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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.	**OPPOSITION OF JEFF AUSTIN, KEITH GREEN, WILLIAM GRUNDY, AND DOUGLAS CHILD TO JOINT MOTION FOR SUMMARY JUDGMENT AND FOR DISTRIBUTION OF INTERPLEADED FUNDS AND CROSS-MOTION FOR SUMMARY JUDGMENT;** Civil Case No. 2:14-cv-00244-DAK Judge Dale A. Kimball

Defendants Jeff Austin, Keith Green, William Grundy, and Douglas Child (the "Moving Defendants") respectfully submit this Opposition to the Joint Motion for Summary Judgment and For Distribution of Interpleaded Funds, and cross-move for summary judgment to deny the Trustee any distribution from the Interpleaded Funds.

PRELIMINARY STATEMENT

The Trustee[1] mistakenly assumes that by settling with William Warwick for $400,000 and an assignment of Mr. Warwick's rights to the Policy (the "Settlement"), he is entitled to have that amount paid from the Policy. In fact, the Trustee is entitled to nothing and the prior Bankruptcy Court orders and injunctions -- including the plan injunction that the Trustee requested and obtained -- specifically prohibit the Trustee from recovering anything from the Policy.

The Bankruptcy Court injunction prohibits the interpleader funds from indemnifying the Settlement, as the proceeds from insurance may only be used to pay Defense Costs (as that term is used in the policy). All other uses, including the indemnification of the Settlement, are enjoined by the injunction in the Confirmed Plan (the "Plan Injunction"). Further, there can be no indemnity from the interpleaded funds because the Settlement is subject to numerous Policy exclusions. As the Trustee admits in his motion, he is seeking a distribution from the Policy of $200,000 that Mr. Warwick is not legally obligated to pay, and thus may not be indemnified by the Policy. The Trustee also admits that the Settlement is based on claims of purported securities law violations that are specifically excluded from coverage. The Plan Injunction and the Trustee's admissions are a sufficient basis to grant summary judgment to the Moving Defendants and hold that the Trustee is not entitled to any portion of the interpleader fund. In the alternative, the Court should deny the Trustee and Mr. Warwick's Joint Motion for Summary Judgment ("Joint Motion") and allow discovery.

I. Response to The Trustee's Statement of Elements and Undisputed Material Facts

[1] The Capitalized Terms as used herein shall have the same meaning as in the Joint Motion for Summary judgment.

1. **Mr. Warwick was a member of CAREIC's board of directors from 2004 until at least November 10, 2009.**

Response: Denied in part. Mr. Warwick was identified as a "director", but CAREIC was a Limited Liability Company incorporated under California law. August 31, 2015 Decl. of David Olsky ("Olsky Decl."), Ex. 1 (Amended Operating Agreement). The "directors" of CAREIC thus were akin to a Board of Advisors, and, except for CAREIC's managing member (its CEO), owed no fiduciary duties to the corporation. *See In re Castle Arch Real Estate Inv. Co., LLC*, Nos. 11–35082, 2013 WL 1603319, at *1 (D. Utah Apr. 25, 2013) (describing CAREIC's Board of Directors as an "Advisory Board").

2. **On October 17, 2011, CAREIC filed a petition for bankruptcy under Chapter 11 of the Bankruptcy code in the Bankruptcy Court.**

Response: Denied in part. Trent Waddoups, then CAREIC's receiver, filed a petition for bankruptcy on behalf of CAREIC.

3. **The Bankruptcy Court approved the appointment of the Trustee on behalf of CAREIC and certain of its subsidiaries or affiliates on May 3, 2012.**

Response: Not disputed.

4. **On June 7, 2013, the Bankruptcy Court entered an *Order Confirming Chapter 11 Trustee's First Amended Plan of Liquidation Dated February 25, 2013 as Modified,* which, among other things: (i) confirmed the *Second Amended Chapter 11 Trustee's Plan of Liquidation Dated February 25, 2013* (the "Confirmed Plan"); (ii) approved the Liquidating Trust Agreements for each of the Trusts (the "Trust Agreements"); appointed the Trustee as the post-confirmation estate representative for each of the Debtors; and (iv) appointed the Trustee as the Liquidating Trustee for each of**

the Trusts. "Claims" and "Causes of Action" of the Debtors' investors as well as those of the Debtors' respective estates, including Claims and Causes of Action against former management such as Mr. Warwick, were retained by the Debtors and transferred to the Trustee on the Effective Date of the Confirmed Plan for prosecution by the Trustee as Liquidating Trustee.

Response: Not disputed that the Confirmed Plan was adopted, but the legal implications (such as whether the "Claims" and "Causes of Action" were properly assigned to the Trustee) are not a factual matter and are denied.

5. **CAREIC obtained the Policy on December 20, 2010.**

Response: Not disputed that the Policy Period begins on December 20, 2010, but it is unknown whether the Policy was purchased on or around that date.

6. **Through subsequent endorsements, the Policy remained in effect until January 20, 2013. CAREIC paid $25,000.00 to extend the effective date of the Policy from January 20, 2012 until January 20, 2013.**

Response: The first sentence is denied to the extent that only the Policy Side A Coverage remained through January 20, 2013. The second sentence is denied insofar as Doug Child (not CAREIC) paid $26,000 to extend the Policy's Side A Coverage, and CAREIC paid nothing. Oct. 28, 2014 Decl. of Douglas W. Child, ¶ 2, Docket No. 86.

7. **Under the Policy, Axis is required to pay:**

> in connection with a **Wrongful Act** which takes place before or during the **Policy Period** all **Non-Indemnifiable Loss** on behalf of any . . . **Insured Individual** arising from any **Claim** for a **Wrongful Act** first made against such **Insured Individual**.

Response: Denied. Although this is an accurate citation of the "Side A" Coverage (see Policy, Section I.A), it does not capture the entire substance of the

Policy, including the Policy's exclusions from coverage. *See* Policy Section IV.A (listing exclusions from coverage).

8. **A Wrongful Act, as defined by the Policy, "means any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by . . . any Insured Individual in his or her capacity as such."**

Response: Denied. Although this is an accurate citation of the definition of "Wrongful Act", it does not capture the entire substance of the Policy, including the Policy's exclusions from coverage. *See* Policy Section IV.A (listing exclusions from coverage).

9. **The Policy defines an Insured Individual as:**

> **[A]ny one or more natural persons who was, is, or shall become an:**
>
> **1. director, officer, trustee, or Manager(s) or equivalent executive of the Policyholder other than a General Partner; or**
>
> **2. employee of the Policyholder.**

Response: Not disputed.

10. **Section III.L of the Policy concerns Loss and states:**

> **Loss means the amount(s) including Defense Costs which the Insured Individuals become legally obligated to pay on account of a Claim, including damages, judgments, any award of pre-judgment or post-judgment interest, settlement amounts, costs and fees awarded pursuant to judgments.**

Response: Not disputed that this is an accurate recitation of a portion of Section III.L, but it does not include all of the definition of "Loss" and does not include the Exclusions to Loss defined in the Policy.

11. **The Policy defines Claim as, among other things "the receipt by any Insured of . . . a written demand against any Insured for monetary or non-monetary relief."**

Response: Not disputed that this is an accurate recitation of the definition of "Claims" under the Policy.

12. **Finally, under the Policy, Non-Indemnifiable Loss means "Loss incurred by an Insured Individual for which the Policyholder . . . is financially unable to indemnify such Insured Individual by reason of Financial Impairment.**

Response: Not disputed that this is an accurate recitation of a portion of the definition of "Loss", but it does not include all of the definition of "Loss" and does not include the Exclusions to Loss defined in the Policy.

13. **And Financial Impairment means:**

> **the appointment by any state or federal official, agency or court of any receiver [or] trustee . . . to take control of, supervise, manage or liquidate the Policyholder; or . . . the Policyholder becoming a debtor in possession within the meaning of the United States Bankruptcy Code or similar legal status under foreign law.**

Response: Not disputed that this is an accurate recitation of a portion of the definition of "Financial Impairment" under the Policy.

14. **On January 18, 2013, the Trustee, through his attorney, made a demand for money damages against Mr. Warwick.**

Response: Not disputed.

15. **In the demand, the Trustee alleged that he has claims against Mr. Warwick arising from "errors, misstatements, misleading statements, acts, omissions, negligence, and breaches of duty [Mr. Warwick] committed in [his] capacity as a director, officer, trustee, manager, managing member, or equivalent, or as an employee of one or more of the . . . Debtors**.

Response: Not disputed.

16. **The Trustee believes that his claims against the Defendants, including Mr. Warwick, likely exceed $50 million.**

Response: Denied. The Trustee has stated that his claims against Mr. Warwick and others may amount to $10 million. Olsky Decl. Ex. 2, June 17, 2014 Rule 9019 Depo. of D, Ray Strong ("Strong Depo.") at 4:20-5:4.

17. **On October 12, 2013, the Trustee circulated a copy of a draft complaint to all defendants that set forth the claims that the Trustee believes he has against the Defendants.**

Response: Not disputed.

18. **Through a series of tolling agreements, the Trustee and Mr. Warwick agreed to toll the statute of limitations relating to the Trustee's claims until 10 days after either the Bankruptcy Court enters a final order approving the Settlement Agreement or the date that the Bankruptcy Court enters an order denying the Settlement Agreement.**

Response: Not disputed.

19. **The Defendants, Axis, and the Trustee participated in a global mediation on February 21, 2014. The parties were unable to reach a global settlement.**

Response: Not Disputed.

20. **Since then, the Trustee entered into the Settlement Agreement with Mr. Warwick on May 6, 2014. The Trustee has not yet entered into settlement agreements with any other Defendants.**

Response: The first sentence is not disputed. With respect to the second sentence, the Trustee entered a separate settlement with Mr. Geringer, which was ultimately rejected by the Bankruptcy Court.

21. **In the Settlement Agreement, the Trustee and Mr. Warwick agree to release all claims between themselves, the Debtors, and the Trusts for the consideration of $400,000.00.**

Response: Not Disputed.

22. **Mr. Warwick agreed to pay the Trustee $200,000.00 from his personal funds, and has deposited this money with the Trustee.**

Response: Not Disputed.

23. **Mr. Warwick also assigned to the Trustee "any and all rights Warwick has under the [Policy], including any right to pursue a bad faith claim."**

Response: Not Disputed that this is the language of the Settlement, but disputed as to the legal effect of the purported "assignment".

24. **In exchange, the Trustee agreed that it would direct further collection efforts at the Policy.**

Response: Not Disputed that this is the language of the Settlement, but disputed as to the legal effect.

25. **The Settlement Agreement is also conditioned upon approval by the Bankruptcy Court and the Bankruptcy Court's entry of a contribution bar order. On May 30, 2014, the Trustee filed motions in the Bankruptcy Court seeking these orders.**

Response: Not disputed.

26. **On April 4, 2014, Axis filed its Interpleader Complaint in this case, alleging that the Defendants have competing claims against the Policy.**

Response: Not disputed.

27. **In the Interpleader Complaint, Axis alleges that, as a result of prior disbursements of Defense Costs, there is currently $589,661.61 remaining in the Policy.**

Response: Not disputed.

28. **Axis has apparently deposited the $589,661.61 remaining in the Policy with the Court.**

Response: Not disputed.

II. Statement of Additional Material Facts

1. Pursuant to Section 6.10 of the Chapter 11 Trustee's First Amended Plan of Liquidation Dated February 25, 2013 (the "Plan") and in paragraph 15 of the June 7, 2013 Order Confirming the Plan, the Bankruptcy Court enjoined the distribution of estate assets, including the Policy Proceeds, absent a further order of the Bankruptcy Court. *See* Olsky Decl. Exs. 3-4. ("**AS OF THE EFFECTIVE DATE, ALL PERSONS ARE PRECLUDED FROM ASSERTING AGAINST ANY PROPERTY OF THE ESTATES, THE LEGACY CONSOLIDATED ESTATE AND ANY OF THE LIQUIDATING TRUSTS AND ASSETS THAT ARE DISTRIBUTED OR TO BE DISTRIBUTED UNDER THE PLAN OR ANY OF THE LIQUIDATING TRUSTS ANY CLAIMS, RIGHTS, CAUSES OF ACTION, LIABILITIES OR INTERESTS BASED UPON ANY ACT OR OMISSION, TRANSACTION OR OTHER ACTIVITY OF ANY KIND OR NATURE THAT OCCURRED PRIOR TO THE EFFECTIVE DATE, OTHER THAN AS EXPRESSLY PROVIDED IN THE PLAN OR THE CONFIRMATION ORDER, REGARDLESS OF THE FILING, LACK OF FILING, ALLOWANCE OR DISALLOWANCE OF ANY CLAIM OR EQUITY INTEREST AND REGARDLESS OF WHETHER SUCH PERSON HAS VOTED TO ACCEPT THE PLAN.")**

2. Pursuant to the January 9, 2014 Order of the United States Bankruptcy Court for the District of Utah, the only permissible use of the Policy proceeds is to advance Defense Costs. Olsky Decl. Ex. 5 ("Bankruptcy Court Order") at 2 ("To the extent applicable, the injunction contained in Section 6.10 of the Plan and in paragraph 15 of the Order Confirming Chapter 11 Trustee's First Amended Plan of Liquidation Dated February 25, 2013, is hereby modified so as to permit AXIS to advance Defense Costs under AXIS Policy No. EAN756858/01/2010. All such payments are to be made solely out of the proceeds of the Policy, subject to the Policy's terms and conditions.").

3. The Bankruptcy Court has not permitted the distribution of proceeds to indemnify a settlement, and has not otherwise modified the Plan Injunction. *See id.* ("Nothing in this Order shall modify or alter the legal and contractual rights and obligations provided for under the terms and provisions of the Policy and applicable law or otherwise modify the Plan injunction").

4. The Bankruptcy Court Order permitting advancement of Defense Costs confirmed that Policy proceeds may only be used to indemnify Loss in a manner permitted under the Policy. *See id.*

5. In the October 12, 2013 Draft Complaint (the "Draft Complaint") setting forth his claims against Mr. Warwick, the Trustee identified the following claims against Mr. Warwick:

- First Claim for Relief: Securities Fraud Under Section 10(b) of the Securities Act of 1934 (15 U.S.C. § 78j) and Rule 10b-5 (17 CFR 240.10b-5).
- Second Claim for Relief: Sales of Securities by Unlicensed Agents Under Section 15 of the Securities Act of 1934 (15 U.S.C. 78o). The Trustee sought rescission of securities contracts pursuant to this claim.

- Third Claim for Relief: Improper Sales of Unregistered Securities – 15 USC § 77e.
- Fourth Claim for Relief: Common Law Fraud.
- Fifth Claim for Relief: Negligent Misrepresentation.
- Sixth Claim for Relief: Breach of Fiduciary Duty.
- Seventh Claim for Relief: Civil Conspiracy.
- Eighth Claim for Relief: RICO – Violation of 18 U.S.C. §§ 1962(c) and (d)
- Ninth Claim for Relief: Avoidance of Fraudulent Transfers Under 11 U.S.C. § 548(a)(1)(A).
- Tenth Claim for Relief: Avoidance of Fraudulent Transfers Under 11 U.S.C. § 548(a)(1)(B).
- Eleventh Claim for Relief: Avoidance of Fraudulent Transfers Under 11 U.S.C. § 544(b) and Utah Code Annotated §§ 25-6-5(1)(a) and 25-6-8.
- Twelfth Claim for Relief: Avoidance of Fraudulent Transfers Under 11 U.S.C. § 544(b) and Utah Code Annotated §§ 25-6-5(1)(b) and 25-6-8.
- Thirteenth Claim for Relief: Avoidance of Fraudulent Transfers Under 11 U.S.C. §544(b) and Utah Code Ann. §§ 25-6-6(1) and 25-6-8.
- Fourteenth Claim for Relief: Avoidance of Preferential Transfers Under 11 U.S.C. § 547(b).
- Fifteenth Claim for Relief: Recovery of Avoided Transfers Under 11 U.S.C. §§ 550 and 551.
- Eighteenth Claim for Relief: Constructive Trust.
- Nineteenth Claim for Relief: Unjust Enrichment and Disgorgement.

See Olsky Decl. Ex. 6 ("Draft Compl.") at 85-110.

6. In a letter dated March 12, 2014 (the "March 12, 2014 Letter"), the Trustee's counsel specified that the primary basis for a settlement with Mr. Warwick would be claims for Civil Conspiracy and the Utah Pattern of Unlawful Activity Act. Olsky Decl. Ex. 7.

7. In the March 12, 2014 Letter, the Trustee's counsel confirmed that the predicate claims for the Trustee's Civil Conspiracy and the Utah Pattern of Unlawful Activity Act claims were the alleged misrepresentations and omissions in certain offering memoranda provided to certain CAREIC investors, which Trustee's counsel characterized as evidence of a "conspiracy to defraud". March 12, 2014 Letter at 4 n.11.

8. The Draft Complaint and the March 12, 2014 Letter set forth the basis under which the claims were settled. Strong Depo. at 38:11-42:10.

9. Section IV of the Policy, as amended by Endorsement 17, sets forth exclusions from Policy coverage. Olsky Decl. Ex. 9 (the "Policy") at 7-9.

10. The Settlement may not be indemnified because the Loss arises from a claim based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving an Insured's activities as an, Underwriter or Broker or Dealer. *See* Policy Section IV.A.16; Policy Endorsement 17.

11. To the extent that the Settlement involves both covered Loss and non-covered Loss, pursuant to Section V of the Policy, the amount of coverage must be allocated only to that portion of the Loss that is actually covered by the Policy. *See* Policy Section V.A; Policy Endorsement 17.

12. The Settlement does not obligate Mr. Warwick to pay more than $200,000, which he has already done. Settlement at 4.

13. The Settlement does not obligate the Trustee to return to Mr. Warwick the $200,000 paid by Mr. Warwick in the event that the Trustee receives a $200,000 indemnification from the Policy proceeds. Settlement at 4.

14. The Trustee's demand for an additional $200,000 to be paid to him from the Policy Proceeds may not be permitted because Mr. Warwick is "legally or financially absolved from payment" from the additional payment of $200,000. Policy III.L.1 (excluding such amounts from definition of "Loss").

III. Argument

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Under Federal Rule of Civil Procedure 56(f)(1), summary judgment may also be granted to a non-movant.

Here, the record requires the grant of summary judgment to the Moving Defendants and the denial of Trustee and Warwick's motion for summary judgment. Under the plain language of the Bankruptcy Court Order and also the Policy, the Trustee is entitled to nothing because the Settlement may not be indemnified from the Policy Proceeds. Even if the Court does not grant summary judgment in favor of the Moving Defendants, it should nonetheless deny the summary judgment motion filed by the Trustee and permit discovery.

A. The Bankruptcy Court Enjoined The Use of Policy Proceeds For Any Use Other Than Advancement of Defense Costs.

The Plan that created the Liquidating Trust for the Legacy Debtors enjoined all claims against Estate assets:

> **AS OF THE EFFECTIVE DATE, ALL PERSONS ARE PRECLUDED FROM ASSERTING AGAINST ANY PROPERTY OF THE ESTATES, THE LEGACY CONSOLIDATED ESTATE AND ANY OF THE**

> **LIQUIDATING TRUSTS AND ASSETS THAT ARE DISTRIBUTED OR TO BE DISTRIBUTED UNDER THE PLAN OR ANY OF THE LIQUIDATING TRUSTS ANY CLAIMS, RIGHTS, CAUSES OF ACTION, LIABILITIES OR INTERESTS BASED UPON ANY ACT OR OMISSION, TRANSACTION OR OTHER ACTIVITY OF ANY KIND OR NATURE THAT OCCURRED PRIOR TO THE EFFECTIVE DATE, OTHER THAN AS EXPRESSLY PROVIDED IN THE PLAN OR THE CONFIRMATION ORDER, REGARDLESS OF THE FILING, LACK OF FILING, ALLOWANCE OR DISALLOWANCE OF ANY CLAIM OR EQUITY INTEREST AND REGARDLESS OF WHETHER SUCH PERSON HAS VOTED TO ACCEPT THE PLAN.**

Olsky Decl. Ex. 3; *see also* Olsky Decl. Ex. 4 ¶ 15.

As the Trustee previously argued, and the Bankruptcy Court agreed, the Policy and its proceeds are assets of the Estate and as such, the Plan Injunction prohibits distribution of such assets without further order of the Bankruptcy Court. *See id.; see also* Bankruptcy Court Order. Certain defendants, including Mr. Warwick, obtained a lift of that stay in order to obtain the plan proceeds specifically to advance Defense Costs. Bankruptcy Court Order at 2. The Bankruptcy Court thereafter ordered that the Plan Injunction was only lifted for purposes of advancement of defense costs; the Bankruptcy Court left in place the injunction over all other uses of those proceeds. Bankruptcy Court Order ¶¶ 2-3 (modifying injunction "so as to permit AXIS to advance Defense Costs under AXIS Policy"). The Trustee has chosen not to seek relief from the Plan Injunction to permit the Policy proceeds to indemnify the Settlement.

Absent such relief, the Policy proceeds may not indemnify the Settlement. The Bankruptcy Court's ruling on the motion to lift stay has not been challenged or modified, and thus remains in effect to bar claims against the Policy except for the advancement of defense costs. *See Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152 (2009) (when Bankruptcy Court orders become final, they are "res judicata to the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but

as to any other admissible matter which might have been offered for that purpose.") (citation and internal punctuation omitted).

B. The Policy Excludes Coverage For The Settlement.

Even if the Plan Injunction did not prohibit indemnification of the Settlement, the Policy proceeds may not be used to indemnify the Settlement. Unlike the duty to advance Defense Costs, the duty to indemnify a Settlement is narrow and "refers to an insurer's responsibility to pay a monetary award when its insured has become liable for a covered claim." *Perdue Farms, Inc. v. Travelers Cas. & Surety Co. of Am.*, 448 F.3d 252, 257-58 (4th Cir. 2006). "While an insurer must frequently defend both potentially covered claims and claims that are not covered under its policy, it is only required to indemnify covered claims for which liability is incurred." *Id.* at 258.

"When a case is settled, the duty to indemnify must be determined on the basis of the settlement", and thus requires a fact finding as to whether (and which) settled claims may be indemnified. *Bankwest v. Fidelity & Deposit Co. of Md.*, 63 F.3d 974, 981 (10th Cir. 1995) (citation and internal punctuation omitted). When, as here, the settling parties provided no information about the particular claims being settled or the proper allocation of the settlement among the claims settled, the party seeking indemnification must provide record evidence demonstrating that the settlement was intended to be allocated to a covered claim. *See id.*; *see also Perdue Farms, Inc.*, 448 F.3d at 263 (affirming advancement of costs to defend action but requiring district court to determine whether portions of the settlement are excluded from coverage); *Guardian Trust Co. v. Am. States Ins. Co.*, No. 95–4073–SAC, 1996 WL 509638, at *11 (D. Kan. 1996) ("The court believes the record here is simply insufficient to decide American States's duty to indemnify for the settlement. While the court has some idea about

which of the claims that the plaintiffs are able to assert coverage under the policy, the more important question is what amount paid in settlement, if any, was for those claims. The settlement agreement here does not specify the amount paid to settle the respective covered claims."); *Travelers Indemnification Co. of Illinois v. Royal Oak Enters.*, 344 F.Supp.2d 1358, 1366 (M.D. Fl. 2004) ("[A] settlement does not, by itself, obligate the insurer to pay for a non-covered claim. Instead, the insurer's duty to indemnify a settlement obligation must be measured by the facts 'inherent in the settlement' or, in other words, the facts extant at the time the settlement was reached.").

The Trustee and Mr. Warwick provided no evidence with their motion as to the facts on which the parties settled or the allocation among the claims. Indeed, there has been no discovery to date relating to such facts, as the parties have yet to hold a Rule 26(f) conference. *See* Fed. R. Civ. P. 26(d)(1) (prohibiting discovery until parties hold their Rule 26(f) conference). The failure to provide any record evidence of the basis for an allocation among the claims, by itself, is reason to deny the Trustee's motion for summary judgment as there is no basis for the Court to permit indemnification. *See Bankwest,* 63 F.3d at 981; *Perdue Farms, Inc.*, 448 F.3d at 263; *Guardian Trust Co. v. Am. States Ins. Co.*, No. 95–4073–SAC, 1996 WL 509638, at *11 (D. Kan. 1996) ("The court believes the record here is simply insufficient to decide American States's duty to indemnify for the settlement. While the court has some idea about which of the claims that the plaintiffs are able to assert coverage under the policy, the more important question is what amount paid in settlement, if any, was for those claims. The settlement agreement here does not specify the amount paid to settle the respective covered claims."); *Travelers Indemnification Co. of Illinois v. Royal Oak Enters.*, 344 F.Supp.2d 1358, 1366 (M.D. Fl. 2004).

To the contrary, the limited record to date -- which only related to the fairness of the settlement under Federal Rule of Bankruptcy Procedure 9019, and not whether the Policy indemnified the Settlement -- leaves no doubt that numerous Policy exclusions (in addition to the Plan Injunction) preclude indemnification of some or all of the Settlement from Interpleader Funds. As the Trustee acknowledges, the Trustee's claims against Mr. Warwick center on purportedly improper sales of the Legacy Debtors' securities through unlicensed broker-dealers. *E.g.*, March 12, 2014 Letter. The Moving Defendants deny those allegations, but regardless, the Settlement is excluded from coverage under at least two separate provisions in the Policy.

1. The $200,000 The Trustee Seeks From The Policy Is Not "Loss"

The Settlement is for $400,000 and has a two-part structure: "In the Settlement Agreement, Mr. Warwick agreed to pay the Trustee $200,000.00 from his personal funds and the Trustee agreed to collect the second $200,000.000 from the Policy." Joint Mot. at 12-13; Settlement at 1. Mr. Warwick also assigned his rights to the Trustee under the Policy, "including any rights to pursue a Bad Faith claim." Settlement at 1. Mr. Warwick has no obligation under the Settlement to pay the remaining $200,000 owed under the Settlement. *See* Settlement at 1 ("The Trustee shall seek payment and collection of the remaining amount solely from the AXIS insurance policy.").

The remaining $200,000 of the $400,000 settlement sought by the Trustee thus may not be indemnified from the Policy. It is not a covered "Loss" because Mr. Warwick is "legally or financially absolved from payment." Policy III.L.1 (excluding such amounts from definition of "Loss").

The Trustee has asserted that he may still seek the remaining $200,000 of the $400,000 settlement under the guise of "recoupment" for the first $200,000 paid by Mr. Warwick. That is

too clever by half, and appears to have been formulated only after the Trustee realized that the structure of the Settlement does not permit him obtain the second $200,000 from the Policy. The plain language of the Settlement states that the settlement is for $400,000, not $200,000, and that the Trustee will seek indemnification from the Policy for the second $200,000, not the first. Further, the motion seeking the distribution and affidavits supporting the Motion state that the Trustee is seeking the distribution of the second $200,000 from the Policy, not the first $200,000. Joint Mot. at 12-13.

In a deposition relating to his motion under Federal Rule of Bankruptcy Procedure 9019 to approve the Settlement, the Trustee testified that his negotiations concerned two separate payments with the first payment of $200,000 from Mr. Warwick and then a second payment, only from the Policy, of $200,000:

> Q. Why is the amount 400,000 and not 200,000?
> A. Well, I think if you look through the documents, you can see the -- the chain of events that took place, the negotiations that were done at arm's length. And we originally started at 500,000, and ultimately we ended at 200,000 in cash, and 200,000 of, you know, potential recovery from the insurance policy that's outstanding.

Strong Depo. at 6:7-15; *see also* Strong Depo. 10:22-11:2 ("Q. So if -- your understanding is that if the court or the interpleader has the funds, if it's decided that you can't get the $200,000 or some other number, Warwick has no responsibility to the estate past his $200,000 payment. A. Correct."); 49:3-5 (Strong: "And to get there, [Warwick] had included a $200,000 cash payment, and we included a $200,000 amount to be able to seek against the insurance proceeds."). Indeed, the Trustee understood that an earlier offer of $300,000 in cash plus $65,000 in interpleader proceeds was intended to be $365,000 -- not $600,000. Strong Depo. at 43:7-25.

Mr. Warwick had a similar understanding, *i.e.*, that he was to make a cash payment of $200,000 and the Trustee was to collect the second $200,000 from the Policy.

> Q. Are you aware that in addition to the $200,000 cash you've agreed to pay the trustee, the trustee also is supposed to get some rights under the active insurance policy?
> A Yes.
> Q Are you aware that there is -- the settlement agreement says that you're assigning your rights to $200,000 of insurance money to the trustee?
> A Yup.
> Q And that's in addition to the $200,000 cash you're paying the trustee; correct?
> A Yup.
> . . . .
> Q Do you have any obligation to pay any money to the trustee in excess of $200,000?
> A Not that I know of.
> Q All money over the $200,000 you're coming up with is coming from the insurance money; correct?
> A Correct.

Olsky Decl., Ex. 8 (June 19, 2014 Rule 9019 Warwick Depo. at 65:17-66:19).

Indeed, if the Trustee is only "recouping" the original $200,000 contributed by Mr. Warwick, then the Trustee should return the original $200,000 to Mr. Warwick. Otherwise, the Trustee will obtain an impermissible double recovery of the first $200,000. *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1134 (10th Cir. 2011) ("[A] plaintiff may not receive a double recovery for the same injuries or losses arising from the same conduct.") .

Simply put, the assertion that the Trustee is now trying to exercise his rights at the first $200,000, rather than the second $200,000, is an argument made up after the fact that contradicts the plain language of the Settlement, the motion, the Trustee's supporting declaration, and the sworn testimony of both the Trustee and Mr. Warwick. The Trustee's has moved only for the second $200,000, and it is not indemnifiable from the proceeds of the Policy.

2. Section IV.A.16 of the Policy Excludes Coverage

Section IV.A.16 eliminates coverage for loss arising from a claim based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving any Insured's activities as an Underwriter or Broker or Dealer. Policy Section IV.A.16. The term "Underwriter" has the same meaning as in Section 2 of the Securities Act of 1933.[2] *Id.* The terms "Broker" and "Dealer" have the same meaning as in Sections 3(a)(4)[3] and 3(a)(5)[4], respectively, of the Securities Exchange Act of 1934. *Id.*

Although the Moving Defendants deny that they were underwriters, brokers, or dealers or that they engaged in any wrongdoing, the Trustee took the opposite position in the Draft Complaint. He asserted that CAREIC "illegally sold [its] securities through unlicensed broker

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[2] Section 2 of the Securities Act defines an "underwriter" as:

> [A]ny person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

15 U.S.C. § 77b(11).

[3] Section 3(a)(4) of the Securities Exchange Act generally defines a "broker" to mean "any person engaged in the business of effecting transactions in securities for the account of others," subject to certain exclusions. 15 U.S.C. § 78c(a)(4).

[4] Section 3(a)(5) of the Securities Exchange Act generally defines a "dealer" as "any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise," subject to certain exclusions. 15 U.S.C. § 78c(a)(4).

dealers" (Draft Compl. at 5), that none of the securities sold by CAREIC were offered or sold pursuant to a valid registration statement (Draft Compl. at 22), that none of the CAREIC securities were in fact exempt from registration (*id.*), and that CAREIC made misrepresentations to investors about the fact that its offerings were exempt from registration (Draft Compl. at 23). Each of the Trustee's claims in the Draft Complaint is premised in large part on these allegations including (but not limited to) his claims regarding Securities Fraud (First Claim For Relief), Sales of Securities by Unlicensed Agents (Second Claim for Relief), Improper Sales of Securities (Third Claim for Relief), Common Law Fraud (Fourth Claim for Relief), Fifth Claim for Relief (Negligent Misrepresentation), Sixth Claim for Relief (Breach of Fiduciary Duty); Seventh Claim for Relief (Civil Conspiracy), and the Eighth Claim for Relief (RICO).

The allegations in the Draft Complaint are frequently vague, using terms such as "management" without identifying the particular individual. Nonetheless, the Trustee (through his counsel) clarified the specific claims he alleges against Mr. Warwick: Civil Conspiracy and the Utah Pattern of Unlawful Activity Act (UPUAA). *See* Mar. 12, 2014 Letter. With respect to the Civil Conspiracy claim, the Trustee (through counsel) represented that Mr. Warwick's liability was based upon, arising out of, directly or indirectly resulting from, in consequence of or involving an insured's alleged activities as an Underwriter or Broker or Dealer:

> The important point from your client's perspective is that liability for civil conspiracy is joint and several. Thus if we can show that the officers and directors of CARIEC agreed to raise money using offering materials that were false and deceptive, we can impose joint and several liability on your client for the damage caused by the scheme as a whole.

Mar. 12, 2014 Letter at 2.

The Trustee's Counsel also cited to Mr. Warwick's liability for a UPUAA claim that the Trustee intended to add to the Draft Complaint. Mar. 12, 2014 Letter at 2-4. He cited to three

offering memoranda in particular, and alleged misrepresentations therein. Mar. 12, 2014 Letter at 4. As with the Conspiracy claim, the UPUAA claim is thus also based upon, arising out of, directly or indirectly resulting from, in consequence of or involving an insured's alleged activities as an Underwriter or Broker or Dealer.

The Trustee's position in settlement negotiations about the basis for Mr. Warwick's liability was then memorialized in the Recitals to the Settlement:

> The Trustee claims that, as a member of CAREIC's Board, Warwick was one of the parties responsible for preparation of the PPMs, that the PPMs were materially false and misleading, and that Warwick knew, or was reckless in not knowing, that the PPMs were materially false and misleading, and that as a result of this investors have lost substantially all of the money that they invested in CAREIC and CAREIC affiliates

Settlement at 4. Thus, the evidence from the Rule 9019 record -- which is confirmed by the terms of the Settlement -- leaves no material issue of fact that the Settlement settled claims that were excluded pursuant to Policy Section IV.A.16.

C. In The Alternative, the Court Should Deny Summary Judgment And Allow Discovery.

Although the Moving Defendants contend that there is no genuine issue of fact, in the alternative the Court should deny all summary judgment motions and permit the parties to conduct discovery on the basis for the settlement and the proper allocation of the settlement among various settled claims. Courts regularly deny summary judgment to a plaintiff or an insured seeking distribution when (as here) the plaintiff fails to provide evidence that would establish his or her right to indemnification. *See, e.g.*, *Bankwest,* 63 F.3d 974, 981 (10th Cir. 1995) (requiring discovery on whether indemnification was permitted); *Perdue Farms, Inc.*, 448 F.3d at 263 (requiring discovery and fact finding on whether portions of the settlement are excluded from coverage); *Guardian Trust Co.*, 1996 WL 509638, at *11 (denying summary

judgment on indemnification when record was insufficient to determine basis for indemnification); *In re Prudential Lines, Inc.*, 170 B.R. 222, 246 (S.D.N.Y. 1994) (permitting "discovery sufficient to explore whether the settled losses fall within the scope of the policies' coverage, whether the settlements are reasonable, and whether PLI was potentially liable to each of the claimants").

Here, only Rule 9019 discovery has been exchanged among the parties. Olsky Decl. ¶ 11. The Trustee only became a party to this action after the Court approved the Settlement, and the Moving Defendants require discovery before an adjudication permitting distribution of the entire $400,000 to the Trustee. *See* Fed. R. Civ. P. 56(d). The Trustee has not participated in a Rule 26(f) conference, nor provided discovery to the other parties concerning the basis for the Settlement. Olsky Decl. ¶¶ 12-13. The Moving Defendants, if granted discovery, will take discovery on the basis for the Settlement, including whether some or all of the settled claims are subject to an exclusion under the Policy. Olsky Decl. ¶ 14. Discovery may be taken for example, on whether some or all of the settled claims are excluded from coverage by Section IV.A.1 because they were previously noticed under another insurance policy, Olsky Decl. Ex. 10 (Settlement with Rockhill Insurance); and on whether some of all of the settled claims are excluded from coverage by Section IV.A.8. because the Trustee (as the assignee of investors) has brought them on behalf of debt or equity interests in a portfolio company. Olsky Decl. ¶ 14.

At bottom, the Trustee cannot simply assert that he has a settlement with Mr. Warwick and therefore he is entitled to be indemnified from the Policy. If the Rule 9019 evidence is not sufficient to deny any distribution to the Trustee, then the Court should permit discovery to the Moving Defendants and then hold a fact finding hearing to determine the particular settled claims that may be indemnified under the Policy. The Court should also grant the Moving

Defendants' prior motion for summary judgment for *per capita* distribution, except that the Trustee should not be afforded a portion of that distribution.

IV. Conclusion

For the reasons stated herein, the Court should grant summary judgment in favor of the Moving Defendants and hold that the Trustee is entitled to none of the interplead proceeds, deny the summary judgment motion filed by the Trustee, and/or require additional discovery.

Dated: August 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, August 31, 2015, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF electronic filing system, which will send an electronic copy of this filing to the counsel of record.

s/ David F. Olsky