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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.	**ROBERT D. GERINGER'S OPPOSITION TO MOVING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT** Civil Case No. 2:14-cv-00244-DAK Judge Dale A. Kimball Magistrate Judge Brooke C. Wells

Robert D. Geringer ("Geringer"), a defendant in the above-captioned action, hereby responds in 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 [Dkt. No. 85] (the "Motion"), filed by defendants Kirby D. Cochran ("Cochran"), Douglas Child ("Child"), Jeff Austin ("Austin"), William Grundy ("Grundy"), and Keith Green ("Green") (collectively, "Moving Defendants"). This Opposition is based on the *Declaration of Robert D. Geringer Pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Plaintiff AXIS' Motion for Summary Judgment* (the "Geringer Decl."), on file herein, and the *Declaration of Robert D. Geringer Pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Moving Defendants' Joint Motion for Summary Judgment* (the "Second Geringer Decl."), filed concurrently herewith, and the following representations.

I. INTRODUCTION

Summary judgment is appropriate only where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Eaves v. Fireman's Fund Ins. Cos.*, 148 Fed. Appx. 696, 699 (10th Cir. 2005); *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, No. 13-3142, 2014 U.S. App. LEXIS 4492, at *5 (10th Cir. Mar. 11, 2014) (reasoning the movant must "demonstrate the absence of a genuine issue of material fact" through the record (quoting Fed. R. Civ. P. 56(c)(1)(A))).

The Moving Defendants cite nothing in support of their allegation that a per capita distribution of the Interpleaded Funds is appropriate on summary judgment. That is because it is clearly not appropriate on summary judgment. Indeed, the only case the Moving Defendants cite involved not a motion for summary judgment, but a decision based upon evidence presented at trial. Here, there has been no trial and no such presentation of evidence from the Moving

Defendants.

There are also numerous disputed issues of material fact which preclude summary judgment. Specifically, it is not at all clear in this case that the AXIS Policy has a policy limit of $1 million, or whether the remaining balance of the Policy is $589,661.61. It remains to be determined whether the Policy reduction from $5 million to $1 million was proper, or whether the reduction was void, voidable, or involved improper conduct by AXIS or other parties. The Motion must be denied based upon these clear disputes of material fact alone.

II. RESPONSE TO STATEMENT OF UNDISPUTED MATERIALS FACTS

Pursuant to Local Rule 56-1(c), Geringer responds to each of Moving Defendants' stated material facts below (the "SOF").

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. Geringer does not dispute that AXIS issued a policy to CAREIC. However, Geringer 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. Geringer disputes that the AXIS Policy contains a $1 million policy limit and that the reduction from $5 million was proper, either as to himself or to the CAREIC bankruptcy estate. *See Memorandum in Opposition to AXIS' Motion for Summary Judgment* (the "Tr. Opp. to AXIS") at *26-27;

Geringer Decl. ¶ 11.

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, solely for purposes of this Opposition.

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.

Response: Undisputed, solely for purposes of this Opposition.

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, solely for purposes of this Opposition.

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: Geringer admits that he received a letter from the Trustee dated January 18, 2013. *See* Second Geringer Decl. ¶ 4. The Trustee's January 18, 2013 letter speaks for itself. Geringer is without knowledge or information regarding letters directed to the Moving Defendants.

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: Geringer admits that he received a draft complaint from the Trustee on or about October 12, 2013. *See* Second Geringer Decl. ¶ 5. The Trustee's draft complaint speaks for itself. Geringer is without knowledge or information regarding draft complaint(s) directed to the Moving Defendants.

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

Response: Disputed. On or about October 30, 2014, the Trustee filed a Complaint (the "Complaint") against the Moving Defendants, among others, but not against Geringer or Warwick. *See* Case No. 14-cv-788-BCW (D. Utah), Docket No. 2. The Complaint speaks for itself.

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, solely for purposes of this Opposition.

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 defendants Geringer, William J. Warwick, William H. Davidson, Child, Austin, Grundy, Green, and Cochran and sought "relief from the automatic stay, to the extent applicable, to authorize AXIS … to advance defense costs." *See* Case No. 11-35082 (the "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.

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 and "Loss" arising from any "Claim" erodes the Policy. The Policy's definition of "Loss" includes "Defense Costs," as further defined. *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: Undisputed, solely for purposes of this Opposition.

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. Geringer disputes that the remaining portion of the AXIS Policy is $589,661.61. *See* Tr. Opp. to AXIS at *26-27; Geringer Decl. ¶ 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: Disputed. Geringer disputes that the amount deposited with the Court represents the remaining portion of the AXIS Policy. *See* Tr. Opp. to AXIS at *26-27; Geringer Decl. ¶ 11.

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, solely for purposes of this Opposition.

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: Geringer is without knowledge or information regarding the Trustee's willingness to settle.

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.

Response: Geringer objects to SOF No. 16 pursuant to Fed. R. Evid. 408. SOF No. 16 is otherwise undisputed, solely for purposes of this Opposition.

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.

Response: Geringer objects to SOF No. 17 pursuant to Fed. R. Evid. 408. Geringer is without knowledge or information regarding the Moving Defendants' reactions to AXIS' proposal.

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: Geringer objects to SOF No. 18 pursuant to Fed. R. Evid. 408. Geringer is without knowledge or information regarding the Trustee's settlement negotiations with the Moving Defendants.

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.

Response: Geringer is without knowledge or information regarding the Moving Defendants' demands to AXIS.

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: The Motion to Approve Settlement Agreement, Docket No. 83-1, speaks for itself.

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: Geringer is without knowledge or information regarding the Moving Defendants' asserted rights to some or all of the Policy proceeds.

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.

Response: Disputed, in part. Geringer 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. Geringer disputes that the AXIS Policy contains a $1 million policy limit and that the reduction from $5 million was proper, either as to himself or to the CAREIC bankruptcy estate. *See* Tr. Opp. to AXIS at *26-27; Geringer Decl. ¶ 11.

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

Response: Disputed. *See* Response to SOF No. 7. Additionally, Robert Clawson has not yet answered the Complaint. *See* Court docket.

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.

Response: Undisputed, solely for purposes of this Opposition.

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

Response: Undisputed, solely for purposes of this Opposition.

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

Response: Disputed. Discovery is ongoing and the extent of "competing demands" is

unknown. Additionally, Geringer 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. Geringer disputes that the AXIS Policy contains a $1 million policy limit and that the reduction from $5 million was proper, either as to himself or to the CAREIC bankruptcy estate. *See* Tr. Opp. at *26-27; Geringer Decl. ¶ 11.

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. Geringer was not informed of the details of the negotiations or the changes to the Policy before the Policy Renewal. As a former executive and board member of CAREIC and an "Insured" under the AXIS Policy, Geringer had a legal and financial interest in the Policy Renewal and a right to understand any changes to the AXIS Policy's terms and conditions. And as a creditor of CAREIC, Geringer did not receive notice of the Policy Renewal or notice that those substantial modifications were approved by the bankruptcy court. *See* Geringer Decl. ¶ 8. Further, Geringer did not agree to pay "an equal portion of the premium payment for the Policy." *See* Second Geringer Decl. ¶ 3.

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 SOF No. 27.

III. STATEMENT OF ADDITIONAL ELEMENTS AND UNDISPUTED MATERIAL FACTS

Solely for purposes of this Opposition, Geringer adopts and incorporates herein by reference, the additional statements of undisputed facts set forth in the *Liquidating Trustee's Memorandum in Opposition to Joint Motion for Summary Judgment and for Per Capita Distribution of Interpleaded Funds* (the "Trustee's Opposition").[1]

IV. LEGAL STANDARD

In determining a summary judgment motion, the Court must "view facts in the light most favorable to the non-moving party" and resolve "all factual disputes and reasonable inferences" in favor of the party opposing the motion. *Cillo v. City of Greenwood Village*, 739 F.3d 451, 461 (10th Cir. 2013). The moving party is only entitled to summary judgment when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Eaves*, 148 Fed. Appx. at 699.

V. ARGUMENT

A. An Equitable Distribution is Inappropriate on Summary Judgment

The Moving Defendants' argument that a per capita distribution of the Interpleaded Funds is appropriate is based entirely upon an unpublished decision from Ohio, *In re National Century Financial Enterprises, Inc. v. Gulf Insurance Company, Inc. et al.*, No. 03-02288, 2005 WL 6242169 (Bankr. S.D. Ohio Jan. 10 2005). The Moving Defendants fail to mention, however, that the *National Century* decision occurred not on a motion for summary judgment,

[1] In the event that the Trustee files or serves a complaint against Geringer, Geringer specifically reserves all of his rights to defend against any and all claims asserted therein, on any and all legal, jurisdictional, factual and equitable grounds.

but following trial. The Moving Defendants have cited no case law providing authority for an "equitable" distribution of the Interpleaded Funds on a motion for summary judgment.

In *National Century*, the only "claims" presented to the Court were for defense costs. The Court received evidence – at trial – detailing each of the insureds' defense costs and concluded that 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.* at *10. The Court in *National Century* made clear that its decision rendered after trial was driven by the proven discrepancy in defense costs:

> There is one overriding reason for this [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 in fees and expenses. Mr. Ayers, on the other hand, has accrued about $190,000 in defense costs.

Id. Because of this discrepancy in defense costs, 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.

Here, the Moving Defendants have presented no evidence of their own defense costs, let alone evidence of an excessive discrepancy in the defense costs among all Defendants. Instead, the Moving Defendants merely allege, without citation, that defendants Austin, Green, and Grundy have "hired one counsel among the three of them, reducing the shared expenses." *See* Motion at 10. Such a baseless and unsupported allegation is not grounds for summary judgment.

Summary judgment is appropriate only where the record shows "that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Eaves v. Fireman's Fund Ins. Cos.*, 148 Fed. Appx. 696, 699 (10th Cir. 2005). Here, there is no evidence whatsoever of any of the parties' defense costs and there remain disputed issues of material fact, including whether a substantial discrepancy in defense costs exists. The Moving Defendants are not entitled to an "equitable" distribution as a matter of law. Indeed, there appears to be nothing in the law which provides for such a remedy on a motion for summary judgment.

B. Summary Judgment is Premature

The Motion is also premature because there are numerous other disputed issues of material fact including: 1) whether the AXIS Policy contains a $1 million policy limit; 2) whether the reduction from $5 million was proper; and 3) whether the remaining balance of the Policy is $589,661.61. *See* Response to SOF Nos. 1 & 12.

On or about June 12, 2014, AXIS filed *Plaintiff AXIS' Motion for Summary Judgment*. The Trustee's *Memorandum in Opposition to AXIS' Motion for Summary Judgment* asserted the following, among other things:

- When CAREIC filed for bankruptcy relief on October 17, 2011, the AXIS Policy provided a $5 million limit covering CAREIC, its subsidiaries, and their directors and officers (including Geringer), for claims made during the policy period. Tr. Opp. to AXIS at *5-6.

- The AXIS Policy was set to expire on December 20, 2012, but included the option to purchase an extension of the time to make claims under the Policy for an additional year, for a payment of 150% of the annual policy premium (the "Tail Coverage"). Tr. Opp. to AXIS at *12-13.

- In January 2012, after one-month of policy extensions and following discussions

between AXIS and only a subset of the co-defendants (excluding Geringer), AXIS amended the AXIS Policy through Endorsement Number 17 which extended the policy on the following terms: (1) the policy limit was reduced from $5 million to $1 million; and (2) AXIS would no longer cover CAREIC as an "Insured" (the "Policy Renewal"). Tr. Opp. to AXIS at *12-14.

- Prior to the Policy Renewal, one of Geringer's co-defendants prepared a notice letter that could be delivered to AXIS to trigger AXIS' coverage obligation under the $5 million policy limit (the "Notice"). The Notice was sent to Hub International Midwest Limited ("HUB"), an insurance broker negotiating the renewal terms with AXIS. Tr. Opp. to AXIS at *13.

- AXIS' willingness to extend the AXIS Policy was specifically conditioned upon it not formally receiving the Notice, and upon none of the insureds invoking the Tail Coverage. Tr. Opp. to AXIS at *13.

- The United States Trustee's Office, the creditors of CAREIC and its affiliates, and the Bankruptcy Court were not informed of the Policy Renewal negotiations or the impact of them on CAREIC's bankruptcy estate and creditors, nor was Bankruptcy Court approval sought for any renewal of coverage with AXIS, the reduction in coverage from $5 million to $1 million and the removal of CAREIC as a named insured. Tr. Opp. to AXIS at *14; Geringer Decl. ¶ 8.[2]

These issues are still in dispute and must be litigated before any relief can be granted in this case. Completing discovery in this matter is particularly important, because it may lead to the conclusion that either the Policy Renewal was void (such that the amount of the remaining policy proceeds is in dispute), or that such renewal resulted in affirmative claims against AXIS or others that should be asserted and litigated before this case can be resolved.

The AXIS Policy specifically provides that CAREIC alone would represent all insureds to send notices of claims or circumstances, pay any additional premiums to place or renew coverage, and negotiate and accept any endorsement which amends the terms of coverage. *See*

[2] Geringer, a former President of CAREIC who resigned in 2009, was excluded from the negotiation process with AXIS. He too lacked any notice of the Renewal until after it was effective. Geringer Decl. ¶ 8.

Geringer Decl. ¶ 9 (discussing section VIII.J. of the AXIS Policy). But when CAREIC filed for bankruptcy relief, it and its management forfeited the ability to act outside of the ordinary course of business, without approval from the bankruptcy court. *See* 11 U.S.C. § 363(b) (any use, sale, or lease of property of the estate outside of the ordinary course of business must be approved by the bankruptcy court, following notice to parties in interest and a hearing). Actions which require approval under section 363(b) but are not so authorized are violations of the automatic stay that are considered *void ab initio* and/or unauthorized transfers that are avoidable under section 549 of the Bankruptcy Code.[3] *See, e.g., Franklin Sav. & Loan Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) ("Any action taken in violation of the stay is void and without effect."); *In re Baker*, 118 B.R. 24 (Bankr. S.D.N.Y. 1990) (lease negotiated post-petition that was not authorized under section 363(b) was void).

CAREIC's management did not seek approval of the Policy Renewal from the bankruptcy court. Geringer is a creditor of CAREIC with an allowed claim. As a creditor, he did not receive notice of the proposed policy changes, and it does not appear that a hearing was held to consider whether the Renewal was appropriate. As a result, CAREIC, the only party authorized to negotiate the Policy Renewal under the AXIS Policy, was without any authority to do so. The Policy Renewal may, therefore, have been ineffective.[4] The only way to determine

[3] It is conceivable that, based on further discovery, the Trustee may also assert that the Policy Renewal and the commensurate reduction in the policy limit was a fraudulent transfer or was otherwise avoidable under chapter 5 of the Bankruptcy Code.

[4] Even aside from the clear terms of the AXIS Policy, the Policy Renewal may not have been effective as an improper conversion of property of the estate (*i.e.*, CAREIC's opportunity under the AXIS Policy to extend the period for lodging claims under the Policy, in exchange for a relatively nominal fee).

whether these claims are legitimate, however, is through ongoing discovery. Thus, summary judgment is premature and the Moving Defendants' Motion must be denied.

VI. CONCLUSION

For the foregoing reasons, Geringer respectfully requests that the Court deny the Motion. There is no basis in law for an equitable division of the Interpleaded Funds by way of summary judgment. Additionally, there remain numerous issues of disputed material fact, including the amount of coverage owed by AXIS. These disputed issues of material fact preclude summary judgment at this time.

Respectfully submitted,
Dated: December 10, 2014

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-and-

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Attorneys for Robert D. Geringer

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

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

vs.

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 ROBERT D. GERINGER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(d) AND IN SUPPORT OF OPPOSITION TO MOVING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

Civil Case No. 2:14-cv-00244-DAK

Judge Dale A. Kimball
Magistrate Judge Brooke C. Wells

I, Robert D. Geringer, pursuant to Federal Rule of Civil Procedure 56(d), state as follows:

1. I am the former President and member of the Board of Directors of Castle Arch Real Estate Investment Company, LLC ("CAREIC") and a defendant in the above-captioned action. In addition, I am a creditor of CAREIC and the holder of an allowed claim in the CAREIC bankruptcy case in the amount of $243,146.13. In this capacity, I have personal knowledge of the facts set forth herein and submit this Declaration in support of my Opposition to Moving Defendants' Joint Motion for Summary Judgment (the "Motion").

2. On or about July 10, 2014, I executed the *Declaration of Robert D. Geringer Pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Motion for Summary Judgment* (the "First Declaration"). Rather than restate my First Declaration, I intend this Declaration as a supplement to my First Declaration and hereby incorporate my First Declaration as if set forth fully herein.

3. As stated in my First Declaration, based on some of the documents I reviewed from the Trustee, I understand that AXIS, Hub International Limited ("HUB"), an insurance broker, and some of my co-defendants negotiated the renewal of coverage which took effect on January 20, 2012. I did not agree to pay an equal portion of the premium for any such renewal.

4. Through my counsel, I received a letter dated January 18, 2013 from D. Ray Strong, the Chapter 11 Trustee, Case No. 11-35082, (the "Trustee").

5. Through my counsel, I received a draft complaint from the Trustee on or about October 12, 2013.

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

Dated: December 10, 2014

/s/ Robert D. Geringer
Signed by Kimberley L. Hansen
with permission of Robert D. Geringer