

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

Ommid C. Farashahi (*admitted pro hac vice*)
Jason P. Minkin (*admitted pro hac vice*)
Michael T. Skoglund (*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
jminkin@batescarey.com
mskoglund@batescarey.com
bwatson@batescarey.com

Attorneys for Plaintiff
AXIS Surplus Insurance Company

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.

**PLAINTIFF'S MOTION
TO QUASH NON-PARTY
SUBPOENA**

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

Judge Dale A. Kimball

Plaintiff, AXIS Surplus Insurance Company (“AXIS”), by and through its undersigned counsel, moves pursuant to Rule 45 of the Federal Rules of Civil Procedure to quash a subpoena served upon it by non-party, Liquidating Trustee D. Ray Strong (the “Trustee”). In support of its motion, AXIS states as follows:

1. On June 4, 2014, the Trustee filed a motion to intervene in this action. (Dkt. No. 36)
2. On June 12, 2012 AXIS filed a motion for summary judgment. (Dkt. No. 41)
3. On June 18, 2014, AXIS filed a Memorandum in Opposition to the Trustee’s Motion to Intervene. (Dkt. No. 44) Defendants Kirby Cochran, Doug Child, Jeff Austin, William Grundy, and Keith Green also filed a Memorandum in Opposition to the Trustee’s Motion to Intervene. (Dkt. No. 45)
4. On July 2, 2014, the Trustee filed a Reply in Support of his Motion to Intervene in this action. (Dkt. No. 49)
5. On July 10, 2014, the Trustee filed a motion to defer consideration of AXIS’ motion for summary judgment to allow discovery under Rule 56(d) of the Federal Rules of Civil Procedure (the “Rule 56(d) motion”). (Dkt. No. 63)
6. On July 10, 2014, the Trustee filed a notice of issuance of subpoena to AXIS, attaching a copy of the subpoena duces tecum issued to AXIS pursuant to Rule 45. (Dkt. No. 59)
7. Rule 45(a)(3) addresses who may issue a subpoena in a civil case. It provides:

The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

8. A proposed intervenor, such as the Trustee, is not a party to this action. *See UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, 261 Fed.Appx. 105, 109 (10th Cir. 2008) (would-be intervenors were not parties to a case); *Barnes v. Harris*, No. 2:12-cv-1010 TS, 2013 WL 164258 (Jan. 15, 2013 D. Utah) (intervenor is not a party until court grants motion to intervene). Because the Trustee is not a party to this action, he has no authority under Rule 45 to issue the subpoena to AXIS.

9. On September 15, 2014, the Court will hold a hearing on the Trustee's motion to intervene, which most of the parties to this action have opposed. Only if the Trustee's motion is granted will the Trustee have authority as a party under Rule 45 to issue a subpoena to AXIS. The Trustee's subpoena is premature at best.

10. Furthermore, even if the Trustee eventually becomes a party to this action, which is not a foregone conclusion, AXIS has opposed the Trustee's attempt to conduct discovery through the subpoena for the reasons set forth in AXIS' opposition to the Trustee's Rule 56(d) motion, which are incorporated herein as additional support for the reasons why this Court should quash the Trustee's subpoena. (Dkt. No. 77)

WHEREFORE, AXIS requests that this Court grant its motion to quash the subpoena issued by non-party Liquidating Trustee D. Ray Strong.

RESPECTFULLY SUBMITTED this 21st day of August, 2014.

BATESCAREY LLP

/s/ Ommid C. Farashahi

Ommid C. Farashahi

Jason P. Minkin

Michael T. Skoglund

Brian J. Watson

Attorneys for AXIS Surplus Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2014, the **PLAINTIFF'S MOTION TO QUASH NON-PARTY SUBPOENA** 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