant's affidavit "[did] not identify any specific facts the [nonmovant] sought to uncover or how it will rebut the [movant's] motion for summary judgment").

[22] *Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000).

[23] *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) (affirming denial of Rule 56(d) delay due to supporting

him or her to rebut the movant's allegations that there is no genuine issue of fact.[24] Thus, the "[m]ere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable is insufficient to invoke [Rule 56(d)]."[25] Denial of a Rule 56(d) motion is proper where the evidence sought is the object of pure speculation.[26]

Notably, the Trustee has failed to attach any affidavits to his motion that comply with the requirements of Rule 56(d). Instead, he has attached an affidavit from his counsel, Milo S. Marsden, consisting of five paragraphs, the only substantive one of which states, in its entirety, "[t]hrough the Interpleader Subpoena and any further discovery determined to be necessary, it is anticipated that the Trusts will obtain information as outlined in the 56(d) Motion and the Opposition."[27] The Trustee has also attached a seven-paragraph affidavit from Nathan S. Seim, briefly describing the Trustee's prior subpoena to AXIS, AXIS' response, and the Trustee's more recent subpoena to AXIS (which is the subject of AXIS' contemporaneously filed motion to quash).[28] Neither affidavit explains why the Trustee cannot now adequately contest summary judgment or what additional facts he needs and expects to obtain. The Trustee's motion should be denied on that basis alone.[29] Even taking into consideration Geringer's declaration and the somewhat more fulsome discussion in the Trustee's motion, the reader is still left wondering

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affidavit's lack of specificity).

[24] *Id*. (affirming denial of Rule 56(d) motion where motion was unsupported by affidavit); *see also Radi v. Sebelius*, 434 F. App'x 177, 178 (11th Cir. 2011) ("A [Rule 56(d)] affidavit that conclusorily states that discovery is required is insufficient; the affidavit must specify the reasons the party is unable to present the necessary facts and describe with particularity the evidence that the party seeks to obtain") (citing *Trask*, 446 F.3d at 1042).

[25] *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 905 (10th Cir. 1995) (citation and internal quotation marks omitted).

[26] *Fed. Deposit Ins. Corp. v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1990).

[27] Dkt. No. 63-1.

[28] Dkt. No. 63-2.

[29] *See Price*, 232 F.3d at 783-84.

exactly what evidence the Trustee hopes to uncover and how it will aid him in advancing any argument that he has not already advanced. Geringer's declaration states only that "I believe that additional discovery will help me and my counsel to understand these contentions and determine whether the relief requested by AXIS is appropriate."[30] But a conclusory and self-serving statement of "belief" is not a substitute for evidence of probable facts and explanation of why they are essential to the nonmovant's efforts to resist summary judgment.[31] Both the Trustee and Geringer cite vague, unspecified potential "claims" against AXIS, but they fail to state what body of law those claims might sound in, much less cite any legal authority indicating why these speculative claims are "essential" to their summary judgment opposition, as required by Rule 56(d). It is not enough for the Trustee and Geringer to argue that they do not know what information exists because it is in AXIS' sole possession.[32] The Non-Movants are seeking nothing more than a Rule 56(d) delay for speculative evidence in support of speculative arguments. Their attempts to derail this action should be denied.

C. AXIS Has Already Provided Non-Movants With The Requested Discovery

As discussed below, the grounds on which the Non-Movants seek to delay this action do not defeat the Court's interpleader jurisdiction. But even setting that aside, the Non-Movants cannot meet their burden of identifying further needed discovery, because AXIS has already provided substantial discovery to them on the very same topics for which they seek to delay this action.

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[30] Dkt. No. 65, ¶ 11.

[31] *See Int'l Surplus Lines Ins. Co.*, 52 F.3d at 905.

[32] *See Price*, 232 F.3d at 783 ("If all one had to do to obtain a grant of a Rule 56(d) motion were to allege possession by movant of certain information [and] other evidence[,] every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files") (citations omitted).

Courts routinely deny 56(d) motions where the nonmovant seeks to discover information that it already has or should have in its possession.[33] Here, as the Non-Movants know, on April 15, 2014, after AXIS filed the Interpleader, the Trustee issued a subpoena duces tecum seeking all documents for the period through January 17, 2013 which relate to the Policy, Castle Arch, and the Defendants in the Interpleader.[34] On May 9, 2014, AXIS produced all documents responsive to the Trustee's subpoena, which included AXIS' entire underwriting file that contained the documents in AXIS' custody pertaining to the Policy and its extensions.[35] Those documents are now and have been in the possession of all parties to this matter, as well as the Trustee, for several months. Thus, the Non-Movants have all the evidence relating to the circumstances under which the Policy was extended.

Further, as the Non-Movants are aware, AXIS has no information about any notices of Claims or notices of circumstances on or before January 20, 2012 which could have triggered coverage under the $5 million limit of liability. That is because AXIS never received any such notice, and therefore no such documents exist.[36] As to correspondence related to AXIS' $410,338.39 defense cost distribution to the Defendants, AXIS has provided the Trustee with the only relevant document, namely, the March 13, 2014 letter countersigned by all Defendants

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[33] *Spindex Physical Therapy, U.S.A., Inc. v. United Healthcare of Ariz., Inc.*, No. 08-CV-00457, 2012 WL 8169880, *9-*10 (D. Ariz. Oct. 19, 2012) (denying 56(d) motion where plaintiffs already possessed relevant documents); *Alliance Mut. Ins. Co. v. Cutrone*, 448 F. Supp. 2d 1226, 1235 (D. Colo. 2006) (denying discovery continuance under Rule 56 and noting that, in insured's consumer protection act claim against insurer, "[p]resumably, most information or evidence regarding what representations [the insured] received would be in [the insured's] possession already"); *Slama v. City of Madera*, No. 08-CV-810, 2012 WL 1067198, *2 (E.D. Cal. Mar. 28, 2012) ("Rule 56(d) is not meant . . . to obtain information that is already in the party's possession, or to merely support evidence that is already in the party's possession") (citations omitted), *reconsideration denied*, 2012 WL 1292501 (E.D. Cal. Apr. 16, 2012).

[34] *See* Bankruptcy Court Subpoena, Trustee Rule 56(d) Motion, Ex. B, Dkt. No. 63-2 at p. 14-20.

[35] *See* AXIS Subpoena Response, Trustee Rule 56(d) Motion, Ex. D. Dkt. No. 63-2 at p. 25-30.

[36] *See* Watson Decl., Dkt. No. 76-1, ¶ 7.

providing their unanimous written consent to the distribution,[37] which followed the Bankruptcy Court's approval of the advancement of Defense Costs and rejection of the Trustee's arguments that the distribution should not be permitted because the Policy was extended without proper "notice." There is no other relevant evidence to be had regarding the payment of Defense Costs agreed to by Defendant Warwick, in whose shoes the Trustee purports to stand.

Finally, AXIS does not understand what the Non-Movants mean when they say they need AXIS' internal correspondence relating to an alleged delay in filing the interpleader or a refusal to cooperate in settlement negotiations. As outlined in further detail in AXIS' summary judgment reply, AXIS has not unreasonably delayed or refused to cooperate in settlement discussions. Rather, AXIS worked steadfastly with the Defendants in attempt to achieve a global resolution of the underlying claim at mediation, and offered to allocate the remaining Policy proceeds equally among the Defendants after it became clear that global settlement could not be achieved. All Defendants, with the exception of Geringer, agreed to AXIS' proposal to receive an equal share of the remaining Policy Proceeds. Within two days of Defendant Geringer's refusal to agree to the equal allocation, AXIS filed the Interpleader. There has been no delay or refusal to cooperate on the part of AXIS. There is not a single document that exists that would suggest otherwise.

D. The Non-Movants' Four Theories Of Opposition To Summary Judgment Do Not Warrant A Delay Under Rule 56(d)

The Non-Movants' four theories of summary judgment opposition, elaborated by the Trustee, are: "(1) [AXIS] is not a disinterested shareholder because there may be claims against it related to the Policy . . . (2) there is no identifiable fund in controversy; (3) that [AXIS] may not be relieved from liability and an injunction may not enter against funds outside of those

[37] *See* Ex. F to Watson Decl., Dkt. No. 76-1.

funds deposited with the Court; and (4) that [AXIS] may have liability relating to acts and omissions made with respect to the Policy, potential bad faith in delaying in filing the Interpleader Suit, and its [allegedly] premature distributions to the Defendants."[38] None of these theories warrant delaying this action simply to harass AXIS with duplicative, pointless discovery requests.

1. The Existence Of Claims Against An Interpleading Plaintiff Does Not Defeat An Interpleader Action

The first and fourth theories are actually based on the same argument, i.e., that interpleader is barred because the Non-Movants speculate that they may have independent claims against AXIS. The law of interpleader is to the contrary.[39] And for good reason: interpleader would be useless as a remedy for resolving competing claims if a claimant could stop an interpleader from going forward simply by filing a counterclaim. Here, no one has filed a counterclaim. Rather, the Non-Movants seek to derail the Interpleader based on *potential* claims against AXIS that they believe might exist. The Non-Movants' argument is based on speculation, which is not a basis to delay a ruling on summary judgment.

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[38] Dkt. No. 63 at 6-7; Dkt. No. 65, ¶ 11.

[39] *See* 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 1706 (3d ed. 2013) (hereinafter "WRIGHT & MILLER") ("The reasons underlying the interpleader remedy continue to have force even when there is a possibility that the stakeholder may also be liable to one of the claimants on some special basis"); James Wm. Moore, *Moore's Federal Practice* § 22.07 (3d ed. 2009) ("This limitation [that the stakeholder's potential independent liability defeats interpleader] should be considered jettisoned in both rule and statutory interpleader"); *Libby, McNeill, & Libby v. City Nat'l Bank*, 592 F.2d 504, 507 (9th Cir. 1978) ("Thus, the mere potentiality of independent stakeholder liability, separate from liability for the interpleaded fund, will not defeat interpleader jurisdiction"); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 428-29 (10th Cir. 1966), *overruled on other grounds by Liberty Nat'l Bank & Trust Co. of Okla. City v. Acme Tool Div. of Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976); *Cagle v. James St. Grp.*, No. 07-CV-0029, 2009 WL 2230928, *2 (W.D. Okla. July 23, 2009) ("The availability of interpleader relief does not depend on the merits of the potential claims against the stakeholder in relation to the stake") (citing *William Penn Life Ins. Co. v. Viscuso*, 569 F. Supp. 2d 355, 359 (S.D.N.Y. 2008)); *Casey, Gerry, Schenk, Francavilla, Blatt & Penfield LLP v. Estate of Cowan*, No. 10-CV-821, 2012 WL 2151532, *3 (S.D. Cal. June 13, 2012). Note that *Knoll* was overruled on its holding that an interpleader court lacks jurisdiction over a counterclaim, not for its statement that a counterclaim will not defeat interpleader jurisdiction itself.

2. The Amount Of The Interpleader Fund Is Determined By AXIS' Pleadings, Not The Claimants' Post-Interpleader Opinions

The Non-Movants argue that there is a dispute as to the amount of the fund, once again citing their speculative claims that the "true" amount of the Policy limit may be $5 million. As explained in AXIS' reply in support of its summary judgment motion, any claims that the Policy limit is above $1 million are frivolous. Even if there were a plausible claim that the Policy limit is anything other than $1 million, such a claim would not justify a delay under Rule 56(d), because the law of interpleader does not require the Court to simply accept a claimant's opinion as to the amount of the fund. Rather, AXIS' pleadings control.[40]

In an interpleader action, "[t]he determination of the appropriate deposit . . . is not a mechanical process under which the court uncritically searches for the highest amount claimed by the adverse claimants and requires that amount to be deposited; rather, the determination depends upon the person who invokes the interpleader and what he asserts to be the subject matter of the controversy."[41] Thus, in the Third Circuit's *Asbestospray* decision, the court found that the interpleading insurer had correctly deposited $3.88 million in unexhausted policy limits, notwithstanding the claimants' argument that the insurer should have deposited $25 million in policy limits, with the difference representing the amount that the claimants alleged the insurers had wrongfully paid or committed toward pre-interpleader settlements.[42] Reversing the district court's contrary ruling, the Third Circuit found that the amounts in excess of the unexhausted policy limits "were not realistically part of the interpleader action *as it was pleaded*, and

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[40] *See, e.g., Kitzer v. Phalen Park State Bank of St. Paul*, 379 F.2d 650, 652 (8th Cir. 1967) ("The determination of what 'property' is to be deposited under Tit. 28 § 1335 depends upon the person who invokes interpleader and what he asserts to be the subject matter of the controversy").

[41] *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 210-11 (3d Cir. 1999) (citation and internal quotation marks omitted).

[42] *Id.*

therefore these sums were not required to be deposited with the court to sustain federal jurisdiction."[43]

So too here. AXIS, as the interpleading party, has deposited the balance of its unexhausted policy limits with the Court. AXIS, as the interpleading party, has accurately stated that the dispute involves the remainder of its Policy limit. No one should be able to derail the Interpleader by arguing that the "true" amount of the Policy limit is $5 million, based on alleged pre-interpleader conduct which is not part of the dispute *as pleaded* by AXIS.

The cases that the Trustee cites for the contrary proposition are inapposite. Two of the cases did not even involve insurance policies.[44] The other two cases involved counterclaims against the interpleading insurer, whereas here there is no counterclaim pending against AXIS. Further, in neither of the two insurance cases did the insurer deposit the entirety of its unexhausted policy limits with the court, as AXIS has done here.[45] The counterclaims in those cases raised genuine disputes as to whether the entirety of the insurers' limits had been deposited, whereas here there can be no dispute that the AXIS Policy provides for a $1 million limit of liability on its face, and that AXIS has deposited the entirety of those limits, less what it previously distributed to the defendants (with their unanimous approval and the authorization of the bankruptcy court). Even if there were a counterclaim raising a non-frivolous argument that AXIS had not deposited the full amount in controversy, however, that would still not bar this

[43] *Id*. at 211 (emphasis added).

[44] *Coopers & Lybrand, L.L.P. v. Michaels*, No. 94-CV-5643, 1995 WL 860760 (E.D.N.Y. Oct. 31, 1995) (overlapping damages claims against two insolvent entities' estates); *Pine Run Props. v. Pine Run Ltd.*, No. 90-CV-6289, 1991 WL 280719 (S.D.N.Y. Dec. 26, 1991) (apartment complex and rents derived therefrom).

[45] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., v. Ambassador Grp., Inc.*, 691 F. Supp. 618 (E.D.N.Y. 1988) (counterclaim arguing that claims in multiple consecutive policy years triggered multiple sets of policy limits as provided for in the policy); *Mut. Ins. Co. v. Eckman*, 555 F. Supp. 775 (D. Del. 1983) (counterclaim arguing that auto insurer failed to deposit an additional $200,000 in policy limits that the policy provided for larger vehicles).

interpleader.[46] To hold otherwise would, in the words of the Fifth Circuit, "unduly broaden federal interpleader jurisdiction to include virtually any contingent or inchoate claim which might ultimately be the subject of litigation."[47] Speculative claims to a $5 million limit that is not reflected on the face of the Policy are precisely the kind of "contingent or inchoate" claims that do not need to be included in an interpleader fund in order for the Court to maintain jurisdiction.

3. The Scope Of AXIS' Requested Discharge And Injunction Are Appropriate

Buried in footnote 112 of the Trustee's summary judgment opposition brief is the revelation that the Trustee "does not oppose to the [sic] Interpleader Suit as it relates to the Interpleaded Funds and releasing [AXIS] from liability *as to the Interpleaded Funds*."[48] This concession effectively moots the Trustee's opposition brief and the attempts by the Non-Movants to delay this action. In light of this admission, the Court's next step should be to enter an order granting AXIS' summary judgment motion and discharging AXIS from any further liability with respect to the interpleaded stake, as AXIS requests and as no one opposes.

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[46] *See Asbestospray, Inc.*, 182 F.3d at 210-11; *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976) (in interpleader action, insurer's deposit of face amount of life insurance policy was sufficient, notwithstanding additional claims for recovery of attorney's fees and statutory damages); *Champlin Petroleum Co. v. Ingram*, 560 F.2d 994, 996-97 (10th Cir. 1977) (trial court had subject matter jurisdiction over interpleader action where plaintiff deposited less than full amount in controversy, but did deposit all that it had in its possession at time it was notified of a dispute); *Brozman v. COR, Inc.*, No. 91-CV-2237, 1991 WL 287176, *1 (D. Kan. Dec. 23, 1991) (plaintiff need not interplead entire amount alleged to be in controversy where equitable principles are not offended); *Mass. Mut. Life Ins. Co. v. Cent.-Penn Nat'l Bank of Phila.*, 362 F. Supp. 1398, 1403-04 (E.D. Pa. 1973) (concluding that interpleading plaintiff is required to pay or post bond only for "the highest amount claimed to be due and owing *under* the written instrument giving rise to the indebtedness, i.e. the highest amount claimed by any claimant to be due in accordance with the specific terms of the instrument itself," and that the court need not "go *outside* the written instrument to create a dispute as to the amount due, and then resolve *that* dispute in order to determine whether the full amount due *under* the contract has been paid into court") (emphasis in original).

The Tenth Circuit's decision in *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Industries, Inc.*, 472 F.2d 893 (10th Cir. 1973), is not to the contrary. In contrast to *Miller & Miller*, AXIS' only distribution of Policy proceeds was done with bankruptcy court approval and the unanimous agreement of all Insureds, including Warwick, in whose shoes the Trustee now purports to stand.

[47] *Murphy*, 534 F.2d at 1159.

[48] Dkt. No. 60 at 34 (emphasis in original).

Nonetheless, the Non-Movants argue that a delay in summary judgment may be warranted because AXIS is supposedly seeking discharge as to funds not deposited with the court. This theory is simply a slightly different formulation of the Non-Movants' other theories, namely, the speculative claims for independent liability against AXIS and the argument that $1 million is not the true Policy limit.[49] This is not even a case of old wine in new bottles, but rather old wine in the same old bottle with a new label pasted over it. For the reasons stated above and in AXIS' summary judgment reply, the Non-Movants' speculative claims of independent liability to a fictional $5 million Policy limit fail on the merits, but in any event do not warrant delaying the summary judgment ruling in this matter.

E. The Possibility Of A Laches Defense Does Not Warrant A Delay

Finally, the Non-Movants argue in passing that they may need additional discovery to argue that AXIS delayed in bringing this interpleader action. This argument is in the nature of laches, an affirmative defense for which the Non-Movants have the burden of proof, and which is generally disfavored in an interpleader action.[50] This argument also fails on the merits because, as explained in AXIS' summary judgment reply brief, AXIS filed this interpleader action within two days of Defendant Geringer's refusal to agree to an equal allocation of the remaining Policy proceeds. But aside from the merits of this argument, no further discovery is necessary for the Non-Movants to litigate it. This history of this matter is well known to all of the parties and the Trustee, and the Non-Movants fail to identify any additional evidence that would enable them to contest this issue.

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[49] *See* Dkt. No. 60 at 34 (arguing that AXIS is seeking an injunction as to property outside the interpleaded fund because "the Trustee believe[s] that the Trusts may have claims [and that] other Defendants in this Interpleader suit may have claims against [AXIS] related to the Policy that are not covered by the fund that have been [sic] deposited with the Court").

[50] *Asbestospray*, 182 F.3d at 208 (noting that courts "rarely" deny interpleader on laches grounds); WRIGHT & MILLER § 1709 ("[C]ourts are reluctant to refuse interpleader on [laches] grounds . . .").

IV. CONCLUSION

AXIS has demonstrated that it meets the requirements for interpleader by showing that it is a disinterested stakeholder faced with potential multiple liability, through no fault of its own, due to the Defendants' competing claims to the remaining Policy proceeds. In filing the Interpleader, AXIS' intent was to achieve an equitable distribution of the remaining limits of its Policy, consistent with AXIS' goal of treating all its Insureds equally. Regrettably, in filing his Rule 56(d) motion, the Trustee has signaled that rather than work constructively to resolve the competing claims, he would prefer to tax the resources of CAREIC's estate, and this Court's time, pursuing speculative claims against AXIS. For the foregoing reasons, the Trustee's arguments, in which Defendants Geringer and Warwick join, do not warrant further discovery, the only purpose of which would be to delay this Interpleader and harass AXIS. AXIS therefore respectfully requests that this Court enter an order denying the Trustee's Rule 56(d) motion, Warwick's joinder, and Geringer's request for further discovery under Rule 56(d).

RESPECTFULLY SUBMITTED this 21st day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2014, **AXIS' OPPOSITION TO NON-PARTY' LIQUIDATING TRUSTEE'S RULE 56(D) MOTION, DEFNDANT WARWICK'S JOINDER, AND DEFENDANT GERINGER'S DECLARATION "PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(D)"** 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 Defendant who has not entered an appearance in this action.

/s/ *Brian J. Watson*
Brian J. Watson

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