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*AXIS Surplus Insurance Company*

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

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AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

v.

ROBERT D. GERINGER; KIRBY D.  
COCHRAN; ROBERT CLAWSON;  
DOUGLAS W. CHILD; JEFF AUSTIN;  
WILLIAM H. DAVIDSON; WILLIAM J.  
WARWICK; WILLIAM GRUNDY; and  
KEITH GREEN,

Defendants.

**JOINT STATUS REPORT**

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

Judge Dale A. Kimball

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The parties to this Interpleader and proposed intervenor, D. Ray Strong in his capacity as post-confirmation estate representative and liquidating trustee (“Trustee”), submit this Joint Status Report to apprise the Court of the status of this action in advance of the status conference currently scheduled on May 12, 2015.

1. AXIS filed the instant action for interpleader pursuant to 28 U.S.C. Section 1335 (the “Interpleader”) on April 2, 2014 in order to resolve competing claims by the Defendants, who are former directors and officers of the bankrupt Castle Arch Real Estate Investment Company, LLC (“CAREIC”) and Insureds under an insurance policy issued by AXIS (the “Policy”), to the proceeds of the Policy in order to defend or settle claims asserted against them by the Trustee on behalf of certain liquidating trusts for damages in excess of \$73 million.<sup>1</sup>

2. AXIS previously paid \$410,338.39 in defense costs on behalf of the Defendants in defense of the Trustee’s claims with the written consent of all of the Defendants. On May 2, 2014, pursuant to an order of the Court, AXIS deposited the remaining policy proceeds (\$589,661.61) into the Court’s Registry to abide by the judgment of the Court as to how the remaining proceeds should be distributed among the Defendants.<sup>2</sup>

3. All of the Defendants have appeared and answered AXIS’ complaint, except for Defendant Clawson, who accepted service of the complaint but has not answered or otherwise appeared.<sup>3</sup>

4. Numerous motions have been filed in the Interpleader since AXIS deposited the remaining proceeds with the Court. The motions and their status are listed in the chart below.

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<sup>1</sup> Dkt. No. 1.

<sup>2</sup> Dkt. No. 26.

<u>Motion</u>	<u>Date Filed</u>	<u>Status of the Motion</u>
Trustee's Motion to Intervene (Dkt. No. 36)	June 4, 2014	Fully Briefed
Trustee's and Warwick's Joint Motion for Summary Judgment and Distribution of Interpleaded Funds (the "Motion for Distribution," Dkt. No. 37)	June 4, 2014	Briefing Ongoing <ul style="list-style-type: none"> <li>• Defendants to file their response 14 days after the Court rules on the Motion to Intervene</li> <li>• Trustee to file his omnibus reply 14 days after the Defendants file their response</li> </ul>
AXIS' Motion for Summary Judgment (Dkt. No. 41)	June 12, 2014	Fully Briefed
Trustee's Motion to Defer Consideration of AXIS' Motion for Summary Judgment to Allow Discovery (the "Rule 56(d) Motion for Discovery," Dkt. No. 63)	July 10, 2014	Briefing Ongoing <ul style="list-style-type: none"> <li>• Trustee to file his reply 14 days after the Court rules on the Motion to Intervene</li> </ul>
Trustee's Amended Motion for Approval of Settlement Agreement Between Trustee and William Warwick (the "Settlement Approval Motion" (Dkt. No. 98, Ex. B; <i>see also</i> Bkrtcy. Case No. 11-35082, Dkt. No. 980	Aug. 6, 2014	Fully Briefed <ul style="list-style-type: none"> <li>• Evidentiary hearing previously set for March 17, 2015 was postponed</li> </ul>
AXIS' Motion to Quash the Trustee's Subpoena Duces Tecum (Dkt. No. 78)	Aug. 21, 2014	Briefing Ongoing <ul style="list-style-type: none"> <li>• Trustee to file his response 14 days after the Court rules on the Motion to Intervene</li> <li>• AXIS to file its reply 7 days after the Trustee files his response</li> </ul>
Certain Defendants' Joint Motion for Summary Judgment and for Per Capita Distribution of Interpleaded Funds (the "Motion for Per Capita Distribution," Dkt. No. 85)	Oct. 29, 2014	Fully Briefed
AXIS' Motion for Leave to File First Amended Complaint for Interpleader, <i>Instante</i> (Dkt. No. 96)	Jan. 21, 2015	Uncontested

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<sup>3</sup> Dkt. Nos. 20-21, 34-35, and 62.

5. As set forth above, several of the motions are fully briefed, while the briefing on other motions is ongoing and will not be completed until the Court rules on the Trustee's Motion to Intervene.

6. The Trustee's Motion to Intervene in the Interpleader is based on the Trustee's proposed settlement with Defendant William Warwick, and the proposed settlement is contingent upon Court approval under Rule 9019 of the Federal Rules of Bankruptcy Procedure, which is the subject of the Settlement Approval Motion.

7. The Court previously set an evidentiary hearing for the Settlement Approval Motion on March 17, 2015.<sup>4</sup>

8. On March 12, 2015, the Court granted Defendant Robert Geringer's Ex Parte Motion to Continue the Evidentiary Hearing Without Date due to the automatic stay imposed by the Bankruptcy Court presiding over Defendant Kirby Cochran's bankruptcy petition, and the Court scheduled a status conference in this matter on May 12, 2015.<sup>5</sup>

9. On April 16, 2015, the Trustee filed a notice with this Court advising that the Bankruptcy Court presiding over Kirby Cochran's bankruptcy petition entered an order terminating the automatic stay with respect to the Interpleader, among other matters, pursuant to a stipulation between the Trustee, Mr. Cochran and Mr. Cochran's bankruptcy trustee, Phillip Jones.<sup>6</sup>

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<sup>4</sup> Dkt. No. 100. The evidentiary hearing was set after the Court previously consolidated into the Interpleader a Miscellaneous Action, No. 14-cv-00626, filed by certain Defendants pursuant to their Motion to Withdraw the Reference from the U.S. Bankruptcy Court with respect to the Settlement Approval Motion (Dkt. No. 82), and granted the Motion to Withdraw the Reference. Dkt. No. 97.

<sup>5</sup> Dkt. No. 107.

<sup>6</sup> Dkt. No. 108.

10. There are five fully briefed motions pending before the Court: (1) the Settlement Approval Motion; (2) the Trustee's Motion to Intervene; (3) AXIS' Motion for Summary Judgment; (4) the Defendants' Motion for Per Capita Distribution; and (5) AXIS' Motion for Leave to File a First Amended Complaint, *Instante*.

11. AXIS respectfully requests that the Court grant its Motion Leave to File First Amended Complaint, *Instante*, which is unopposed.

12. With respect to the remaining motions, the parties dispute the order in which the outstanding motions should be decided and hearings scheduled, except as follows:

- a. The parties agree that the Court should re-schedule the evidentiary hearing on the Settlement Approval Motion;
- b. The parties agree that the Court should schedule a hearing on the Trustee's Motion to Intervene for a date after the Court has ruled upon the Settlement Approval Motion;

13. Following resolution of the motions in Paragraph 12, AXIS contends that the Court should schedule a hearing on the Trustee's Rule 56(d) Motion for Discovery and AXIS' Motion to Quash in conjunction with AXIS' Motion for Summary Judgment, after briefing on the Trustee's Rule 56(d) Motion for Discovery and AXIS' Motion to Quash is complete, as those motions are interrelated. AXIS contends that its Motion for Summary Judgment should be resolved before the Trustee's Motion for Distribution and certain Defendants' Motion for Per Capita Distribution because AXIS' Motion for Summary Judgment raises the issue of whether the Interpleader was properly filed by AXIS in the first place (Stage 1 of the Interpleader), which must be resolved before the Court can decide how to distribute the interpleaded funds (Stage 2 of the Interpleader). *See Prudential Ins. Co. of Am. v. Hovis*, 553 F.3d 258, 262 (3rd Cir. 2009).

14. Following resolution of the motions in Paragraph 12, the Trustee and Defendant Robert Geringer contend that the Court should schedule hearing on the Trustee's Rule 56(d) Motion for Discovery, and AXIS' Motion to Quash before hearing AXIS' Motion for Summary Judgment. The Trustee further contends that, after hearing AXIS' Motion for Summary Judgment, the Court should schedule a hearing on the Moving Defendants' Motion for Per Capita Distribution, and the Trustee's Motion for Distribution, once briefing on the Trustee's Motion for Distribution is complete.

15. The Moving Defendants Jeff Austin, William Grundy, Keith Green, Douglas Child, and Mr. Jones (on behalf of the Kirby Cochran bankruptcy estate) contend that their Motion for Per Capita Distribution should be decided immediately, that the Motion does not require an additional hearing, and the proceeds currently in interpleader should be divided among the defendants that have appeared in this Interpleader action.<sup>7</sup> No party contests that AXIS has properly put these proceeds in interpleader. The Moving Defendants contend that they have priority right in these proceeds under the policy to advance their defense costs. *Aspen Ins. UK, Ltd. v. Fiserv, Inc.*, No. 09-cv-02770-CMA-CBS, 2010 WL 5129529, at \*7 (D. Colo. Dec. 9, 2010) (costs must be advanced as they are incurred); *Perdue Farms, Inc. v. Travelers Cas. & Surety Co. of Am.*, 448 F.3d 252, 257-58 (4th Cir. 2006) (insurer duty to defend arises when claim is asserted; duty to indemnify only applies when liability is established for covered claims). Advancement of defense costs is the *only* authorized use of the proceeds under the order of the Bankruptcy Court. The Moving Defendants have an emergency need for these proceeds to fund their defense costs as the Trustee is aggressively litigating cases against certain Moving defendants (Austin, Green, and Grundy).

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

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<sup>7</sup> Defendant Robert Clawson has not appeared in this Interpleader Action.

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 8, 2015, the foregoing **JOINT STATUS REPORT** was filed with the United States District Court for the District of Utah via 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/ Brian J. Watson* \_\_\_\_\_  
Brian J. Watson