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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

AXIS SURPLUS INSURANCE COMPANY, Plaintiff, 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.	Civil Case No. 2:14-cv-00244-DAK AXIS' REPLY IN SUPPORT OF ITS MOTION TO SUPPLEMENT THE RECORD ON AXIS' SUMMARY JUDGMENT MOTION AND AXIS' OPPOSITION TO THE TRUSTEE'S RULE 56(D) MOTION FOR DISCOVERY

The Trustee filed a lawsuit alleging legal malpractice against Castle Arch Real Investment Company, LLC's ("CAREIC") former counsel, after the briefing on AXIS' motion for summary judgment was completed. In the malpractice action, the Trustee represented that no claims or circumstances were reported under the AXIS policy's $5 million limit, in an attempt to hold CAREIC's former counsel liable for a loss of coverage. Here, however, he resists AXIS' discharge from this case, arguing among other things, that there was no loss of coverage because perhaps a claim or notice of circumstances was reported to AXIS under the $5 million limit after all. In his response, the Trustee does not—because he cannot—dispute that these positions are clearly inconsistent. Instead, he argues that this Court should ignore his inconsistent pleadings and assertions because: (1) although the bankruptcy court in the malpractice action accepted and relied upon the inconsistent facts that he presented to that court, it ultimately ruled against him on the merits; (2) it will not be unfair for the Trustee to pursue these diametrically opposed theories of relief; and (3) even if the policy limit is $1 million, the Trustee speculates that he may have claims related to matters other than the policy limit.

This Court should decline the Trustee's invitation to ignore his inconsistent positions. Instead, the Court should consider the evidence of the Trustee's inconsistent positions, and preclude him from arguing that the AXIS policy's limit of liability may be $5 million, for three reasons:

1) The Trustee's inconsistent statements in the malpractice action are evidentiary admissions under the Federal Rules of Evidence that are highly probative and support AXIS' summary judgment arguments;
2) There is no requirement that a party win on the merits of its claim before it can be judicially estopped from asserting an inconsistent position; and

3) A court should not grant a Rule 56(d) delay in pursuit of evidence on speculative arguments, and furthermore, the Trustee's speculative extra-contractual arguments fail on the merits anyway for the reasons provided in AXIS' opposition to the Trustee's Rule 56(d) delay motion.[1]

ARGUMENT

1. The Trustee's Statements in the Malpractice Action Are Highly Probative Evidentiary Admissions

As AXIS argued in its motion to supplement the record, the Trustee's factual declarations from the malpractice action are highly probative evidentiary admissions which are admissible pursuant to Federal Rule of Evidence 801(d).[2] The Trustee has offered no response to this argument, which in itself is grounds to grant AXIS' motion (even if the Court does not bar the Trustee from arguing that the policy limit may be $5 million).[3]

The cases that AXIS cited in its motion to supplement the record, which the Trustee has ignored, demonstrate that this Court should consider the Trustee's inconsistent positions when ruling on AXIS' summary judgment motion. In *LWT, Inc. v. Childers*, 19 F.3d 539 (10th Cir. 1994), LWT sued the defendant for breach of warranty when it sold LWT a hot oil heater. In a prior action where it was a defendant, LWT had asserted the existence of a limited warranty as an affirmative defense. In the later action, however, LWT as a plaintiff argued that the limited warranty never became part of its sales agreement. In ruling on summary judgment, the district

[1] Dkt. No. 77.

[2] *See* Dkt. No. 125 at 7.

[3] *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1295 (D. Utah 2010) (adopting movant's argument where non-movant failed to respond); *In re Castle Arch Real Estate Inv. Co., LLC*, No. 15-2007, 2015 WL 3825897, *3 (Bankr. D. Utah June 18, 2015) (ruling that the Trustee "effectively conceded" facts and arguments by failing to respond to them).

court declined to consider the evidence of this inconsistent pleading. On appeal, the Tenth Circuit reversed, concluding that the district court had abused its discretion. Noting that "[i]nconsistent allegations contained in prior pleadings are admissible as evidence in subsequent litigation," the Tenth Circuit found that "Plaintiff's reliance upon defendant's limited warranty in the [prior] litigation is directly contrary to the position it takes here . . . ." *Id*. at 542. "Those pleadings, therefore, were admissible as substantive evidence under Fed. R. Evid. 801(d)(2)." *Id*.

Similarly, in *Dugan v. EMS Helicopters*, 915 F.2d 1428 (10th Cir. 1990), the district court disregarded evidence of prior inconsistent pleadings, and its ruling was reversed by the Tenth Circuit on appeal. The plaintiffs in *Dugan* sued a helicopter owner and operator for wrongful death. The defendants sought to introduce evidence of the plaintiffs' prior complaint against different defendants for the same injuries, in which the plaintiffs had argued a separate group of defendants were the only parties responsible for the injury. The Tenth Circuit found that the earlier complaint was "factually inconsistent with the position plaintiffs pursued in this case and therefore constitutes an admission against interest pursuant to Fed. R. Evid. 801(d)(2). Further, it directly contradicts plaintiffs' prior statements and therefore may be introduced for its impeachment value." *Id*. at 1434.

LWT and *Dugan* apply squarely here. Like the parties in those cases, AXIS seeks to introduce evidence of factually inconsistent pleadings by the Trustee, which directly contradicts the Trustee's speculative assertion that the AXIS policy limit may be $5 million.

2. The Trustee's Loss on the Merits in Bankruptcy Court Does Not Preclude Judicial Estoppel

The Trustee does not dispute, and therefore effectively concedes, that he took a clearly inconsistent position in the malpractice action when he argued that the AXIS policy's limit was $1

million and that no notices of claims were submitted under the prior $5 million limit.[4] Nevertheless, the Trustee argues that he should not be judicially estopped from contradicting his inconsistent position because the bankruptcy court ruled against him on the merits in the malpractice action when it concluded that he failed to introduce any evidence of damages.[5]

There is no requirement that a party prevail on the merits in one case before it can be judicially estopped from arguing an inconsistent position in another case. The Trustee's argument to the contrary depends on an improper, rigid application of the judicial estoppel factors, which are not "inflexible prerequisites."[6] Further, the only case that the Trustee relies on for this argument does not hold that a party must prevail in all aspects of the other case or on the merits before it can be judicially estopped, as the Trustee wrongly suggests. Rather, it states that "courts regularly inquire whether the party has succeeded *in persuading a court to accept that party's earlier position*, such that judicial acceptance of an inconsistent position in a later proceeding would

[4] The closest the Trustee comes to disputing that he took an inconsistent position is footnote 19 of his opposition brief, Dkt. No. 128, where he merely notes that "it is far from clear" that the two positions are inconsistent. The Trustee suggests that it would not be inconsistent for the bankruptcy court to find that Prince Yeates negligently failed to submit a claim or notice of circumstance because he speculates that it is possible AXIS "received a claim or notice of circumstance from some other source . . ." *Id.* The Trustee does not suggest an identity for this speculative "other source" but if AXIS did receive notice of a claim or notice of circumstances then Prince Yeates' alleged negligence would be without consequence since the $5 million limit would not have been lost. Thus, the Trustee's footnoted speculation is at odds with the entire premise of his malpractice action, which is that the $5 million AXIS limit was not available because no claim or notice of circumstances was reported (by Prince Yeates or anyone else). *See* Bankr. No. 15-2007, Dkt. No. 29, ¶ 6 ("Had coverage been preserved and carrier payments at or close to the limits of the $5 million Policy for actual or potential claims been available, I believe I could have settled claims against CAREIC management early, and without substantial expense."). It is indeed inconsistent for the Trustee to file one lawsuit on the basis that no $5 million limit exists and to contend in another suit that it does. If the Trustee has reason to believe that potential coverage under the $5 million limit has been preserved by another source's reporting of actual or potential claims before January 20, 2012, then he has no good faith basis for his malpractice action.

[5] The fact that the Trustee was unable to produce any credible evidence of damages either in briefing or in oral argument despite persistent prodding by the bankruptcy court raises questions about what exactly he hopes to achieve in this interpleader action.

[6] *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (noting that that the three factors set forth by the Supreme Court are not "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel").

create the perception that either the first or the second court was misled."[7] As the Tenth Circuit has explained, the main concern is whether the estopped party's actions led the court "to accept [her] position, so that judicial acceptance of an inconsistent position in a later proceeding" would introduce the "risk of inconsistent court determinations and thus pose . . . [a] threat to judicial integrity."[8] Judicial integrity is protected "by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[9]

Here, although the Trustee failed to establish damages in the malpractice action,[10] he did in fact succeed in persuading the bankruptcy court to accept his inconsistent position. Specifically, he succeeded in persuading the bankruptcy court to find that CAREIC did not report any actual or potential claims to AXIS during the reporting period for the $5 million limit, based on the material facts that the Trustee submitted in opposition to the Prince Yeates' motion, including his declaration.[11] The Trustee argues, incredibly, that his inconsistent statements regarding the policy limit was "not at issue" in the malpractice action. But setting aside that this is not the test for judicial estoppel, how could the limit *not* have been at issue? The entire basis of the Trustee's malpractice action was that the policy's $5 million limit was allowed to expire without providing notice under the policy of actual or potential claims.[12] The bankruptcy court's factual finding

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[7] *Barker v. Citigroup, Inc.*, No. 11-CV-51, 2012 WL 1379308, *2 (D. Utah Apr. 20, 2012) (quoting *New Hampshire*, 532 U.S. at 750-51) (emphasis added).

[8] *Paup v. Gear Prods., Inc.* 327 F. App'x 100, 107 (10th Cir. 2009) (quoting *New Hampshire*, 532 U.S. at 750).

[9] *New Hampshire*, 532 U.S. at 749-50.

[10] For now, at least. He has taken an appeal. Bankr. No. 15-2007, Dkt. No. 62 (notice of appeal of bankruptcy court order granting summary judgment against Trustee on damages).

[11] *See* Bankr. No. 15-2007, Dkt. No. 1, Exhibit B to Prince Yeates' Notice of Removal, at p.85-86; Bankr. No. 15-2007, Dkt. No. 28, Additional Legal Elements and Undisputed Facts, ¶ 16, at p.33; Bankr. No. 15-2007, Dkt. No. 29, ¶¶ 6-7.

[12] *See* Bankr. No. 15-2007, Dkt. No. 29, ¶ 6.

therefore would have been a necessary predicate for the Trustee to make a case for malpractice against CAREIC's former counsel. The bankruptcy court did not draw the legal conclusion that the Trustee no doubt hoped it would draw, but it undeniably relied on his pleadings and testimony in concluding that the $5 million policy was not renewed and that no claims or potential claims were reported. That the Trustee established the factual predicate but then lost his case because he could not show damages does not mean that this Court should ignore that predicate, even if it would be convenient for the Trustee given "the exigencies of the moment" in this case.

The Trustee also fails in his argument that it would not be unfair for him to assert diametrically opposed facts in two different venues. This is so for two reasons. First, the Trustee would gain an unfair litigation advantage, and a chance at double recovery, if he can represent to the bankruptcy court that no claims or notices of circumstances were reported under the $5 million limit in an attempt to hold Prince Yeates liable for a loss of coverage, only to turn about-face and argue here that there was no loss of coverage because perhaps a claim or notice of circumstances was reported to AXIS under the $5 million limit after all. Second, it would be unfair to AXIS because it potentially forces AXIS to provide discovery and incur litigation costs defending against a speculative argument that another court has already rejected – *at the Trustee's own urging*. For these reasons, all the elements of judicial estoppel are met, and the Trustee should be estopped from arguing that the AXIS policy limit is not $1 million.

3. The Trustee's Other Admittedly Speculative Theories Do Not Preclude Judicial Estoppel or Justify the Court Ignoring Evidence of his Inconsistent Positions

The Trustee argues that, regardless of whether he is limited to arguing that the policy limit is $1 million, he has other arguments that warrant a Rule 56(d) delay. This argument fails for three reasons. First, the $1 million policy limit is hardly some incidental issue. If the policy limit

is $1 million, then the Court's next step should be to immediately grant AXIS' motion for summary judgment and discharge. (Indeed, the Court should take that next step immediately anyway, since the Trustee admits that he does not oppose AXIS receiving a discharge as to the interpleaded funds.[13])

Second, the Trustee's admission that he seeks discovery in pursuit of speculative claims dooms his attempt to win a Rule 56(d) delay. The Trustee has made clear, repeatedly, that he has no evidence of wrongdoing by AXIS and that his theories to the contrary are wholly speculative. For example, in his response to AXIS' motion to supplement the record, the Trustee "admit[s] that he needs more information to determine whether [his] argument is viable" and notes that he has used language such as "it is possible" and "may" to describe his "potential" arguments.[14] The Trustee's demands for discovery *before* articulating a plausible claim for relief turn the litigation process on its head. As AXIS noted in its opposition to the Trustee's Rule 56(d) delay motion, courts will not grant a Rule 56(d) delay where the evidence sought is the object of pure speculation, and where the party seeking a delay fails, as the Trustee has, to describe the missing evidence with specificity and to explain why it is "essential" to opposing summary judgment.[15] As the Tenth Circuit has observed, "[i]f all one had to do to obtain a grant of a Rule [56(d)] motion were to allege possession by movant of certain information [and] other evidence[,] every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's

[13] Dkt. No. 60 at 34, n. 112 (conceding that the Trustee "does not oppose to the [sic] Interpleader Suit as it relates to the Interpleader funds and releasing [AXIS] from liability *as to the Interpleaded Funds*.") (emphasis in original).

[14] Dkt. No. 128 at 8 and n.21.

[15] *See Fed. Deposit Ins. Corp. v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013) ("Speculation cannot support a Rule 56(d) motion."); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 1015, 1018 (10th Cir. 1995) ("[M]ere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable is insufficient to invoke [Rule 56(d)].") (citation and internal quotation marks omitted).

files."[16] And as the Supreme Court has instructed, "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[17] For that reason, a party seeking discovery must at a minimum plead a "facially plausible claim," that is, one that "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[18] Here, however, the Trustee seeks significant discovery without having pleaded *anything at all*. As AXIS has explained, there is no evidence of any nefarious activity with regard to any prior distribution of funds because all the Defendants—including Warwick, in whose shoes the Trustee now stands—unanimously approved that distribution in writing after the bankruptcy court authorized payment of defense costs.[19]

Third, even if the Trustee did plead a counterclaim against AXIS, that would still not merit a Rule 56(d) delay, because the existence of claims against an interpleading plaintiff does not defeat an interpleader action.[20] Further, as AXIS has explained, the amount of the interpleader

[16] *Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (citations and internal quotation marks omitted).

[17] *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

[18] *Id.* at 678.

[19] *See* Dkt. No. 77 at 10-11.

[20] *See* 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 1706 (3d ed. 2013) ("The reasons underlying the interpleader remedy continue to have force even when there is a possibility that the stakeholder may also be liable to one of the claimants on some special basis."); James Wm. Moore, *Moore's Federal Practice* § 22.07 (3d ed. 2009) ("This limitation [that the stakeholder's potential independent liability defeats interpleader] should be considered jettisoned in both rule and statutory interpleader."); *Libby, McNeill, & Libby v. City Nat'l Bank*, 592 F.2d 504, 507 (9th Cir. 1978) ("Thus, the mere potentiality of independent stakeholder liability, separate from liability for the interpleaded fund, will not defeat interpleader jurisdiction."); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 428-29 (10th Cir. 1966), *overruled on other grounds by Liberty Nat'l Bank & Trust Co. of Okla. City v. Acme Tool Div. of Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976); *Cagle v. James St. Grp.*, No. 07-CV-0029, 2009 WL 2230928, *2 (W.D. Okla. July 23, 2009) ("The availability of interpleader relief does not depend on the merits of the potential claims against the stakeholder in relation to the stake.") (citing *William Penn Life Ins. Co. v. Viscuso*, 569 F. Supp. 2d 355, 359 (S.D.N.Y. 2008)). Note that *Knoll* was overruled on its holding that an interpleader court lacks jurisdiction over a counterclaim, not for its statement that a counterclaim will not defeat interpleader jurisdiction itself.

stake is determined by AXIS' pleadings, not the Trustee's post-hoc speculative objections.[21] And, the Trustee cannot obtain a delay based on a laches defense—which courts "rarely" accept in interpleader[22]—because the history of this matter is well-known to all sides and the Trustee has failed to identify any additional evidence he would need to assert such a defense.

CONCLUSION

The Trustee seeks relief based on two inconsistent and mutually exclusive sets of facts in two different actions. The Trustee wants the Court to ignore the evidence of his inconsistent position. The Court should not. Rather, the Court should hold the Trustee to the facts that he argued to the bankruptcy court and which that court accepted. Basic fairness demands no less. Accordingly, for the foregoing reasons, AXIS respectfully requests that the Court grant its motion to supplement the record, consider the facts and evidence cited therein in connection with AXIS' Motion for Summary Judgment and its opposition to the Trustee's Rule 56(d) Motion, and bar the Trustee from contending that the AXIS policy limit is not $1 million.

RESPECTFULLY SUBMITTED this 29th day of July, 2015.

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[21] *See U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 210-11 (3rd Cir. 1999) (concluding that insurer correctly deposited $3.88 million in unexhausted policy limit, and reversing district court's ruling that insurer should have deposited additional limit that objector claimed were at issue).

[22] *Id.* at 208.

CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2015, **AXIS' REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD ON AXIS' SUMMARY JUDGMENT MOTION AND AXIS' OPPOSITION TO THE TRUSTEE'S RULE 56(D) MOTION FOR DISCOVERY** was filed with the United States District Court for the District of Utah via the CM/ECF system, and that a copy of the foregoing is similarly being served via electronic mail on counsel designated to accept service on behalf of the named Defendants who have not entered an appearance in this action.

/s/ *Brian J. Watson*
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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 J. WARWICK; WILLIAM GRUNDY; and KEITH GREEN, Defendants.	Civil Case No. 2:14-cv-000244-DAK **PROPOSED ORDER GRANTING PLAINTIFF AXIS' MOTION TO SUPPLEMENT THE RECORD ON AXIS' MOTION FOR SUMMARY JUDGMENT AND AXIS' OPPOSITION TO THE TRUSTEE'S RULE 56(D) MOTION FOR DISCOVERY**

This matter having come before the Court on AXIS Surplus Insurance Company's ("AXIS") Motion to Supplement the Record on AXIS' Motion for Summary Judgment and AXIS' Opposition to the Trustee's Rule 56(d) Motion for Discovery (the "Motion"), with due notice having been given, and the Court having considered the Motion, any opposition thereto, and the entire record, it is hereby:

1. **ORDERED** that AXIS' Motion is **GRANTED**;

2. **ORDERED** that the record on AXIS' Motion for Summary Judgment will incorporate the Trustee, D. Ray Strong's pleadings (Bankr. No. 15-2007, Dkt. No. 1, Exhibit A), declaration (Bankr. No. 15-2007, Dkt. No. 29), and the Bankruptcy Court's Findings of Fact and Conclusions of Law (Bankr. No. 15-2007, Dkt. No. 53) from the Trustee's action captioned, *D. Ray Strong v. Prince, Yeates & Geldzahler, PC*, Adv. Pro. No. 15-2007 in the U.S. Bankruptcy Court for the District of Utah**.**

Dated _____, 2015

_____
The Honorable Dale A. Kimball
United States District Court Judge