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

<p>AXIS SURPLUS INSURANCE COMPANY,</p> <p>Plaintiff,</p> <p>v.</p> <p>ROBERT D. GERINGER, KIRBY D. COCHRAN, ROBERT CLAWSON, DOUGLAS W. CHILD, JEFF AUSTIN, WILLIAM H. DAVIDSON, WILLIAM J. WARWICK, WILLIAM GRUNDY and KEITH GREEN,</p> <p>Defendants.</p>	<p>JOINT MOTION FOR SUMMARY JUDGMENT AND FOR PER CAPITA DISTRIBUTION OF INTERPLEADED FUNDS FILED BY DEFENDANTS KIRBY D. COCHRAN, DOUGLAS CHILD, JEFF AUSTIN, WILLIAM GRUNDY AND KEITH GREEN</p> <p>Case No. 2:14CV-0244BCW</p>
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Pursuant to Federal Rule of Civil Procedure 56, Defendants Cochran, Child, Austin, Grundy and Green (the “Moving Defendants”), by their respective counsel, jointly move for

Summary Judgment and for per capita distribution of the interpleaded funds. The Moving Defendants further move that any interpleaded funds owing to AXIS Surplus Insurance Company (“AXIS”) for expenses relating to this case be paid from the distributions made to Defendants Robert Geringer and William Warwick.

I.
INTRODUCTION

This case involves a dispute between nine (9) insured individuals over the proper distribution of certain remaining insurance proceeds under a policy issued by AXIS.

Prior to filing the Interpleader Complaint in this case, AXIS proposed to the nine (9) Defendants that the remaining Policy proceeds be allocated equally among them to defend or settle the underlying claims. At that time, all but one of the Defendants, Mr. Geringer, agreed to AXIS’ proposal. Unable to obtain a unanimous resolution, on April 2, 2014 AXIS filed the Interpleader Complaint. On May 1, 2014, AXIS deposited with the Court the remaining Policy proceeds of \$589,661.61.

Subsequent to AXIS filing the Interpleader Complaint, another Defendant, Mr. Warwick, reached a tentative settlement agreement with the Liquidating Trustee (the “Trustee”). The Trustee and Mr. Warwick claim entitlement to \$200,000.00 of the interpleaded funds and have filed a joint motion for summary judgment in this action seeking a \$200,000.00 distribution from the remaining Policy proceeds.¹ It is expected that Mr. Geringer may file a motion in this action

¹ Mr. Warwick had previously agreed to the equal distribution proposed by AXIS. In addition to the instant summary judgment motion, the Moving Defendants objected to the Trustee’s motion to intervene in this case and opposed the Joint Motion for Summary Judgment filed by the Trustee and Warwick. Further, the Moving Defendants objected to the proposed settlement between the Trustee and Warwick and moved to withdraw the reference from bankruptcy court.

seeking more than a per capita share. The Trustee has also filed motions seeking extensive discovery of AXIS in this case, causing additional expense to AXIS and the Moving Defendants.

The Court should distribute the remaining insurance proceeds in the manner initially proposed by AXIS, *i.e.* a per capita distribution.² Interpleader is an equitable action. Despite the fact that each Defendant may need or want more than his equal share, a per capita distribution is the legally appropriate, fair and equitable distribution of the remaining Policy proceeds in this case. Mr. Child and other Moving Defendants (but not the Trustee, Mr. Warwick, Mr. Geringer, or the Debtor) paid the premium for the policy, and they should receive an equal share of the proceeds to defend the claims that have been asserted against them.

Further, equitable principles dictate that any amounts owing to AXIS should be paid from the distributions to Mr. Geringer and Mr. Warwick: Mr. Geringer's refusal to submit to an equitable distribution caused AXIS to expend sums in the filing and prosecution of the Interpleader action, despite the acquiescence of the eight other Defendants. Further, the Trustee (through the settlement with Mr. Warwick) has caused AXIS to spend funds defending itself in the Interpleader. The Moving Defendants by contrast attempted to minimize AXIS' expense by agreeing (prior to the Interpleader filing) to a per capita distribution and also by not opposing AXIS' motion for summary judgment. The Moving Defendants' distribution should not be affected by the efforts of Mr. Geringer and the Trustee to increase the litigation costs in this action.

² The Moving Defendants also propose that the mediator's outstanding bills in this case be paid from the interpleaded funds before the per capita distribution is made. All defendants/named insureds should agree to this payment, having used his services.

II.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Legal Elements and Authority

An interpleader action is equitable and is controlled by equitable principles. *State of Texas v. State of Florida*, 306 U.S. 398, 406-407 (1938); *Holcomb v. Aetna Life Insurance Company*, 228 F.2d 75, 81-82 (10th Cir.), *cert. denied*, 350 U.S. 986 (1955); *Standard Surety and Casualty Company of New York v. Baxter*, 105 F.2d 578, 580 (8th Cir. 1939).

Other than the general principle that a court should determine what is fair and equitable under the fact of each particular interpleader case, no clear bright-line rule has been accepted for application of that principle. Depending on the facts, courts have applied a “per capita” rule where defense costs of the directors have or will exceed the remaining interpleaded proceeds. *See, In re National Century Financial Enterprises, Inc. v. Gulf Insurance Company, Inc. et al.*, 2005 WL 6242169 (Bankr. S.D. Ohio 2005) (“There are limited funds available to the directors for their defense costs and the directors will inevitably accrue a great deal more defense (and perhaps judgment) costs as the NCFE and MDL litigation move forward. Given that defense costs of the directors have and will far exceed the amount of available proceeds, equity would dictate that each party be given an equal amount to use as they see fit. This Court will thus take a *per capita* approach and divide the remaining Proceeds evenly among the seven directors.”)

B. Undisputed Material Facts Necessary to Establish Summary Judgment

1. AXIS issued Private Equity and Venture Capital Fund Liability Policy No. EAN756858/01/2010 to Castle Arch Real Estate Investment Company (“CAREIC”) for the Policy Period of December 20, 2010, to January 20, 2013 (the “Policy”). The Policy contains a

\$1 million Limit of Liability. *See* Ex. A to Decl. of Mee Choi attached as Exhibit 1 to AXIS' Motion for Summary Judgment.

2. Each of the Defendants in this interpleader action was a director, officer and/or employee of CAREIC and, thus, an insured under the Policy (the "Insureds"). Interpleader Complaint at ¶ 6.

3. On October 17, 2011, CAREIC filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah.³

4. On May 3, 2013, the Bankruptcy Court approved the appointment of D. Ray Strong as the Chapter 11 Trustee (the "Trustee") on behalf of CAREIC and certain of its subsidiaries or affiliates, including CAOP Managers, LLC; Castle Arch Kingman, LLC; Castle Arch Secured Development Fund, LLC; Castle Arch Smyrna, LLC; Castle Arch Star Valley LLC; Castle Arch Opportunity Partners I, LLC; and Castle Arch Opportunity Partners II, LLC (collectively, the "Debtors"). (Case No. 11-35082, Dkt. No. 215.)

5. On January 18, 2013, the Trustee issued demand letters to certain of the Insureds, including Geringer, Cochran, Austin, Clawson, Child, Davidson and Warwick, alleging that they committed unspecified errors, misstatements, misleading statements, acts, omissions, negligence and breaches of duty in their capacities as directors, officers, trustees, managers, managing members or employees of one or more of the Debtors. The Trustee claimed he would file a complaint at the appropriate time.

³ Bankruptcy Case No. 11-35082, Dkt. No. 1. On October 20, 2011, several affiliates of CAREIC, including Castle Arch Opportunity Partner Managers, LLC; Castle Arch Opportunity Partners I, LLC; Castle Arch Opportunity Partners II, LLC; Castle Arch Kingman, LLC; Castle Arch Secured Development Fund, LLC; and Castle Arch Smyrna, LLC, similarly filed bankruptcy petitions – all of which have been consolidated under Case No. 11-35082.

6. On October 12, 2013, the Trustee sent a draft complaint to the Insureds, alleging that they raised over \$73.6 million from investors through a conspiracy involving fraudulent securities offerings, breached their fiduciary duties to the Debtors and their investors, and otherwise received fraudulent or preferential transfers prior to the filing of Debtors' petition for bankruptcy.

7. The Trustee has asserted claims against the Defendants alleging damages in excess of \$73 million. Choi Dec. ¶ 5.

8. The Defendants have retained six law firms of their choosing to defend the Trustee's claims. Choi Decl. ¶ 6; Dkt. No. 20, Answer of William Davidson ¶ 32; Dkt. No. 21, Answer of William Warwick ¶ 32; Dkt. No. 34, Answer of Jeff Austin, William Grundy and Keith Green ¶ 32; Dkt. No. 35, Answer of Kirby Cochran, ¶ 32.

9. On January 9, 2014, after a full hearing at which the Trustee objected, the Bankruptcy Court ordered Axis to advance payment of Defense Costs to the Insureds. *See* Bankruptcy Case No. 11-35082 (Dkt. 885).

10. The payment of Defense Costs erodes the Policy limits. Ex. A. to Choi Decl. Section V.B. at p. 10.

11. With the consent of all Defendants, AXIS paid on behalf of the Defendants \$410,338.39 in Defense Costs incurred in defense of the Underlying Claim. Choi Decl. ¶ 8; Dkt. No. 20, Davidson Answer ¶ 32; Dkt. No. 21, Warwick Answer ¶ 32; Dkt. No. 34, Austin, Grundy and Green Answer ¶ 32; Dkt. No. 35, Cochran Answer ¶ 32.

12. AXIS' payment of \$410,338.39 has reduced the Limit of Liability of the Policy to the amount of the remaining Policy proceeds, \$589,661.61. Choi Decl. at p. 10; Dkt. No. 20,

Davidson Answer ¶ 32; Dkt. No. 21, Warwick Answer ¶ 32; Dkt. No. 34, Austin, Grundy and Green Answer ¶ 32; Dkt. No. 35, Cochran Answer ¶ 32.

13. On May 1, 2014, pursuant to an Order of this Court (Dkt. No. 26), AXIS deposited the remaining Policy proceeds into the registry of the Court. *See* Transaction Receipt attached as Exhibit 2 to AXIS' Motion for Summary Judgment.

14. AXIS participated in a global mediation with the Defendants and the Trustee on February 21, 2014, in an attempt to reach a global settlement on behalf of all Defendants to resolve the underlying claim. The mediation was unsuccessful. Choi Decl. ¶ 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. The Trustee is unwilling to agree to a global settlement with all Defendants to resolve the underlying claim for an amount within the remaining Policy proceeds. Choi Decl. ¶ 9; Dkt. No. 20, Davidson Answer ¶¶ 33, 38; Dkt. No. 21, Warwick Answer ¶¶ 33, 38; Dkt. No. 34, Austin, Grundy and Green Answer ¶¶ 33, 38; Dkt. No. 35, Cochran Answer ¶¶ 33, 38.

16. After attempts to reach a global settlement failed, AXIS proposed that the remaining Policy proceeds be allocated equally among the Insureds to defend or settle the underlying claim. *See* Ex. A to Decl. of Brian Watson attached as Exhibit 3 to AXIS' Motion for Summary Judgment; Dkt. No. 20, Davidson Answer ¶ 35; Dkt. No. 21, Warwick Answer ¶ 35; Dkt. No. 34, Austin, Grundy and Green Answer ¶ 35; Dkt. No. 35, Cochran Answer ¶ 35.

17. All of the defendants but one, Robert Geringer, initially agreed to AXIS' proposal. Watson Decl. ¶ 4; Dkt. No. 20, Davidson Answer ¶ 36; Dkt. No. 21, Warwick Answer ¶ 32; Dkt. No. 36, Austin, Grundy and Green Answer ¶ 32; Dkt. No. 36, Cochran Answer ¶ 36.

18. The Trustee has made separate settlement offers to certain of the Defendants for amounts that collectively exceed the remaining Policy proceeds. Watson Decl. ¶ 5.

19. Certain of the Defendants have demanded that AXIS allow them to use the remaining Policy proceeds to negotiate settlements of the underlying claim with the Trustee. Trustee. Watson Decl. ¶ 6.

20. The Trustee and Defendant Warwick have agreed to a tentative settlement in which Warwick and the Trustee, as a proposed assignee of Warwick, seek \$200,000.00 out of the remaining Policy proceeds. See Exhibit 1 to Trustee's Joint Motion for Summary Judgment and Distribution of Interpleaded Funds (Dkt. No. 37).

21. Each of the Defendants asserts a right to some or all of the remaining Policy proceeds. Choi Decl. ¶ 10; Dkt. No. 20, Davidson Answer ¶ 41; Dkt. No. 21, Warwick Answer ¶ 41; Dkt. No. 34, Austin, Grundy and Green Answer ¶ 41; Dkt. No. 35, Cochran Answer ¶ 41.

22. At least six of the Defendants assert that the competing claims exceed the remaining Policy proceeds. Dkt. No. 20, Davidson Answer ¶¶ 42-43; Dkt. No. 21, Warwick Answer ¶¶ 42-43; Dkt. No. 34, Austin, Grundy and Green Answer ¶¶ 42-43; Dkt. No. 35, Cochran Answer ¶¶ 42-43.

23. All of the Defendants have answered AXIS' Complaint.

24. AXIS repeatedly advised the Defendants that it would treat them equally and would not favor the interests of one Insured over another. Watson Decl. ¶ 7; Dkt. No. 20, Davidson Answer ¶¶ 1, 30; Dkt. No. 21, Warwick Answer ¶¶ 1, 30; Dkt. No. 34, Austin, Grundy and Green Answer ¶¶ 1, 30; Dkt. No. 35, Cochran Answer ¶¶ 1, 30.

25. There are competing demands for Defense Costs and indemnity against the remaining Policy proceeds. Interpleader Complaint ¶ 42.

26. The remaining Policy proceeds are insufficient to satisfy the competing demands. Interpleader Complaint ¶ 43.

27. When the Policy was renewed on or about January 20, 2012, the Defendants agreed to pay an equal portion of the premium payment for the Policy. Mr. Child paid \$26,000 from his personal account for the premium. Oct. 28, 2014 Decl. of Douglas Child at ¶¶ 2-3.

28. Neither Mr. Warwick nor Mr. Geringer paid their shares of the premium for the Policy. *Id.* at ¶¶ 4-5.

III. **ARGUMENT**

Summary judgment is proper where the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Summary judgment is appropriate here because there are competing demands, none legally superior to the other,⁴ to a fund that is inadequate to satisfy all of the demands. *National Century Financial Enterprises*. 2005 WL 6242169.

The Court should follow *National Century* and allocate the proceeds on a per capita basis. In *National Century*, the court was concerned about the potential for gamesmanship with respect to the use of insurance proceeds. The insured directors in that case faced liability from a common set of facts, but had expended wildly different sums in defending those suits. *Id.* at *10

⁴ With regard to Mr. Warwick's proposed settlement with the Trustee, one of the "principal evils the interpleader device was intended to remedy" was the unfairness to multiple claimants resulting from a situation where one claimant would negotiate a settlement attempting to "appropriate all or a disproportionate slice of the funds before his fellow claimants were able to establish their claims." *See State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533 (1967).

(certain insured directors had accrued between \$190,000; others had incurred \$3 million to \$9 million). The court ruled in favor of a per capita approach because “theoretically a pro rata approach would reward an expensive litigation strategy to the detriment of an economical one.” *Id.* at *11.

The Court faces the same quandary here. One defendant (Mr. Geringer, the only refusal to initial per capita distribution) has hired two law firms to engage in substantive work, has taken depositions in multiple states, and may be seeking to expend even further sums. Other defendants have kept their expenses to a minimum: Mr. Austin, Mr. Green and Mr. Grundy have hired one counsel among the three of them, reducing the shared expenses. The Moving Defendants have also refrained from discovery. Dividing the sums in a per capita share, as all but Mr. Geringer had initially agreed to do, will prevent one insured from profiting at the expense of the others.

Further, dividing in a per capita fashion prevents gamesmanship by the Trustee and settling parties. The Trustee has been forthright about seeking to settle with one party so that all of the remaining proceeds are depleted at one time, regardless of the merit of the suit against the particular insured. He has sought a \$200,000 settlement with Mr. Warwick, but the allegations against Mr. Warwick -- an outside director in his eighties with little involvement in the company -- do not merit the amount of the settlement for which he is seeking approval. Dividing the proceeds in a per capita fashion will force the Trustee to settle cases on the merits on a good faith basis against that particular individual, and not on the total available proceeds that may be available for all insureds.

Each party would like to have the full amount of the proceeds for settlement (e.g., the Trustee and Mr. Warwick) or for litigation expenses (e.g., Mr. Geringer). Indeed, each of the undersigned would prefer to receive more of the interpleaded funds than sought by the summary judgment motion; however, there are competing demands for a fund that is insufficient to satisfy all of the demands. Thus, the only reasonable manner in which to prevent gamesmanship and to uphold the equitable principles underlying an interpleader proceeding is a per capita distribution of the remaining \$589,661.61, minus the payment to the mediator for his services. This is the legally appropriate, fair and equitable remedy under the circumstances.

Moreover, to the extent that AXIS is owed funds for its expenses related to this proceeding, those expenses should be deducted from the per capita distributions to Mr. Geringer and Mr. Warwick. But for Mr. Geringer's refusal to sign to AXIS' proposal to the insureds, the Interpleader would never have been filed. Further, the Trustee has increased the litigation costs of AXIS by moving to intervene in this proceeding and -- over the objections of AXIS and the Moving Defendants -- by moving for discovery. As an equitable matter, Mr. Geringer, Mr. Warwick and the Trustee should be responsible for any costs that AXIS has had to incur in this matter, if such costs are deducted from the available proceeds. Indeed, neither Mr. Geringer nor Mr. Warwick have paid their share of the premium for the policy, and they should not be permitted to drain the policy proceeds through expensive litigation tactics.

WHEREFORE, Defendants Child, Cochran, Austin, Grundy and Green move the Court to grant this motion for summary judgment and distribute the interpleaded fund to the nine (9) Defendants on a per capita basis.

DATED this 29th day of October 2014.

/s/ Neil A. Kaplan
/s/ Jennifer A. James

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Attorneys for Defendant Kirby D. Cochran

/s/Schuyler G. Carroll

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Attorney for Jeff Austin, William Grundy and
Keith Green

/s/Loren E. Weiss

Loren E. Weiss
Attorney for Douglas W. Child

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, I electronically filed the foregoing Joint Motion for Summary Judgment and for Equal Pro Rata Distribution of Interpleaded Funds filed by Defendants Kirby D. Cochran, Douglas Child, Jeff Austin, William Grundy and Keith Green with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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

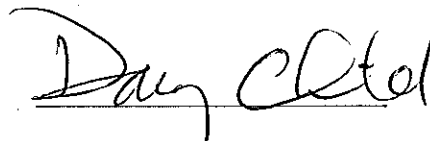
<p>AXIS SURPLUS INSURANCE COMPANY,</p> <p>Plaintiff,</p> <p>v.</p> <p>ROBERT D. GERINGER, KIRBY D. COCHRAN, ROBERT CLAWSON, DOUGLAS W. CHILD, JEFF AUSTIN, WILLIAM H. DAVIDSON, WILLIAM J. WARWICK, WILLIAM GRUNDY and KEITH GREEN,</p> <p>Defendants.</p>	<p>DECLARATION OF DOUGLAS W. CHILD IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT AND FOR PER CAPITA DISTRIBUTION OF INTERPLEADED FUNDS FILED BY DEFENDANTS KIRBY D. COCHRAN, DOUGLAS CHILD, JEFF AUSTIN, WILLIAM GRUNDY AND KEITH GREEN</p> <p>Case No. 2:14CV-0244BCW</p>
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I, Douglas W. Child, declare under penalty of perjury that I have knowledge of the following facts and that they are true:

1. AXIS issued Private Equity and Venture Capital Fund Liability Policy No. EAN756858/01/2010 to Castle Arch Real Estate Investment Company ("CAREIC") for the Policy Period beginning December 20, 2010 (the "Policy").
2. To renew the Policy for another period beginning on January 20, 2012, I paid the \$26,000 premium from my personal account. CAREIC did not pay for the renewal of the policy.
3. My understanding was that I was to be reimbursed by other Insureds who may have claims to the Policy proceeds.
4. William Warwick has not paid me for his share of the premium.
5. Mr. Geringer has not paid me for his share of the premium.

I declare the above is true under penalty of perjury.

October 28, 2014


Douglas W. Child