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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 K. WARWICK; WILLIAM GRUNDY; and KEITH GREEN, Defendants.	**LIQUIDATING TRUSTEE'S MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR SUMMARY JUDGMENT AND FOR PER CAPITA DISTRIBUTION OF INTERPLEADED FUNDS** Civil Case No. 2:14-cv-00244-DAK The Honorable Dale A. Kimball

Proposed intervenor, D. Ray Strong, as the post-confirmation estate representative of the Consolidated Legacy Debtors, Castle Arch Opportunity Partners I, LLC, Castle Arch Opportunity Partners II, LLC, and the Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, the Castle Arch Opportunity Partners I, LLC Liquidating Trust, and the Castle Arch Opportunity Partners II, LLC Liquidating Trust (the "Trustee") in *In re Castle Arch Real Estate Investment Company, LLC* (the "Bankruptcy Case"),[1] by and through undersigned counsel, hereby submits this Opposition to the *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* (the "Motion"). For the reasons set forth below, the Motion should be denied.

I. INTRODUCTION

Defendants Kirby D. Cochran ("Cochran"), Douglas Child ("Child"), Jeff Austin ("Austin"), William Grundy ("Grundy"), and Keith Green ("Green") (collectively, the "Moving Defendants") request that the Court distribute the funds interpleaded (the "Interpleaded Funds") in this case (the "Interpleader Case") to each defendant on a per capita basis. They further ask the Court to rule that any fees or expenses of AXIS Surplus Insurance Company ("AXIS") otherwise chargeable to the Interpleaded Funds be paid from any distribution made to Robert Geringer ("Geringer") and William Warwick ("Warwick").

The Moving Defendants' motion must be denied because a per capita distribution of the Interpleaded Funs would be improper under the facts and the law.

[1] Bankr. Case No. 11-35082 (Bankr. D. Utah); *see also infra* at p. 3-4 (providing background about the bankruptcy case).

On June 4, 2014—now nearly six months ago—Warwick and the Trustee filed a *Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds* (the "Joint Motion") [Docket No. 37], in furtherance of a settlement agreement they had reached (the "Warwick Settlement Agreement"). After Warwick and the Trustee filed the Joint Motion, the parties stipulated (and the Court ordered) that the Defendants could respond to the Joint Motion "fourteen (14) days after this Court issues its order on the Liquidating Trustee's Motion to Intervene." *See* Docket No. 75, at 2. By filing this Motion, the Moving Defendants are apparently attempting to "jump the queue."

Taking advantage of the parties' scheduling stipulation in this way is improper. But it does not does not affect the facts. The Moving Defendants have not made any evidentiary showing that any of them is entitled to any of the Interpleaded Funds. Warwick is the only defendant that has shown with evidence that he is entitled to any portion of the Interpleaded Funds. As such, the only requested distribution of Interpleaded Funds before this Court for which there is an *evidentiary foundation* is the $200,000 distribution requested by Warwick and the Trustee, pursuant to their settlement agreement.

The Moving Defendants are also wrong about the law. The "per capita" rule they advocate is not generally applied in federal courts. Rather, the rule that is in accord with federal common law, and that should be applied in this case, is the "first in time, first in right rule."

Further, AXIS has not requested, nor is it entitled to a payment of attorney fees from the Interpleaded Funds. If AXIS ultimately requests and is allowed any fees or costs, those amounts would be chargeable to the Interpleaded Funds, not just to any portions distributed to Warwick and Geringer.

The Court should deny the Motion and instead grant the Trustee and Warwick's Joint Motion.

II. ADDITIONAL BACKGROUND

Pursuant to DUCivLR 56-1(c) the Trustee submits this Additional Background related to the relief requested by the Moving Defendants in the Motion.

On February 21, 2014, the parties, including AXIS, participated in a mediation to attempt to reach a global settlement of the claims against defendants for their role in the failure of CAREIC and its related companies. The mediation failed.

Both prior to and since the mediation, the Trustee has attempted to settle with several of the Defendants individually on behalf of the Trusts. To date, although the Trustee has engaged in settlement discussions with all Defendants and submitted formal settlement proposals to many of them, only one of the Defendants—Warwick—has settled with the Trustee. Under the Warwick Settlement Agreement, Warwick paid the Trustee $200,000 in cash, and assigned to the Trustee any and all rights he has under the Policy to seek payment for an additional $200,000.

As a result of the Warwick Settlement Agreement, on June 4, 2014, the Trustee filed a *Motion to Intervene* (the "Motion to Intervene") [Docket No. 36] in this Interpleader Case. Concurrent with the Motion to Intervene, the Trustee and Warwick filed the Joint Motion seeking a distribution of the $200,000 now owing to the Trusts. The Trustee also filed a motion to approve the Warwick Settlement in the Bankruptcy Court (the "Motion to Approve Settlement Agreement"). *See* Bankruptcy Case, Docket Nos. 925 & 980. The Motion to Approve Settlement Agreement has since been transferred to this Court and consolidated with this

Interpleader Case. *See* Docket Nos. 82 (Order Granting Motion to Consolidate) & 83 (*Motion to Withdraw Bankruptcy Court Reference* for the Motion to Approve Settlement Agreement).

In light of these circumstances, the Trustee and the Defendants agreed that the Defendants could respond to the Joint Motion "fourteen (14) days after this Court issues its order on the Liquidating Trustee's Motion to Intervene." *See* Docket No. 75, at 2. The purpose of the stipulation was professional courtesy and avoidance of unnecessary fees and costs. Now, however, it appears that the Moving Defendants are using the stipulation tactically—filing their own motion seeking distribution from the Interpleaded Funds, despite having not responded to the Joint Motion which was filed nearly six months ago.

III. RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Pursuant to DUCivLR 56-1(c)(2), the Trustee submits the following response to AXIS' Statement of Elements and Undisputed Material Facts.

A. Response to Legal Elements and Authority

The Trustee agrees that an interpleader action is controlled by equitable principles. Beyond that, however, the Moving Defendants are wrong about almost everything. First, the "per capita" rule they advocate is not generally applied in federal courts. Even the lone unpublished case the Moving Defendants cite in support of their "per capita" rule recognizes this is the case. See *National Century Financial Enterprises, Inc. v. Gulf Ins. Co.*, No. 03-02288, 2005 WL 6242169, at *10 (Bankr. S.D. Ohio Jan. 10, 2005).

Second, the interpleader statute was not, as Moving Defendants contend, designed to ensure that all potential claimants receive an equal share of the interpleaded funds. To the contrary, its focus is on protecting stakeholders (like AXIS) "from conflicting claims and

multiple liability." *Great Am. Ins. Co. v. Spraycraft, Inc.*, 844 F.Supp. 1188, 1192 (S.D. Ohio 1994).

Third, the appropriate rule for this federal court to follow in determining priority of distribution is the "first in time, first in right rule." That is the rule recognized by federal common law as being "grounded in principles of equity." *Spraycraft*, 844 F.Supp. at 1192; *In re Lehigh Valley Mills, Inc.*, 341 F.2d 398, 400-01 (3d Cir. 1965); *see also Smith v. Wildman Trucking & Excavating, Inc.*, 627 F.2d 792, 800 (7th Cir. 1980).

B. Response to Defendants' Statement of Undisputed Material Facts

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.

Response: Disputed, in part. The Trustee does not dispute that AXIS issued the Policy to CAREIC. However, the Trustee does not, at this stage, admit the "Limit of Liability" under the Policy is $1 million. The Policy's original limit of liability was $ 5 million. That amount was, purportedly, changed. The Trustee is currently seeking, and intends to seek, discovery from AXIS and from the Defendants relating to the circumstances surrounding the purported reduction, and whether "Notice of Circumstances," was given to AXIS under the higher Limit of Liability, triggering coverage. The Trustee has submitted a notice of claim under the $ 5 million Limit of Liability, which has been denied. *See Declaration of D. Ray Strong, Liquidating Trustee in Support of Memorandum in Opposition to AXIS' Motion for Summary Judgment*, Exh.

2 to Appendix, [Docket No. 61] at ¶¶ 17, 18 & 21; *Liquidating Trustee's Motion to Defer Consideration of AXIS' Motion for Summary Judgment to Allow Discovery Under Rule 56(d) of the Federal Rules of Civil Procedure and Memorandum in Support* (the "56(d) Motion") [Docket No. 63].

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.

Response: Undisputed.

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.[2]

Response: Undisputed.

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.)

Response: Undisputed.

[2] Bankruptcy Case No. 11-35082, Docket. 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.

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.

Response: The Trustee does not dispute that he sent demand letters to each of the Insureds on January 18, 2013. The Trustee states that the demand letters speak for themselves.

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.

Response: Undisputed.

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

Response: Disputed. On October 30, 2014, the Trustee filed a Complaint against the Moving Defendants, among others. *See* Case No. 14-cv-788-BCW (D. Utah), Docket No. 2 (the "Insider Complaint"). The Insider Complaint seeks substantial damages, but not $73 million absent enhancement. The Defendants raised in excess of $73 million from investors and the bulk of it was squandered. *Id.* at ¶¶ 2, 34, 38 & 147.

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.

Response: Undisputed.

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).

Response: Disputed. The Bankruptcy Court's order does not "order[] Axis to advance payment of Defense Costs to the Insureds." The motion to which the Bankruptcy Court's order pertains was filed by the Defendants and sought "relief from the automatic stay, to the extent applicable, to authorize AXIS . . . to advance defense costs." Bankruptcy Case Docket No. 863, at 2. The court's order permitted the payments so long as they were "subject to the Policy's terms and conditions." Bankruptcy Case, Docket No. 885, at 2. AXIS' payment made prior to the Interpleader Case was voluntary, not court-ordered.

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

Response: Disputed, in part. The Policy speaks for itself. Proper payment reimbursing any "Loss" arising from any "Claim" erodes the Policy. *See* Policy § V.B.

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.

Response: Disputed. Because of the posture of this case (*i.e.*, the Trustee's status as a proposed intervenor), the Trustee has not been able to conduct any discovery on this topic. As such, the Trustee does not admit that payments were made with the consent of all Defendants, or that the amounts paid were "Defense Costs" within the meaning of the Policy. *See generally*, 56(d) Motion, Docket No. 63.

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.

Response: Disputed. *See* Response to No. 11.

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.

Response: Undisputed.

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.

Response: Undisputed.

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.

Response: Undisputed. Similarly, the Defendants were unwilling to agree to the global settlement proposal made by the Trustee. *Declaration of Milo Steven Marsden in Support of Liquidating Trustee's Opposition to Joint Motion for Summary Judgment and Per Capita Distribution of Interpleaded Funds* (the "Marsden Declaration"), at ¶ 4.

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

Response: Disputed. *See* Response to No. 11.

17. All of the defendants but one, Robert Geringer, initially agreed to AXIS' proposal. Watson Decl. ¶ 4; Dkt. No. 20, Davison Answer ¶ 36; Dkt. No. 21, Warwick Answer ¶ 36; Dkt. No. 34, Austin, Grundy and Green Answer, ¶ 36; Dkt. No. 35, Cochran Answer ¶ 36.

Response: Disputed. *See* Response to No. 11.

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.

Response: Disputed. The Trustee has engaged in settlement discussions with all of the Defendants and has extended formal settlement offers to many of them. Many of these

settlement offers are within policy limits. However, Warwick is the only Defendant with whom the Trustee has been able to reach a definitive agreement. Marsden 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. Watson Decl. ¶ 6.

Response: Disputed. *See* Response to No. 11.

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).

Response: Disputed. The settlement with Warwick is not "tentative." It is subject to approval by this Court. *See generally*, Motion to Approve Settlement Agreement, Docket No. 83-1.

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.

Response: Undisputed.

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, Green and Grundy Answer ¶¶ 42-43; Dkt. No. 35, Cochran Answer ¶¶ 42-43.

Response: Undisputed.

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

Response: Disputed. The Trustee states that Robert Clawson has not yet answered the Interpleader Complaint. *See* Court Docket.

24. AXIS repeatedly advised the Defendants that it would treat them equally and would not favor the interests of on Insured over another. Watson Decl. ¶ 7, Dkt. No. 20, Davidson Answer ¶¶ 1, 30; Dkt. No. 31 Warwick Answer ¶¶ 1, 30; Dkt. No. 34, Austin, Grundy and Green Answer ¶¶ 1, 30; Dkt. No. 35, Cochran Answer ¶¶ 1, 30.

Response: Disputed. *See* Response to No. 11.

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

Response: Undisputed.

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

Response: Undisputed.

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.

Response: Disputed. *See* Response to No. 11.

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

Response: Disputed. *See* Response to No. 11.

IV. TRUSTEE'S STATEMENT OF ADDITIONAL ELEMENTS AND MATERIAL FACTS

Pursuant to DUCivLR 56-1(c)(2)(D), the Trustee submits the following Statement of Additional Elements and Material Facts.

A. First-in-Time Distribution is Appropriate.

The Court should distribute the Interpleaded Funds applying the principle of first in time first in right. *See, e.g.*, *Great Am. Ins. Co. v. Spraycraft, Inc.*, 844 F.Supp. 1188, 1191-92 (S.D. Ohio 1994).

B. Additional Material Facts

1. AXIS filed its complaint in this interpleader case on April 2, 2014. Docket No. 2.

2. On May 6, 2014, the Trustee entered into the Warwick Settlement Agreement. Warwick Settlement Agreement, attached as Exhibit A to the *Declaration of D. Ray Strong, Liquidating Trustee in Support of Memorandum in Opposition to AXIS' Motion for Summary Judgment*, Exhibit 2 to the *Appendix to Liquidating Trustee's Memorandum in Opposition to AXIS' Motion for Summary Judgment* [Docket No. 61].

3. Pursuant to the Warwick Settlement Agreement, the Trustee and Warwick agreed to release all claims between themselves, the Debtors, and the Trusts for the consideration of $400,000.00. Warwick agreed to pay the Trustee $200,000.00 from his personal funds and has deposited this money with the Trustee. Warwick also assigned to the Trustee "any and all Rights Warwick has under the [Policy], including any right to pursue a bad faith claim." In exchange, the Trustee agreed that he would direct further collection efforts at the Policy. Warwick Settlement Agreement ¶ 1.

4. After entering into the Warwick Settlement Agreement, on June 4, 2014, the Trustee filed his *Motion to Intervene*, seeking to participate in this Interpleader Case based on the interest assigned to him under the Warwick Settlement Agreement. *See* Docket No. 36.

5. Concurrently, the Trustee and Warwick filed their Joint Motion, seeking distribution of the additional $200,000.00 from the Interpleaded Funds. *See* Docket No. 37.

6. Moving Defendants and AXIS both objected to the Trustee's Motion to Intervene. *See* Docket Nos. 44 & 45.

7. On June 12, 2014, AXIS filed its *Motion for Summary Judgment* seeking, among other things, dismissal from the Interpleader Case and an injunction against all suits against it pertaining to the Policy or the Interpleaded Funds. *See* Docket No. 41. AXIS did not request attorney fees. *Id.*

8. On July 10, 2014, the Trustee issued a subpoena to AXIS (the "Interpleader Subpoena") seeking documents relevant to the allegations asserted in AXIS' Motion for Summary Judgment. *See Notice of Subpoena*, Docket No. 59.

9. On that same day, the Trustee filed his *Memorandum in Opposition to Axis' Motion for Summary Judgment*. Docket No. 60. One of the Trustee's principal arguments was that he needed further discovery to adequately respond to AXIS' Motion for Summary Judgment. *Id.* at 7 & 24; *see also* 56(d) Motion, Docket No. 63.

10. For this reason, the Trustee also filed the 56(d) Motion. Docket No. 63.

11. The Trustee has not entered a settlement agreement or obtained a judgment against any of the defendants in this case other than Warwick. Marsden Decl. ¶ 6.

12. Other than the current Motion, the Moving Defendants have not made a request to the Court for a distribution of any portion of the Interpleaded Funds. They have not submitted copies of their legal bills to the Court or provided any other evidence to substantiate their claims or the amount of their legal fees to date. Marsden Decl., at ¶ 7.

13. The Trustee has engaged in settlement discussions with all of the Defendants and has made formal settlement offers to many of them. *Id.* at ¶ 5.

14. The Trustee filed the Insider Complaint on October 30, 2014. Case No. 14-cv-00788-BCW (D. Utah), Docket No. 2. The Trustee also filed adversary complaints against Green and Grundy in the Bankruptcy Court. *See Strong v. Grundy*, Case No. 14-02339 (Bankr. D. Utah), Docket No. 1; *Strong v. Green*, Case No. 14-2340 (Bankr. D. Utah), Docket No. 1.

V. ARGUMENT

Summary judgment is appropriate when "the movant shows that 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).

A. The Court Should Not Distribute the Interpleaded Funds Per Capita.

Moving Defendants seek a per capita distribution of the Interpleaded Funds, arguing that a per capita distribution is the only equitable method to distribute the Interpleaded Funds. While Moving Defendants are correct that an action for interpleader is equitable in nature and controlled by equitable principles, *Burchfield v. Bevans*, 242 F.2d 239, 241 (10th Cir. 1957), a per capita distribution does not further these equitable principles in this case.

Instead of distributing the Interpleaded Funds on a per capita basis, the Court should distribute the funds on a first in time, first in right basis. *See Great Am. Ins. Co. v. Spraycraft,*

Inc., 844 F.Supp. 1188, 1192 (S.D. Ohio 1994). "The federal courts have recognized that the 'first in time, first in right' rule *is* grounded in principles of equity." *Id.* This approach represents the federal common-law approach to distributing interpleaded funds. *See* *Smith v. Wildman Trucking & Excavating, Inc.*, 627 F.2d 792, 800 (7th Cir. 1980); *In re Lehigh Valley Mills, Inc.*, 341 F.2d 398, 400-01 (3d Cir. 1965).[3]

The first in time approach promotes a "race of diligence." *See* *David v. Bauman*, 196 N.Y.S.2d. 746, 748 (N.Y. Sup. Ct. 1960). "The rule . . . is aimed at protecting stakeholders from inordinate delays in determining the scope of their liability and at rewarding diligent claimants." *Spraycraft*, 844 F.Supp. at 1192. It thus encourages prompt settlement or resolution of claims.

In similar contexts, courts have repeatedly explained that where there are multiple claimants, the insurer may pay proceeds (even if those proceeds completely deplete the policy) to the first claimant to obtain a judgment or settlement. *See, e.g.*, *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 477-78 (5th Cir. 1969), *abrogated on other grnds. by* *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996) (noting that the insurer "would be in no danger if it settled with [the first in time claimant]"); *Miller v. GA Interlocal Risk Mgmt. Agency*, 501 S.E.2d 589, 591 (Ga. App. 1998) (holding that a claimant had no right to a pro rata division of insurance proceeds and the insurer had no legal obligation to confer with the claimant before

[3] Under Utah choice of law rules, the Trustee believes that either Illinois, (AXIS' principle place of business), Georgia (AXIS' place of incorporation), or New Jersey (where all notices must be sent) law may apply. *See* *Am. Nat. Fire Ins. Co. v. Farmers Ins. Exch.*, 927 P.2d 186, 190 (Utah 1996) (applying the most-significant relationship test). The law of each of these states supports a first-in-time distribution. *Haas v. Mid Am. Fire & Marine Ins. Co.*, 343 N.E.2d 36, 38 (Ill. App. Ct. 1976); *Allstate Ins. Co. v. Evans*, 409 S.E.2d 273, 274 (Ga. App. 1991); *Miller v. GA Interlocal Risk Mgmt. Agency*, 501 S.E.2d 589, 591 (Ga. App. 1998); *Goughan v. Rutgers Cas. Ins. Co.*, 570 A.2d 501, 503 (N.J. Super. Ct. Law Div. 1989); *Ligouri v. Allstate Ins. Co.*, 184 A.2d 12 (N.J. Super. Ct. Ch. Div. 1962).

settling); *Goughan v. Rutgers Cas. Ins. Co.*, 570 A.2d 501, 503 (N.J. Super. Ct. Law Div. 1989) ("Our courts encourage the settlement of claims. They will not interfere with an insurer's settlement of the claim of one of several persons injured by a tortfeasor notwithstanding the fact that the settlement may deplete or exhaust the insurance proceeds available to others."); *Ligouri v. Allstate Ins. Co.*, 184 A.2d 12 (N.J. Super. Ct. Ch. Div. 1962) (holding that anything other than a first to settle rule "would interfere with the judicially favored policy of avoiding unnecessary expense and delay through settlement practice"); *Haas v. Mid. Am. Fire & Marine Ins. Co.*, 343 N.E.2d 36, 38 (Ill. App. Ct. 1976) ("it is generally held in other jurisdictions that an insurer may settle with some claimants even if the settlement virtually or completely exhausts the available proceeds and even though another claimant, who subsequently obtains a judgment is unable to collect in full").

Moving Defendants cite only one case in support of their argument that the funds should be distributed on a per capita basis—*National Century Financial Enterprises, Inc. v. Gulf Ins. Co.*, No. 03-02288, 2005 WL 6242169 (Bankr. S.D. Ohio Jan. 10, 2005). In that case, the court determined that a $3.5 million insurance policy should be allocated per capita between seven insured directors with allowable claims exceeding the $3.5 million. *Id.* at *10. But in National Century, *no settlements had been reached and no judgments had been entered against any of the insureds.* Thus, the only "claims" presented to the court were for defense costs. And, the court was presented with evidence that there was a large discrepancy among the insureds' defense costs—one group of insureds had incurred over $3.9 million in legal fees while another director had incurred only $190,000 in defense costs. *Id.* The court made clear that its decision was entirely driven by this set of circumstances:

> *There is one overriding reason for this method [the per capita method]*. Despite the fact that all the directors are implicated in one way or another in NCFE's bankruptcy and the MDL litigation, the expenses and fees they have accrued are uneven. The Outside Directors, between the three of them, have thus far accrued more than $3-9 million [sic] in fees and expenses. Mr. Ayers, on the other hand, has accrued about $190,000 in defense costs.

Id. Because of this discrepancy, the court applied a per capita distribution because a pro rata distribution "would reward an expensive litigation strategy to the detriment of an economical one." *Id.* at *11.

A per capita distribution is not appropriate in this case. The critical distinction between this case and *Gulf Insurance* is that here the Court is faced with a settlement of claims covered by the Policy. That settlement was reached nearly six months ago between Warwick and the Trustee. In that settlement Warwick agreed to make a payment out of his own pocket, which he has done. Meanwhile, settlement discussions with the remaining Defendants have stalled, or gone nowhere. These circumstances are far from those presented in *Gulf Insurance*, and they demand that the Court apply the normal first in time rule.

Currently, only Warwick has proven any claim to any portion of the Interpleaded Funds. *See* Joint Motion, Docket No. 27.[4] The Court should follow *Spraycraft* and distribute the Interpleaded Funds on the first-in-time basis. In *Spraycraft*, the issue was how to allocate $300,000 that had been distributed into the court's registry in an interpleader case. 844 F.Supp. at 1189-90. Defendants in that case all had judgments that exceeded the amount of the interpleaded funds. *Id.* at 1190-91. The court determined that a first-in-time distribution was

[4] The parties have agreed that the defendants will respond to the Joint Motion two weeks after the Court decides the Trustee's Motion to Intervene.

equitable, even though it resulted in recovery for only one defendant. *Id.* at 1191-92. It reasoned that although the interpleader statue is grounded in equity, "its primary intent [is] to protect stakeholders . . . from conflicting claims and multiple liability, *not* to ensure that all potential claimants receive an equal share of the interpleaded funds." *Id.*

In this case, the Trustee has diligently attempted to settle with all Defendants and pursued settlement with all Defendants. He participated in a global mediation with all Defendants and AXIS in February 2014. Rewarding those who have cooperated with the Trustee and diligently worked toward a settlement is an equitable result. *See id.* at 1192; *David*, 196 N.Y.S.2d. at 748.

Further, the Policy itself contemplates a first-in-time distribution. It provides that: "If the Limit of Liability is exhausted by payment of Loss, the Insurer's obligations under this Policy shall be completely fulfilled and extinguished." The insurance policy in *Spraycraft* had a similar provision, which the court held "gives further evidence that the very contract giving rise to [the insurer's] liability herein contemplated that claims would be paid by priority in time." 844 F.Supp. at 1192 n.2.

Accordingly, the Court should distribute the Interpleaded Funds on a first-in-time basis and should not apply a per capita distribution.

B. If AXIS is Entitled to any of the Interpleaded Funds, the Distribution Should Not be Taken from Warwick and Geringer's Allocation of the Interpleaded Funds.

AXIS should not be entitled to *any* of the Interpleaded Funds. Nothing in the Policy entitles AXIS to attorney fees and AXIS has not sought attorney fees.[5] Moreover, in AXIS'

[5] Despite its previous motion for summary judgment seeking dismissal and stating that it has no interest in the Interpleaded Funds, AXIS filed a response to the Motion. *See AXIS' Response to Defendants' Joint Motion for Summary Judgment and for Per Capita Distribution of*

Motion for Summary Judgment, AXIS requests that it be "dismissed from [the Interpleader Case]." Docket No. 41 at 15. It did not request attorney fees in the AXIS Motion or in the Complaint.[6]

Even if the Court determines that AXIS is entitled to attorney fees and that those fees should come from the Interpleaded Funds, they should not be applied only to Warwick and Geringer's distributions. Moving Defendants allege that Warwick (through the Trustee) and Geringer have needlessly driven up defense costs in this case. But Moving Defendants are as responsible for the costs in this matter as anyone. Moving Defendants state that the Trustee has increased costs by (1) moving to intervene in the matter and (2) asking for discovery. But these two actions were necessary steps to collect under the Warwick Settlement Agreement and were required by his duty as Trustee of seeking a maximum recovery for the estate. The Trustee moved to intervene on the basis that he had entered into Warwick Settlement Agreement and thus had an interest in this Interpleader Case. Despite the Trustee's clear interest, and likely ability to substitute for Warwick upon approval of the Settlement Agreement under Rule 25 of

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Interpleaded Funds, Docket No. 87. Therein, AXIS supports a per capita distribution and makes its first and only mention of attorney fees, stating that it reserves its right to seek its expenses in the Interpleader Case. *Id.* at 2-3.

[6] Even if AXIS had requested attorney fees, it is not entitled to attorney fees in the Interpleader Case. Although the Court has discretion to award attorney fees to a stakeholder in an interpleader case, attorney fees are generally inappropriate when the stakeholder is an insurer. *See Prudential Prop. & Cas. Co. v. Baton Rouge Bank & Trust Co.*, 537 F.Supp. 1147, 1150 (M.D.Ga. 1982). This is because the interpleader process benefits the insurer by relieving it of the risk of multiple claims, potential harassment, and expense. *Id.* It also discharges the insurer from all liability with regard to the fund. *Id.* For these reasons it is "unreasonable to award an insurance company fees for bringing an action which is primarily in its own self-interest." *Id.* (quotations omitted). The Trustee reserves all arguments regarding AXIS' entitlement to attorney fees should AXIS make such a request.

the Federal Rules of Civil Procedure, the Moving Defendants (as well as AXIS) still chose to oppose the Motion to Intervene and filed separate oppositions, both on the ground that the Warwick Settlement Agreement had not yet been approved. This was entirely unnecessary.

Moreover, the Trustee has sought discovery from AXIS through the Interpleader Subpoena and filed the 56(d) Motion to ascertain the true facts behind the extension of the Policy and to ensure that $1 million is the proper Limit of Liability.[7] As there are serious questions surrounding the extension of the Policy and whether certain Defendants gave notice of circumstances under a $5 million Limit of Liability, such discovery is not improper. In fact, Moving Defendants should be interested in the result of this discovery because they will also reap the benefits of an increased Limit of Liability.

If AXIS is ultimately awarded attorney fees, and if the Court determines that a per capita distribution is appropriate, the fees should not come solely out of Warwick and Geringer's distributions.

VI. CONCLUSION

For the reasons expressed herein, the Court should deny the Moving Defendants' Motion.

DATED this 26th day of November, 2014.

DORSEY & WHITNEY LLP

/s/ Milo Steven Marsden
Milo Steven Marsden
Peggy Hunt
Sarah Goldberg
Attorneys for D. Ray Strong, Trustee

[7] AXIS has not yet produced documents related to the Interpleader Subpoena.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2014, I caused a true and correct copy of the foregoing **LIQUIDATING TRUSTEE'S MEMORANDUM IN OPPOSITION TO 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** to be filed with the United States District Court for the District of Utah by using the CM/ECF system, which will automatically send email notifications of such filing to all counsel who have entered an appearance in this action.

/s/ Sarah Goldberg

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AXIS SURPLUS INSURANCE COMPANY, Plaintiff, ROBERT D. GERINGER; KIRBY D. COCHRAN; ROBERT CLAWSON; DOUGLAS W. CHILD; JEFF AUSTIN; WILLIAM H. DAVIDSON; WILLIAM K. WARWICK; WILLIAM GRUNDY; and KEITH GREEN, Defendants.	**DECLARATION OF MILO STEVEN MARSDEN IN SUPPORT OF LIQUIDATING TRUSTEE'S OPPOSITION TO JOINT MOTION FOR SUMMARY JUDGMENT AND FOR PER CAPITA DISTRIBUTION OF INTERPLEADED FUNDS** Civil Case No. 2:14-cv-00244-DAK The Honorable Dale A. Kimball

Milo Steven Marsden, being of lawful age, hereby declares, verifies, and states as follows:

1. I am a partner in the law firm of Dorsey & Whitney LLP and work in Salt Lake City, Utah.

2. I represent D. Ray Strong (the "Trustee"), as the post-confirmation estate representative of the Consolidated Legacy Debtors, Castle Arch Opportunity Partners I, LLC,

Castle Arch Opportunity Partners II, LLC, and the Liquidating Trustee of the Consolidated Legacy Debtors Liquidating Trust, the Castle Arch Opportunity Partners I, LLC Liquidating Trust, and the Castle Arch Opportunity Partners II, LLC Liquidating Trust in the Chapter 11 bankruptcy case styled as *In re Castle Arch Real Estate Investment Company, LLC*, Bankr. No. 11-35082 (Bank. D. Utah), and in the above captioned proceeding.

3. I submit this Declaration in support of the *Liquidating Trustee's Memorandum in Opposition to Joint Motion for Summary Judgment and for Per Capita Distribution of Interpleaded Funds* (the "Opposition"), and unless otherwise stated, capitalized terms used herein are as defined in the Opposition. This Declaration is based upon my personal knowledge of the facts set forth herein.

4. The parties, including the Trustee, participated in a global mediation on February 21, 2014. The Defendants were unwilling to agree to the global settlement proposal made by the Trustee.

5. Acting on the Trustee's behalf, I have engaged in settlement discussions with all of the Defendants and have extended formal settlement offers to many of them on behalf of the Trustee. Many of these settlement offers have been within the Policy limits. However, Warwick is the only Defendant with whom the Trustee has been able to reach a definitive agreement.

6. The Trustee has not entered a settlement agreement or obtained a judgment against any of the defendants in this case other than Warwick.

7. Other than the current motion, the Moving Defendants have not made a request to the Court for a distribution of any portion of the Interpleaded Funds. They have not submitted

copies of their legal bills to the Court or provided any other evidence to substantiate their claims or the amount of their legal fees to date.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

DATED this 26th day of November, 2014.

/s/ Milo Steven Marsden
Milo Steven Marsden

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2014, I caused a true and correct copy of the foregoing **DECLARATION OF MILO STEVEN MARSDEN IN SUPPORT OF LIQUIDATING TRUSTEE'S OPPOSITION TO JOINT MOTION FOR SUMMARY JUDGMENT AND FOR PER CAPITA DISTRIBUTION OF INTERPLEADED FUNDS** to be filed with the United States District Court for the District of Utah by using the CM/ECF system, which will automatically send email notifications of such filing to all counsel who have entered an appearance in this action.

/s/ Sarah Goldberg