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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
RESPONSE TO AXIS' MOTION TO
SUPPLEMENT THE RECORD ON
AXIS' SUMMARY JUDGMENT
MOTION AND AXIS OPPOSITION TO
THE TRUSTEE'S RULE 56(d)
MOTION FOR DISCOVERY**

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

The Honorable Dale A. Kimball

Proposed intervenor, D. Ray Strong, as the Liquidating Trustee for 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 "Liquidating Trustee") in the bankruptcy case *In re Castle Arch Real Estate Investment Company, LLC et al.*,¹

¹ Bankr. Case No. 11-35082 (Bankr. D. Utah).

by and through undersigned counsel, hereby submits this Response to the *Motion to Supplement the Record on Axis' Summary Judgment Motion and Axis' Opposition to the Trustee's Rule 56(d) Motion for Discovery* (the "Motion to Supplement") filed by Axis Surplus Insurance, Co. ("Axis").²

INTRODUCTION

In the Motion to Supplement, Axis contends that the Liquidating Trustee's malpractice suit (the "Malpractice Suit") against Prince, Yeates & Geldzahler, P.C. and Adman S. Affleck (collectively, "Prince Yeates") and certain statements made by the Trustee and the Bankruptcy Court therein, bar the Liquidating Trustee from arguing that the proper limit of liability under the insurance policy at issue in this interpleader case was \$5 million rather than the \$1 million that Axis claims, and that the further discovery requested by the Liquidating Trustee is unwarranted. But the Liquidating Trustee was not successful in the Malpractice Suit—the Bankruptcy Court dismissed the case—and the Liquidating Trustee's claims and the Bankruptcy Court's ultimate opinion dismissing the Malpractice Suit were not dependent on the policy's limit of liability or whether a claim was made or notice of circumstances submitted under the \$5 million limit of liability. Moreover, even if the Court determines that the Liquidating Trustee is foreclosed from arguing that the limit of liability is \$5 million, such a determination does not affect the Liquidating Trustee's additional arguments and is not a basis for denying his 56(d) Motion or granting Axis' Motion for Summary Judgment and does not negate the Liquidating Trustee's need for discovery on his additional arguments.

² [Docket No. 125](#).

BACKGROUND

1. This case concerns the distribution of the proceeds of Axis Insurance Policy No. EAN756858/01/2010 (the “Policy”)³ issued to Castle Arch Real Estate Investment Company, LLC (“CAREIC”) and its directors and officers on January 20, 2010.

2. Axis filed this action for interpleader on April 12, 2014 (the “Interpleader Case”),⁴ and deposited \$589,661.61 with the Court. Axis allegedly distributed \$410,338.39 in defense costs to the Defendants before commencing this Interpleader Case.

3. On June 12, 2014, Axis filed its *Motion for Summary Judgment* (the “Motion for Summary Judgment”),⁵ seeking to discharge it from all liability under and related to the Policy, and dismiss it from the Interpleader Case.

4. On July 10, 2014, the Liquidating Trustee filed his *Memorandum in Opposition to Axis’ Motion for Summary Judgment* (the “Opposition”)⁶ and his *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”).⁷ As explained more fully in the Opposition and the 56(d) Motion, the Liquidating Trustee has four primary arguments as to why the Court should not grant the Motion for Summary Judgment: (1) Axis is

³ All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Policy or the Opposition or 56(d) Motion.

⁴ [Docket No. 2.](#)

⁵ [Docket No. 41.](#)

⁶ [Docket No. 60.](#)

⁷ [Docket No. 63.](#)

not a disinterested stakeholder because there may be claims against it related to the Policy, including those assigned to the Liquidating Trustee in the Warwick Settlement Agreement involving (a) whether Axis acted properly in its dealings with all of the Defendants, such as changes that were made to the Policy without notice and Axis' dealings with the Defendants once an initial demand on the Policy was made, (b) whether amounts already distributed for Defense Costs were appropriate under the Policy and applicable law, and (c) the possibility that rights remain under the \$5 million Limit of Liability; (2) there is no identifiable fund in controversy; (3) that Axis may not be relieved from liability and an injunction may not enter against funds outside of those funds deposited with the Court; and (4) that Axis may have liability relating to acts and omissions made with respect to the Policy, potential bad faith in its delay in filing the Interpleader Suit, and its premature distribution to the Defendants. The Liquidating Trustee filed the 56(d) Motion so that it could conduct the necessary discovery on these theories to adequately respond to the Motion for Summary Judgment.

5. On December 16, 2014, the Liquidating Trustee filed the Malpractice Suit against Prince Yeates. Prince Yeates served as counsel to CAREIC after it filed for bankruptcy. The Malpractice Suit was removed to the Bankruptcy Court on January 14, 2015.⁸ In the Malpractice Suit, the Liquidating Trustee brought claims for breach of fiduciary duty, professional negligence, and breach of contract. These claims were premised, in part, on Prince Yeates failure to counsel CAREIC, as an entity, of the importance of maintaining coverage under the

⁸ *Strong v. Prince Yeates & Geldzahler, PC*, Adv. Pro. No. 15-2007 (Bankr. D. Utah), [Docket No. 1](#).

Policy, of notifying Axis of actual or potential claims against the Policy, and of failing to procure tail coverage.⁹

6. On March 30, 2015, Prince Yeates filed a *Motion for Summary Judgment Re: Damages and Supporting Memorandum* (the “Prince Yeates Summary Judgment Motion”).¹⁰ In the Prince Yeates Summary Judgment Motion, Prince Yeates argued that the Liquidating Trustee could not succeed on his claims because he could not prove that CAREIC (as an entity) suffered any damages from Prince Yeates’ conduct. The Liquidating Trustee filed his *Opposition to Defendants’ Motion for Summary Judgment (Damages)*¹¹ on April 24, 2015, and Price Yeates filed its *Reply*¹² on May 12, 2015.

7. The Bankruptcy Court issued a *Memorandum Decision* (the “Malpractice Decision”) granting Prince Yeates Summary Judgment Motion on June 18, 2015.¹³ In the Malpractice Decision, the Bankruptcy Court stated that “[t]he Policy lapsed on January 20, 2012, and CAREIC did not renew the Policy, report any actual or potential Claims to AXIS during the reporting period, or purchase an extension of the reporting period.”¹⁴

⁹ See *id.*, at [Docket No. 1](#), Exh. B, Malpractice Amended Complaint ¶¶ 24-37.

¹⁰ *Id.*, at [Docket No. 20](#).

¹¹ *Id.*, at [Docket No. 28](#).

¹² *Id.*, at [Docket No. 31](#).

¹³ *Id.*, at [Docket No. 53](#).

¹⁴ *Id.* at [2](#).

RESPONSE

Axis contends that based on the arguments that the Liquidating Trustee has made in the Malpractice Suit and the Bankruptcy Court's Malpractice Decision, the Liquidating Trustee should be judicially estopped from arguing that there is a question of fact as to the Policy's proper Limit of Liability¹⁵ and that the additional discovery requested by the Liquidating Trustee in the 56(d) Motion is unwarranted.¹⁶ These arguments fail for two primary reasons. First, judicial estoppel is inapplicable because the Liquidating Trustee did not succeed in the Malpractice Suit and there will be no injustice or prejudice to Axis in permitting the Liquidating Trustee to pursue his discovery and argument regarding the proper Limit of Liability under the Policy. Second, the discovery that the Liquidating Trustee seeks pursuant to the 56(d) Motion encompasses much more than the proper Limit of Liability under the Policy. Thus, even if the Court determines that the Liquidating Trustee cannot continue to argue that there is a possibility of a \$5 million Limit of Liability, this is not a basis for rejecting the Liquidating Trustee's other arguments and denying the 56(d) Motion, preventing discovery, or granting the Motion for Summary Judgment.

A. Judicial Estoppel Does Not Bar the Liquidating Trustee's Arguments Regarding the Proper Limit of Liability Because the Bankruptcy Court Dismissed the Malpractice Suit and the Liquidating Trustee Will Not Derive an Unfair Advantage by Maintaining the Argument.

Judicial estoppel applies when (1) a party takes a position clearly inconsistent with an earlier-taken position; (2) the party has succeeded in persuading a court to accept that party's

¹⁵ [Motion to Supplement at 7.](#)

¹⁶ [Id. at 9.](#)

earlier position, so that judicial acceptance of an inconsistent position would create the perception that either the first or the second court was misled, and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.¹⁷ It is a narrow doctrine that should be applied sparingly.¹⁸

The requirements to apply judicial estoppel are not present here.¹⁹ First and foremost, the Liquidating Trustee was not successful in the Malpractice Suit.²⁰ Instead, the Bankruptcy Court granted the Prince Yeates Summary Judgment Motion and dismissed the Malpractice Suit. Although the Bankruptcy Court stated in the Malpractice Decision that CAREIC did not renew the policy, make a claim under the policy, or submit notice under the Policy, this statement in no way affected the outcome of the Malpractice Case. In fact, the Bankruptcy Court granted the Prince Yeates Summary Judgment Motion on the basis that CAREIC could not prove that it suffered damage from Prince Yeates' failure to renew the Policy. The proper Limit of Liability of the Policy was not at issue in the Prince Yeates Summary Judgment Motion or the Malpractice Suit in general, and neither party argued the issue. There is no risk of an inconsistent decision.

¹⁷ [*New Hampshire v. Maine*, 532 U.S. 742, 750-51 \(2001\)](#); [*Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 \(10th Cir. 2005\)](#).

¹⁸ See [*Vehicle Market Research, Inc. v. Mitchell Intern., Inc.*, 767 F.3d 987, 989 \(10th Cir. 2014\)](#) (“The Tenth Circuit applies the doctrine both narrowly and cautiously.” (quotations omitted)).

¹⁹ Axis blithely contends that the Liquidating Trustee's positions in the Malpractice Suit and this case are “clearly inconsistent.” But it is far from clear that this is the case. A finding that Prince Yeates was negligent in failing to renew the Policy or submit a claim or notice of circumstance would not foreclose a finding that Axis received a claim or notice of circumstance from some other source, and that a \$5 million limit of liability applies.

²⁰ See [*Barker v. Citigroup, Inc.*, No. 11-cv-51, 2012 WL 1379308, at *3 \(D. Utah Apr. 20, 2012\)](#) (unpublished) (holding that judicial estoppel was not applicable because state court had not accepted party's inconsistent position).

Accordingly, because the Liquidating Trustee was not successful in the Malpractice Suit and the Limit of Liability under the Policy was not even at issue there, judicial estoppel should not apply to prohibit the Liquidating Trustee from maintaining its argument that a \$5 million Limit of Liability may apply.

Second, the Liquidating Trustee will not derive an unfair advantage nor will Axis suffer an unfair detriment by the Liquidating Trustee's continued argument and investigation into the proper Limit of Liability. The Liquidating Trustee has admitted that he needs more information to determine whether this argument is viable.²¹ As the Liquidating Trustee had not been appointed at the time of the relevant events, he lacks certain information that would normally be available to a litigant. Thus, through the 56(d) Motion, the Liquidating Trustee simply seeks to obtain this information and further develop his theories of the case. And until the Liquidating Trustee receives clear evidence that there was no valid claim or notice of circumstance submitted under the \$5 million Limit of Liability, he has a duty to pursue this argument. As the Liquidating Trustee was not successful in the Malpractice Suit, he has gained no advantage from what Axis labels as inconsistent arguments. And, as the Liquidating Trustee is seeking discovery on other theories that overlap with the Liquidating Trustee's theory regarding the \$5 million Limit of Liability, Axis cannot argue that it is prejudiced by this argument and will suffer no injustice if the Court permits the Liquidating Trustee to continue to assert this argument.

²¹ See [Opposition at 6, 29](#) (stating that "it is possible" and using "may" language to discuss the Liquidating Trustee's potential arguments); See generally, [56\(d\) Motion](#).

For these reasons, the Court should not judicially estop the Liquidating Trustee from pursuing his argument that a claim was made or notice of circumstances were submitted under the \$5 million Limit of Liability.

B. Prohibiting the Liquidating Trustee from Arguing a \$5 Million Limit of Liability Does Not Affect the Liquidating Trustee's Other Arguments in the 56(d) Motion and Opposition.

Even if the Court determines that the Liquidating Trustee is judicially estopped from pursuing his theory that there may have been a claim made or notice of circumstances provided under the \$5 million Limit of Liability, the Liquidating Trustee has submitted numerous alternative theories to deny Axis' Summary Judgment Motion and for which additional discovery is necessary pursuant to the 56(d) Motion. These alternative theories include whether Axis acted properly in its dealings with the Defendants regarding changes made to the Policy and Axis' conduct after receiving a demand on the Policy, whether amounts disbursed prior to filing this Interpleader Suit were proper, and whether Axis may have liability relating to acts and omissions relating to the Policy, including potential claims for bad faith and Axis' premature distributions to the Defendants. The Liquidating Trustee seeks further discovery to develop these theories and, in addition to learning of whether Axis received notice of circumstance under the \$5 million Limit of Liability, to learn the circumstance regarding Axis' decision to condition the renewal of the Policy on the Defendants not invoking tail coverage or submitting a notice of circumstance, the previous distribution to the Defendants, and Axis' refusal to cooperate in the Liquidating Trustee's settlement negotiations with the Defendants. Thus, even if the Court determines that the Liquidating Trustee is judicially estopped from arguing the potential for a \$5 million Limit of

Liability, this is not a basis to reject the Liquidating Trustee's other arguments, grant the Summary Judgment Motion or deny the 56(d) Motion.

CONCLUSION

For the reasons expressed herein, and in the briefing on the Summary Judgment Motion and the 56(d) Motion, the Liquidating Trustee respectfully requests that the Court not bar him from arguing that there is a possibility that a claim was made or notice of circumstances submitted under the \$5 million Limit of Liability and grant the 56(d) Motion and deny the Summary Judgment Motion.

DATED this 15th day of July, 2015.

DORSEY & WHITNEY LLP

/s/ Milo Steven Marsden

Milo Steven Marsden

Peggy Hunt

Sarah Goldberg

Attorneys for Liquidating Trustee

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2015, I caused a true and correct copy of the foregoing **LIQUIDATING TRUSTEE'S RESPONSE TO AXIS' MOTION TO SUPPLEMENT THE RECORD ON AXIS' SUMMARY JUDGMENT MOTION AND AXIS OPPOSITION TO THE TRUSTEE'S RULE 56(d) MOTION FOR DISCOVERY** 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