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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.	**TRUSTEE'S REPLY IN SUPPORT OF THE JOINT MOTION FOR SUMMARY JUDGMENT AND FOR DISTRIBUTION OF INTERPLEADED FUNDS AND OPPOSITION TO JEFF AUSTIN, KEITH GREEN, WILLIAM GRUNDY, AND DOUGLAS CHILD'S CROSS-MOTION FOR SUMMARY JUDGMENT** Civil Case No. 2:14-cv-00244-DAK The Honorable Dale A. Kimball

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") submits this *Reply* in support of his and Defendant William Warwick's *Joint Motion for Summary Judgment and Distribution of Interpleaded Funds* [Docket No. 37] (the "Joint

Motion") and *Opposition* to the *Cross Motion for Summary Judgment* [Docket No. 135] (the "Opposition/Cross Motion") filed by Defendants Jeff Austin, Keith Green, William Grundy, and Douglas Child (the "Moving Defendants").[1]

I. PRELIMINARY STATEMENT

The Trustee's request for a $200,000 distribution from the interpleaded Policy has been undecided for some 16 months now. In the Joint Motion, the Trustee and Warwick sought distribution of $200,000 to the Trustee based on the Settlement Agreement, which this Court approved on July 20, 2015. After the Trustee and Warwick filed the instant motion, the Moving Defendants' first move was to file a *Joint Motion for Summary Judgment and for Per Capita Distribution of Interpleaded Funds* (the "Per Capita Motion") [Docket No. 85], arguing that the Policy Proceeds should be split per capita among the insureds without any insured having any obligation to show entitlement to a share of the Policy Proceeds.

Now, in opposition to the Joint Motion, the Moving Defendants claim that a distribution to the Trustee, as a result of the Settlement Agreement with Warwick, is entirely barred. To take this position, the Moving Defendants must grossly misstate a prior order from the Bankruptcy Court, ignore the fact that this Court has, in fact, approved the Settlement Agreement, and that

[1] Moving Defendants label their Opposition/Cross Motion an Opposition and Cross-Motion. Pursuant to DUCivR 7-1(b)(1)(A) *Motions Are Not to Be Made in Response or Reply Memoranda; Evidentiary Objections Permitted*, "No Motion, including but not limited to cross-motions and motions pursuant to Fed. R. Civ. P. 56(d), may be included in a response or reply memorandum. Such motions must be made in a separate document." As such, the Moving Defendants' "*Cross Motion,*" is improper. The "*Cross Motion*" is also improper because it both duplicates and contradicts the arguments the Moving Defendants made and the relief they sought in their earlier-filed Per Capita Motion. By cross-moving here, the Moving Defendants are simply seeking an unauthorized sur-reply.

AXIS, for whose benefit many of the provisions for which the Moving Defendants contend exclude coverage, is no longer part of this interpleader suit.

Moreover, Defendants Austin, Green and Grundy have clearly failed to realize the practical consequence of their argument. The only insureds potentially affected by the Policy's exclusion of coverage for activities as a "broker dealer," are Austin, Green and Grundy. They are the *only persons* that the Trustee charges with acting as a "broker" or a "dealer." *See* Complaint, ¶¶ 23, 175-81.[2] Thus, in arguing that the Policy excludes coverage for broker dealers, Austin, Green and Grundy are arguing that *they* have no claim on the Policy or its proceeds, and that they must return to the Court the Policy Proceeds that have already been distributed to them.

The Moving Defendants' arguments against the Joint Motion fail. The Court should allow the distribution of $200,000 of the Policy Proceeds to the Trustee, in accordance with the Settlement Agreement that it approved.

II. RESPONSE TO DEFENDANTS' 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. Ex. 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

[2] Defendants Green and Grundy are not defendants in the main insider case. Instead, the Trustee filed adversary complaints against them in the Bankruptcy Court seeking, among other things, recovery for transfers from CAREIC and consideration paid by investors on the basis that they were not licensed securities brokers. *See* Trustee's Statement of Additional Facts § III, ¶ 3.

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.")

RESPONSE: Disputed, and immaterial. Moving Defendants have accurately quoted some language form the Plan and Confirmation Order. However, it is beside the point. Neither the Plan nor the Order Confirming the Plan mentions the Policy or the Policy Proceeds and neither categorizes the Policy or Policy Proceeds as property of the estate, or not. *See* Plan; Confirmation Order. Moreover, the Plan and Order Confirming the Plan do not enjoin the Trustee from seeking to pursue estate property for the benefit of the Estate, and they do not enjoin internal transfers of property of the estate. Moving Defendants' contention that the Plan and Order Confirming the Plan prevent the Trustee from seeking, and this Court from ordering, "distribution" of Policy Proceeds *to the Estate* is an incorrect legal conclusion, not a statement of undisputed fact.

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.").

RESPONSE: Disputed, and immaterial. Moving Defendants have accurately quoted some language from the Bankruptcy Court order, but then they misrepresent what it says. The Bankruptcy Court Order does not state that the *only permissible use* of the Policy Proceeds was to advance Defense Costs. Nor does the Bankruptcy Court Order state that the Plan Injunction or the automatic stay applies to the Policy Proceeds and the Bankruptcy Court did not opine on any other permissible or impermissible use of the Policy Proceeds. Instead, the Bankruptcy Court Order reserves on these precise questions and states only that "*[t]o the extent applicable*," the injunction does not apply to the advancement of Defense Costs.

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.").

RESPONSE: Disputed. On June 20, 2015, this Court approved the Settlement Agreement between Warwick and the Trustee, which provided for a distribution from the Policy Proceeds [Docket No. 129]. No other party has moved the Bankruptcy Court for distribution of proceeds to indemnify a settlement. And, accordingly the Bankruptcy Court has not denied such relief. *See* Bankruptcy Court Docket. The Bankruptcy Court Order speaks for itself and the Trustee disputes this statement to the extent it is inconsistent with the contents thereof.

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.*

RESPONSE: Disputed. This is an impermissible legal conclusion regarding the import of the Bankruptcy Court Order. The Bankruptcy Court Order states only that "[a]ll such

payments [from the Policy] are to be made solely out or the proceeds of the Policy, subject to the Policy's terms and conditions." *See* Responses to Defendants SOF, ¶¶ 1-3.

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: Sale 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 U.S.C. § 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.**

RESPONSE: Disputed, and immaterial. The Draft Complaint did not "set forth . . . claims against Mr. Warwick." It was never filed. Moreover, the email transmitting the Draft Complaint to Warwick, and several potential defendants, made clear that the proposed Draft

Complaint was "unfinished and likely will change before filing." *Declaration of Milo Steven Marsden in Support of Trustee's Reply in Support of Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds and Opposition to Jeff Austin, Keith Green, William Grundy, and Douglas Child's Cross-Motion for Summary Judgment*, Exh. A. Thus, it should be no surprise that the Draft Complaint does not specify who in particular its claims are asserted against. For instance, in the Draft Complaint Claims 1, 2, 6, 7, and 8 are asserted against the "Insider Defendants"—a term that the Draft Complaint does not define. Draft Complaint at 85-89, 96-102. Claim 3 does not specify who it is asserted against. *Id*. at 89-91. Claims 4 and 5 are asserted against "Defendants," without any further specificity. *Id*. at 91-96. In short, the Draft Complaint was just that, *an early draft.* Saying that it sets forth claims against Mr. Warwick is inaccurate.

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

RESPONSE: Disputed, and immaterial. First, the March 12, 2014 Letter is explicitly "Settlement correspondence" and, as such, under Rule 408 of the Federal Rules of Evidence it is "not admissible—on behalf of any party—to either prove or disprove the validity or amount of a disputed claim or to impeach a prior inconsistent statement." Fed. R. Evid. 408(a). Second, the Moving Defendants misrepresent the March 12, 2014 Letter. It does not state that the primary basis for a settlement with Warwick would be claims for Civil Conspiracy and the Utah Pattern of Unlawful Activity Act. Instead, the March 12, 2014 Letter states that those claims are the "two claims which [the Trustee] believe[s] present Mr. Warwick with his largest exposure, and which [the Trustee] believe[s] should motivate him to contribute meaningfully to a global

settlement, or to approach [the Trustee] directly with a significant offer of settlement." March 12, 2014 Letter at 1.

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 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.

RESPONSE: Disputed, and immaterial. *See* Response to SOF ¶ 6, above.

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.

RESPONSE: Disputed. The Trustee did not testify that the Draft Complaint and the March 12, 2014 Letter set forth the bases under which the claims were settled. Instead, the Trustee testified that the March 12, 2014 Letter accurately describes Warwick's role with CAREIC and in the Conspiracy. Strong Depo at 38:11-39:21.

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

RESPONSE: Undisputed.

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.

RESPONSE: Disputed. This is not a statement of undisputed fact. It is a legal argument and an erroneous one. The Warwick Settlement plainly does not arise "from, in consequence of or in any way involving an Insured's activities as an, Underwriter or Broker or

Dealer." Warwick did not act as an Underwriter[3] or Broker[4] or Dealer,[5] and there is not a single document where the Trustee has made such an allegation against Warwick.

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.

RESPONSE: Disputed, and immaterial. This is not a statement of undisputed fact. It is a legal argument. *See* Policy § V.A, Endorsement 17, for the actual language of the Policy. The allocation provisions of the Policy are irrelevant because the Warwick Settlement is for covered Loss.

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

RESPONSE: Disputed. This is misstates Warwick's obligations under the Settlement Agreement. *See* Settlement Agreement at ¶ 1. Under the Settlement Agreement Warwick must "pay Two Hundred Thousand Dollars ($200,000) from his own personal funds." *Id*. In addition, he must "assign to the Trustee any and all rights [he] has under the AXIS Insurance Policy." *Id*.

[3] Section 2.(11) of the Securities Act of 1993 (referenced in Endorsement 17) says the term "underwriter" means "any 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. . . ." 15 U.S.C. § 77b(11).

[4] Section 3.(a)(4) defines the term "broker" in general to mean "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. §78c(a)(4).

[5] Section 3.(a)(5) defines the term "dealer" in general to mean "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." 15 U.S.C. §78c(a)(5).

Thus, in addition to paying $200,000, he assigns (pays) to the Trustee his $200,000 claim against the Policy for reimbursement of that payment.

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.

RESPONSE: Undisputed, although the term "indemnification" is in this context ambiguous.

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").

RESPONSE: Disputed. This is not a statement of undisputed fact. It is a legal argument and an erroneous one. *See* Section IV.B.2 below.

III. TRUSTEE'S STATEMENT OF ADDITIONAL FACTS

1. Section V.A of the Policy (as modified by Endorsement 17) concerns Allocation, and states:

> If there is an agreement on an allocation of Defense Costs, the Insurer shall advance on a current basis such Defense Costs. If there can be no agreement on allocation of Loss:
>
> (a) no presumption as to allocation shall exist in any arbitration, suit or other proceeding;
>
> (b) the Insurer shall advance on a current basis Defense Costs which the Insurer believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined; and
> . . .
>
> Any negotiated arbitrated or judicially determined allocation of Defense Costs on account of a Claim shall be applied retroactively

> to all Defense Costs on account of such Claim, notwithstanding any prior advancement to the contrary. Any allocation or advancement of Defense Costs on account of a Claim shall not apply to or create any presumption with respect to the allocation of other Loss on account of such Claim.

2. On October 30, 2015, the Trustee filed a Complaint (the "Complaint") in the United States District Court for the District of Utah against Kirby Cochran, Jeff Austin, Austin Capital Solutions, William Davidson, Douglas Child, Child Van Wagoner and Associates, Robert Clawson, and Hybrid Advisors Group. *See Strong v. Cochran*, 14-cv-788 (D. Utah), Docket No. 2.

3. Also on October 30, 2015, the Trustee filed complaints in the Bankruptcy Court against William Grundy and Keith Green. *See Strong v. Grundy*, 14-02339 (Bankr. D. Utah), Docket No. 2 and *Strong v. Green*, 14-02340 (Bankr. D. Utah), Docket No. 2.

IV. REPLY

Nothing in the Bankruptcy Court Order, the Policy, the Plan Injunction, or the Settlement Agreement prohibits the Trustee, as either a party to the Settlement Agreement or Warwick's assignee, from being indemnified from the Policy Proceeds.

A. The Plan Injunction and the Bankruptcy Court Order Do Not Prohibit Distribution of the Policy Proceeds *to the Trustee*.

The Moving Defendants' principal argument against a summary judgment ordering disbursement of $200,000 to the Trustee pursuant to the Warwick Settlement (which this Court has approved), is that the Bankruptcy Court has ruled (a) that Policy Proceeds *are property of the estate* and (b) that, as such, they may only be used for advancement of Defense Costs.

This position is counterintuitive to say the least. It is also wrong. In fact, the Bankruptcy Court has not entered either ruling. On November 23, 2013, the Defendants filed a motion in the

Bankruptcy Court seeking a "comfort order" regarding use of the Policy Proceeds. *See Motion for Relief from the Automatic Stay, to the Extent Applicable, to Advance Defense Costs* [Bankruptcy Case Docket No. 863] (the "Motion for Relief from Stay"). Olsky Declaration in Support of Per Capita Motion [Docket No. 95] Exh. 1. In the Motion for Relief from Stay, the Defendants told the Court that they were acting "out of an abundance of caution" in case the Court determined that the Policy Proceeds were property of the estate. *Id.* at 6. However, they explicitly argued that Policy Proceeds *were not* property of the estate:

> Defense Costs will not be paid by the Debtors or from property of the Estate, and the Policy specifically covers Insured Individuals only, and the Movants are not Debtors. Therefore, granting this motion will not result in any prejudice to the Estate or the Trustee and will not otherwise diminish the Estate.
>
> * * * *
>
> For the reasons discussed herein, proceeds of the Policy are not property of the Estate.

Id. at 10. They also argued that the automatic stay and distribution bars in the Plan and Confirmation Order did not apply. *Id.* at 7-8.

The Trustee, for his part, argued that the Policy and its Proceeds were property of the Estate, and that the relief Moving Defendants sought (use of policy proceeds for defense costs) was not appropriate. The Bankruptcy Court chose not to decide the issues the motion presented. Instead, it provided the Moving Defendants the "comfort order" they sought by stating and ordering as follows:

> *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.

Bankruptcy Court Order at 2 (emphasis added). Contrary to the Moving Defendants' contention the Bankruptcy Court made no order on whether the Policy Proceeds were property of the estate, or on whether Policy Proceeds could be used for purposes other than Defense Costs.[6]

Moreover, this issue is entirely a red herring. The Plan Injunction cannot reasonably be interpreted—as Moving Defendants do—to bar an action by the Trustee that will increase the Estate. The Plan Injunction prevents actions against the Estate and distribution of property out of the Estate. It does not bar actions by the Trustee, and it does not bar collections into the Estate by the Trustee. *See* Plan §16.10 (prohibiting claims 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"). Here, the so-called "distribution" sought does not leave the Trusts and thus does not violate that Plan Injunction. Thus, whether the Policy Proceeds are part of the Estate is irrelevant. In either case, the Plan Injunction presents no obstacle to the Trustee's Joint Motion.

[6] The Moving Defendants cite *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), for the proposition that the Trustee should have challenged the Bankruptcy Court Order and that it is res judicata as to this issue. That case involved a collateral attack to an order *that covered the same issue*. It is irrelevant because the Bankruptcy Court Order applied only to the advancement of Defense Costs. It has no bearing on the Trustee's right to distribution.

B. The Policy Does Not Exclude Coverage for the Settlement Agreement.

The Moving Defendants next contend that the Trustee should not be able to recover $200,000 from the Policy Proceeds because the Policy may exclude coverage for some of the claims the Trustee settled and—according to the Moving Defendants—"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." Opposition/Cross-Motion, at 16.

Here again, Moving Defendants are just wrong. The Trustee provided plenty of information on these topics in connection with the *Joint Motion to Approve of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of Bankruptcy Procedure 9019, Including Contribution Bar Required Under Settlement Agreement*, [Bankruptcy Docket No.925] ("Settlement Motion") and his amendment to the Settlement Motion [Docket No. 98; Bankruptcy Docket No. 980] ("Amended Settlement Motion").

First, in his moving papers the Trustee explained exactly what claims he was settling and how he valued those claims:

> The Trustee has determined to date that, although Warwick may be one of the Potential Defendants with the best ability to pay a judgment, he also has less culpability than the other Defendants given his more limited role as an outside director of CAREIC. *The strongest claims against Warwick are for breaches of fiduciary duty, which are comparative fault claims, and the Trustee has estimated that Warwick's culpability is in the range of 5%*. Assuming $10 million in potential damages, if the Trustee were fully successful against Warwick, he would obtain a $500,000.00 judgment, not taking into account litigation or collection expenses.

Respondent-Trustee's Reply to Robert D. Geringer's Objection To Amended Motion For Approval of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of

Bankruptcy Procedure 9019, at 4 ¶ 8 [Bankruptcy Docket No. 1007, Exh. 1].[7] There is no question that such breach of fiduciary duty claims are within Policy coverage.

Second, the Trustee provided his own Declaration (the "Strong Declaration") and the Declaration of William Warwick (the "Warwick Declaration"). *See* Bankruptcy Court Docket Nos. 926, 927, 981. Both of these declarations similarly reflect that the claims the Trustee and Warwick settled were within coverage. For instance, in the Trustee's Declaration he states that

> Causes of action against Warwick would include without limitation claims based on federal and state securities law, bankruptcy law, and common law fraud and breach of fiduciary duty.

Strong Declaration, ¶ 17. In his declaration Warwick states that "[t]he Trustee has notified me of certain Claims and Causes of Action for which he maintains that I have liability related to my service on CAREIC's Board of Directors." Warwick Declaration, ¶ 3.[8]

Third, the settlement correspondence that the Trustee produced in discovery (to the extent it may properly be considered), also shows that the claims the Trustee and the Warwick settled were within Policy coverage. The March 12, 2014 Letter describes Warwick's culpability as stemming from:

- his role as "a founding board member of CAREIC and a member of the Audit Committee, Compensation Committee, and Governance and Compliance Committees of the Board." March 12, 2014 Letter, at 4;
- the fact that "Mr. Warwick was identified as an independent director in every Private Placement Memorandum used to solicit investments for CAREIC, beginning in 2004," and was "identified in, and signed, promotional materials for CAREIC and its projects" *Id.*; and

[7] *Child v. Strong*, No. 14-cv-626-BSJ (D. Utah), Docket No. 8.

[8] The Trustee's and Mr. Warwick's depositions were both taken in June of 2014, although the Moving Defendants did not show up for these depositions. *See* Olsky Decl. Exhs. 2 & 8.

- the fact that "Mr. Warwick had access to CAREIC's financial statements, balance sheets, auditors' reports and tax returns," and thus knew or should have known that CAREIC's PPMs and other offering documents were false. *Id*.

Nevertheless, the Moving Defendants make two arguments why the Warwick Settlement is outside of coverage. Neither is meritorious.

1. The Claims Against Warwick Were Not Claims for Related to Activities as a Broker or Dealer

The Moving Defendants contend that under Section IV.A.16 of the Policy[9] the Warwick Settlement is outside of coverage to the extent it involves claims related to Warwick's (or other Insureds') "activities as an Underwriter or Broker or Dealer." Opposition/Cross Motion, at 20.

The principal problem with this argument is that Trustee has never contended that Warwick (or CAREIC for that matter) acted as an Underwriter or Broker or Dealer. In the Draft Complaint, irrelevant as it is, the Trustee does not allege that Warwick or CAREIC acted as an underwriter, broker, or dealer. CAREIC was clearly an "issuer," not an underwriter. Indeed, the only persons whose coverage is threatened by the underwriter, broker, dealer exclusion are three

[9] Section IV.A.16 of the Policy excludes coverage for Claims made against an Insured:

> Based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving to any Insured's activities as an, Underwriter or Broker or Dealer. As used in this exclusion 16:
>
> (a) "Underwriter" means an underwriter as defined in Section 2.(11) of the Securities Act of 1933 as amended; and
>
> (b) "Broker" and "Dealer" shall mean broker and dealer as those terms are defined in section 3.(a)(4) and section 3.(a)(6) of the Securities and Exchange Action of 1934, as amended.

of the four Moving Defendants.[10] They are the only persons that the Trustee has ever alleged acted as broker-dealers, albeit unlicensed ones.[11]

The Trustee has never claimed that Warwick was an underwriter, broker, or dealer or liable for the Moving Defendants' failure to properly license as broker-dealers. In fact, in the March 12, 2014 Letter, the Trustee makes clear that the claims for which he believed Warwick faced the largest (but not only) exposure were for civil conspiracy and the Utah Pattern of Unlawful Activity Act. These are not broker dealer claims. The March 12, 2014 Letter makes clear that the underlying bases for these claims are fraud and securities fraud claims: "if we can show that the officers and directors of CAREIC agreed to raise money using offering materials that were false or deceptive, we can impose joint and several liability on your client for the damage caused by the scheme as a whole." Counsel for the Trustee then laid out a series of

[10] The Moving Defendants are at risk not only for further distributions from the Policy, but also for any past draws on the Policy. Section V.A of the Policy (as modified by Endorsement 17) makes clear that if the Moving Defendants are determined to be outside of coverage because they acted as brokers or dealers, they will have to disgorge insurance payments received.

[11] *See* Complaint ¶ 23 ("Austin served as CAREIC's Senior Vice President of Business Development . . . Austin was the person principally responsible for the Debtors' capital-raising activities, comprised of selling securities to the public through unlicensed broker-dealers by means of material misstatements and omissions. Austin was not registered with the Securities & Exchange Commission ("SEC") as a broker-dealer or as being associated with a broker-dealer firm that was registered with the SEC."); Green Am. Complaint ¶ 8 ("Defendant . . . received funds from the Debtors for his role in raising funds for the Debtors' securities at a time when he was not a licensed securities broker-dealer."); *id.* at ¶ 27 ("Defendant received funds from the Debtors in connection with his roles in raising funds for the Debtors' securities at a time when he was not a licensed securities broker-dealer."); Grundy Am. Compl. ¶ 8 ("Defendant . . . received funds from the Legacy Debtors for his role in raising funds for the Legacy Debtors . . . at a time when he was not a licensed securities broker-dealer."); *Id.* at ¶ 29 ("Defendant received funds from the Legacy Debtors in connection with his roles in raising funds for the Debtors at a time when he was not a licensed securities broker-dealer.").

alleged misstatements in the CAREIC PPM's for which he could be liable under such theories of liability. These are all claims that relate to activity as an issuer, not a broker, dealer, or underwriter. *See* 15 U.S.C. § 78c(a)(4), (5) & (8); 15 U.S.C. § 77b(11).

For these reasons, Section IV.A.16 does not and cannot prevent the Trustee from recovering the $200,000 from the Policy.

2. Warwick Suffered a Loss Under the Policy.

The Moving Defendants also contend that Settlement Agreement is outside of coverage under Section III.L.1 of the Policy which states that "Loss does not include . . . any amounts for which the Insureds are legally or financially absolved from payment." The Moving Defendants argue that Section III.L.1 applies here because, in the Settlement Agreement, the Trustee collected $200,000 in cash from Warwick's personal funds, and agreed that he would collect the remaining amount of the settlement "solely from the AXIS Insurance Policy." According to the Moving Defendants under this language Warwick is "legally or financially absolved from payment" of the remaining $200,000, and therefore, there has been no Loss. *See* Opposition/Cross Motion at 17-18.

This argument is based on the premise that paragraph 1.b of the Settlement Agreement does not exist. But under paragraph 1.b Warwick assigned all of his rights under the Policy to the Trustee:

> b. Upon execution of this Agreement, Warwick will assign to the Trustee any and all rights Warwick has under the AXIS Insurance Policy, including any right to pursue a bad faith claim.

In this case, Warwick paid the Trustee $200,000—an amount that (the Moving Defendants do not dispute) he was legally obligated to pay under the Settlement Agreement, and in fact did pay.

As such, Warwick perfected his right to indemnification as an Insured under the Policy. He has paid $200,000; he is entitled to indemnification for that $200,000 payment. This right to indemnification, which Warwick assigned to the Trustee in the Settlement Agreement, is clearly allowed by the Policy. Accordingly, the Trustee is entitled to recover the $200,000 from the Policy, as assignee of Warwick's right to indemnification.

Contending that this straightforward argument is "too clever by half," Opposition/Cross Motion at 18, the Moving Defendants embark upon a reading of the Settlement Agreement that metaphysically separates the "first $200,000" from the "second $200,000," and limits the Trustee to asserting rights only to seek the "second $200,000" from the Policy. The Moving Defendants approach would, of course, read paragraph 1.b entirely out of the contract.

Cash is fungible. The Trustee does not care what theory it is available under. Warwick agreed to a $400,000 settlement. He has clearly suffered a Loss of $200,000 which he is legally obligated to pay pursuant to the Settlement Agreement on account of a Claim.[12] In paragraph

[12] The Moving Defendants also contend that indemnification to the Trustee of the $200,000 that Warwick paid would be an impermissible double recovery. Opposition/Cross Motion at 19. This is not true. The Trustee is seeking to recover a total of $400,000 which he is entitled to under the Settlement Agreement—no more. This is not a double recovery and does not permit the Trustee to recover more under the Settlement Agreement than he was originally entitled. Further, the case that the Moving Defendants cite to support their argument that this is an impermissible double recovery, *Leprino Foods Co. v. Factory Mutual Insurance Co.*, 653 F.3d 1121 (10th Cir. 2011), is not applicable. First, it applies Colorado state law. Second, it involves a situation opposite to this case. In *Leprino*, an insured settled with a tortfeasor and then sought coverage for its total amount of damages. The Tenth Circuit held that the insured's recovery from the Insurer had to be reduced by the amount of the settlement because anything more would constitute a double recovery. *Id.* at 1134-35. This case does not involve a double recovery for Warwick—the Insured. If Warwick had not assigned his rights under the Policy to the Trustee, he would personally have the right to recover from the Policy to be made whole and would not constitute a double recovery. Unlike in *Leprino*, here, the Trustee was not a party to the Policy. Because the Trustee is standing in Warwick's shoes, there is no double recovery.

1.b, Warwick assigned the Trustee all his rights under the Policy. Warwick also testified that he was assigning his "right[] to $200,000 of the insurance money to the trustee." Warwick Depo. at 65. The Trustee may seek $200,000 from the Policy.[13]

For these reasons, there has been a Loss under the Policy and the Trustee, as Warwick's assignee, should be able to recover the $200,000 from the Policy.

C. Further Discovery is Unnecessary.

More discovery relating to the Settlement Agreement is unnecessary. There has already been discovery related to the Settlement Agreement, including depositions of the Trustee and Warwick and document production. Based on this evidence, this Court approved the Settlement Agreement. As discussed above, there is *no* evidence that even a portion of the Settlement Agreement was based on excluded Loss. Even if the parties conduct more discovery, it would not provide any more insights into the Settlement Agreement or any apportionment of the Trustee's claims in the Draft Complaint. Furthermore, currently, the Trustee is the *only* party who has proved any entitlement to the Policy Proceeds. Although the Moving Defendants have filed the Per Capita Motion, they have not established any proof that they themselves should be entitled to any of the Policy Proceeds. The Moving Defendants cannot have it both ways—advancement and assumption that all Defense Costs are proper while at the same time

[13] Further, even if the Trustee was seeking to recover the alleged second $200,000, the Moving Defendants' argument cannot succeed. Prohibiting the Trustee from recovering the second $200,000 would go against the public policy in favor of settlements and in enforcing an insurer's duty to indemnify after a settlement is reached. *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 2015 (1994) ("public policy wisely encourages settlements."); *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969) ("It is well settled as a matter of sound public policy, that the law should favor the settlement of controversies.").

prohibiting indemnification from the Policy that is fully supported with evidence that has been presented to the Court.

V. CONCLUSION

For the reasons expressed herein, in the Joint Motion, and in the Trustee's *Memorandum in Opposition to Joint Motion for Summary Judgment and Per Capita Distribution of Interpleaded Funds*, Docket No. 87, the Court should grant the Joint Motion, deny the Cross Motion, and permit a distribution of $200,000 from the Policy Proceeds to the Trustee.

DATED this 6th day of October, 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 6th day of October, 2015, I caused a true and correct copy of the foregoing **TRUSTEE'S REPLY IN SUPPORT OF THE JOINT MOTION FOR SUMMARY JUDGMENT AND FOR DISTRIBUTION OF INTERPLEADED FUNDS AND OPPOSITION TO JEFF AUSTIN, KEITH GREEN, WILLIAM GRUNDY, AND DOUGLAS CHILD'S CROSS-MOTION FOR SUMMARY JUDGMENT** 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