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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.

ROBERT D. GERINGER'S OPPOSITION TO JOINT MOTION FOR SUMMARY JUDGMENT AND FOR DISTRIBUTION OF INTERPLEADED FUNDS

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

Judge Dale A. Kimball
Magistrate Judge Brooke C. Wells

Robert D. Geringer ("Geringer"), a defendant in the above-captioned action, hereby responds in opposition to the *Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds* [Dkt. No. 37] (the "Motion"), filed by defendant William K. Warwick

("Warwick") and D. Ray Strong (the "Trustee") (collectively, the "Moving Parties"). This Opposition is based on the *Declaration of Robert D. Geringer Pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Plaintiff AXIS' Motion for Summary Judgment* (the "Geringer Decl.") [Dkt. No. 65], on file herein, and the *Declaration of Robert D. Geringer Pursuant to Federal Rule of Civil Procedure 56(d) and in Support of Opposition to Moving Defendants' Joint Motion for Summary Judgment* (the "Second Geringer Decl.") [Dkt. No. 93], also on file herewith, and the following representations.

INTRODUCTION

Summary judgment is appropriate only where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Eaves v. Fireman's Fund Ins. Cos.*, 148 Fed. Appx. 696, 699 (10th Cir. 2005); *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, No. 13-3142, 2014 U.S. App. LEXIS 4492, at *5 (10th Cir. Mar. 11, 2014) (reasoning the movant must "demonstrate the absence of a genuine issue of material fact" through the record (quoting Fed. R. Civ. P. 56(c)(1)(A))).

Summary judgment must be denied in this case because Warwick's assignment of his rights under the Policy does not constitute a covered "Loss" under the Policy. Pursuant to the Policy, in order for something to be a covered "Loss", it must be an amount that the beneficiary is "legally obligated to pay." *See* Policy, Section III.L. Here, Warwick agreed to pay $200,000 to the Trustee and also assigned his rights under the Policy to the Trustee who, in turn, agreed to seek an additional $200,000 from the Policy. Thus, the only amount that Warwick is obligated to pay is $200,000. If the Trustee is not successful in obtaining the additional $200,000 from the

Policy, Warwick will not have to pay it. Therefore, it cannot be considered a "Loss" under the Policy because Warwick is not "legally obligated to pay." *Id.*

RESPONSE TO STATEMENT OF UNDISPUTED MATERIALS FACTS

Pursuant to Local Rule 56-1(c), Geringer responds to each of Moving Parties' stated material facts below (the "SOF").

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

Response: Disputed in part. Warwick is identified as a "director", but CAREIC was a limited liability company incorporated under California law. *See* August 31, 2015 Declaration of David Olsky, 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*, Case No. 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, 2001, CAREIC filed a petition for bankruptcy under Chapter 11 of the Bankruptcy code in Bankruptcy Court.

Response: Disputed 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: Undisputed, solely for purposes of this Opposition.

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"); and (ii) approved the Liquidating Trust Agreements for each of the Trusts (the "Trust Agreements"); [(iii)] appointed the Trustee as the post-confirmation estate representative for each of the Debtors; (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: Undisputed 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 factual matter and are disputed.

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

Response: Undisputed that the Policy Period begins on December 20, 2010, but it is unknown when the Policy was obtained.

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: Disputed. Geringer was not informed of the details of the negotiations or

the changes to the Policy before the Policy Renewal. As a former executive and board member of CAREIC and an "Insured" under the AXIS Policy, Geringer had a legal and financial interest in the Policy Renewal and a right to understand any changes to the AXIS Policy's terms and conditions. And as a creditor of CAREIC, Geringer did not receive notice of the Policy Renewal or notice that those substantial modifications were approved by the bankruptcy court. *See* Geringer Decl. ¶ 8.

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: Disputed in part. The Moving Parties' cited language does not include the entire substance of the Policy, including the Policy's exclusions from coverage. *See e.g.* Policy Section IV.A.

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: Disputed in part. The Moving Parties' cited language does not include the entire substance of the Policy, including the Policy's exclusions from coverage. *See e.g.* Policy Section IV.A.

9. The Policy defines an Insured Individual as:

> [A]ny one or more natural persons who was, or 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: Undisputed, solely for purposes of this Opposition.

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 obligate 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: Disputed in part. The Moving Parties' cited language does not include the entire 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 momentary or non-monetary relief."

Response: Undisputed, solely for purposes of this Opposition.

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: Disputed in part. The Moving Parties' cited language does not include the entire definition of "Loss" and does not include the Exclusions to Loss defined in the Policy.

13. And Financial Impairment means:

> the appointment by 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: Undisputed, solely for purposes of this Opposition.

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

Response: Geringer is without knowledge or information regarding the Trustee's communications with Warwick.

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: Geringer is without knowledge or information regarding the Trustee's communications with Warwick.

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

Response: Geringer is without knowledge or information regarding the Trustee's beliefs.

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: Geringer admits that he received a draft complaint from the Trustee on or about October 12, 2013. *See* Second Geringer Decl. ¶ 5. The Trustee's draft complaint speaks for itself. Geringer is without knowledge or information regarding draft complaint(s) directed to

the other defendants.

18. Through a series of tolling agreement, 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: This purported fact is a legal conclusion which should be stricken and requires no response.

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: Geringer objects pursuant to Fed. R. Evid. 408. SOF No. 19 is otherwise undisputed, solely for purposes of this Opposition.

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: Disputed. The Trustee entered into a settlement agreement with Geringer on or about May 13, 2015.

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: Undisputed, solely for purposes of this Opposition.

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

Response: Undisputed, solely for purposes of this Opposition.

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: Undisputed, solely for purposes of this Opposition.

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

Response: Undisputed, solely for purposes of this Opposition.

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: Undisputed, solely for purposes of this Opposition.

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

Response: Undisputed, solely for purposes of this Opposition.

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: Undisputed, solely for purposes of this Opposition.

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

Response: Undisputed, solely for purposes of this Opposition.

LEGAL STANDARD

In determining a summary judgment motion, the Court must "view facts in the light most favorable to the non-moving party" and resolve "all factual disputes and reasonable inferences" in favor of the party opposing the motion. *Cillo v. City of Greenwood Village*, 739 F.3d 451, 461 (10th Cir. 2013). The moving party is only entitled to summary judgment when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Eaves*, 148 Fed. Appx. at 699.

ARGUMENT

The Requested Distribution is Premature

The Moving Parties' recitation of facts omit that Geringer originally opposed the proposed settlement between the Trustee and Warwick. *See* Objection to Amended Motion for Approval of Settlement Agreement Between Trustee and William Warwick Under Federal Rule of Bankruptcy Procedure 9019 (the "Objection") [Dkt. No. 98]. Geringer subsequently withdrew his Objection as required pursuant to his settlement agreement with the Trustee. *See* Notice of Withdrawal of Robert D. Geringer's Opposition to Trustee's Amended Motion for Approval of Settlement Between Trustee and William Warwick [Dkt. No. 124].

Specifically, on May 13, 2015, Geringer and the Trustee resolved their disputes through mediation with the Honorable Randall J. Newsome (retired) and entered into a settlement agreement memorialized in the Memorandum of Understanding attached hereto as Exhibit "A." Pursuant to the Memorandum of Understanding, Geringer agreed to "withdraw his opposition to the Warwick settlement, and … not otherwise oppose the Warwick settlement. " *Id.* ¶ 5.

Geringer fulfilled his obligations under the Memorandum of Understanding and withdrew his Objection, only to then discover that the Trustee failed to comply with the Memorandum of Understanding. Geringer reserves all rights against the Trustee based upon the Trustee's breach of the Memorandum of Understanding, for monetary damages and otherwise.

Specifically, Geringer reserves his right to seek relief from the order approving the Warwick settlement under Fed. R. Civ. P. 60(b) and otherwise. Geringer submits that the Warwick settlement never should have been approved, but for the fact that Geringer voluntarily withdrew his opposition to the Warwick settlement. And Geringer's withdrawal of his opposition was done in reasonable reliance on the Trustee honoring his obligations under the Memorandum of Understanding. It now appears that the Trustee never intended to honor his obligations, and as a result the Warwick settlement is invalid. As a result, because the Trustee's recovery from the Policy depends entirely on the invalid Warwick settlement, this summary judgment motion must be denied.

The Moving Parties also fail to recognize that the requested distribution from the Policy is not covered by the Policy. Pursuant to the Policy, in order for something to be a covered "Loss", it must be an amount that the beneficiary is "legally obligated to pay." *See* Policy, Section III.L. Indeed, the Policy goes so far as to clarify that a Loss does not include "any amounts for which Insureds are legally or financially absolved from payment." *See* Policy § I.D. Here, Warwick's purported assignment to the Trustee runs afoul of this prohibition. The only amount that Warwick must pay the Trustee is $200,000. If the Trustee is not successful in obtaining the additional $200,000 from the Policy, Warwick will not have to pay it. Therefore, it

cannot be considered a "Loss" under the Policy because Warwick is not "legally obligated to pay." *See* Policy, Section III.L; *see also, e.g., U.S. Bank Nat'l Assoc. V. Federal Ins. Co.*, 664 F.3d 693, 700 (8th Cir. 2011) (assignment of a limited right to sue for insurance proceeds in connection with a stipulated judgment was not a "Loss" because the insured was absolved from any payment obligation); *Brownstone Homes Condo. Ass'n v. Brownstone Forest Heights, LLC*, 298 P.3d 1228, 1234 (Or. Ct. App. 2013) (holding an "operative nonexecution covenant" released the insured from any liability to a claimant and provided the insured's assignee with "no enforceable claims" under the insurance policy); *Lida Mfg Co. v. U.S. Fire Ins. Co.*, 448 S.E.2d 854, 857 (N.C. Ct. App. 1994) ("[W]hen an insurance policy contains language such as 'legally obligated to pay,' an insurer has no obligation to an insured party where the insured is protected by a covenant not to execute.").

Not only is the requested distribution not a covered "Loss" under the Policy, but there is also no basis upon which to favor Warwick's settlement with the Trustee over the other parties' claims to the Policy proceeds. Were it otherwise, the entirety of the Policy proceeds could be summarily exhausted by the self-serving settlement assignments of one or two parties. The Trustee has shown no grounds in fact or law as to why Warwick's purported claim to the Policy proceeds should be given precedence over Geringer's. Indeed, there appears to be nothing in the law which provides such a basis. The Trustee's requested distribution is premature and the Motion must be denied.

CONCLUSION

For the foregoing reasons, Geringer respectfully requests that the Court deny the Motion.

There remain numerous issues of disputed material fact, including the amount of coverage owed by AXIS. These disputed issues of material fact preclude summary judgment at this time. Additionally, the requested disbursement of insurance proceeds is not a covered "Loss" under the Policy. Thus, no payment should be made and the Trustee's Motion should be denied.

Respectfully submitted,

Dated: October 23, 2015

COHNE KINGHORN, P.C.

/s/ Kimberley L. Hansen
George Hofmann
Kimberley L. Hansen

-and-

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EXHIBIT A

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") memorializes the material points of the agreement reached between D. Ray Strong, Liquidating Trustee of the Legacy Debtors Liquidating Trust (and its related liquidating trusts) ("Trustee") and Robert Geringer at a mediation held on May 13, 2015 in front of the Honorable Randall J. Newsome (retired):

1. The Trustee will sell to Mr. Geringer the approximately 484 acres of raw land outside the city limits of Smyrna, Tennessee ("Smyrna Property") that the Trustee currently owns, for a price of $2,225,000 to be paid as follows:
   a) Four hundred seventy five thousand dollars in readily available funds, within 30 days of the date the bankruptcy court enters an order approving the sale outlined in this MOU;
   b) Five hundred thousand dollars in readily available funds, on a date within 120 days after the date the U.S. Bankruptcy court enters an order approving the sale outlined in this MOU;
   c) $1,250,000 no later than 18 months after the date the bankruptcy court approves the MOU.
2. Mr. Geringer's payment obligations will be memorialized in a promissory note in customary form, and secured by a security agreement on the Smyrna Property.
3. The Trustee and Mr. Geringer will exchange mutual general releases of all claims.
4. Mr. Geringer will release and waive his unsecured claim in the CAREIC bankruptcy.
5. Mr. Geringer will withdraw his opposition to the Warwick settlement, and will not otherwise oppose the Warwick settlement.

6. Mr. Geringer will indemnify the Trustee for any damage claims asserted by DSSIII Holding Co., LLC (the current Buyer of the Smyrna property) arising out of the termination of the current contract between the Trustee and DSSIII Holding. Mr. Geringer may defend any such claims as the real party in interest, and will have authority to settle such claims.

7. The Trustee will within 5 days provide notice of termination of the contract to sell the Smyna to DSSIII and will provide notice of this sale and of the motion to approve this sale to DSSIII Holding Co., LLC.

8. Mr. Geringer has the right to approve the sale motion and order, which right he will reasonably exercise.

9. Mr. Geringer will reasonably cooperate with the Trustee in prosecuting litigation against the CARIEC insiders.

10. This MOU is subject to the approval of the bankruptcy court, and the Trustee's ability to terminate the current purchase contract.

11. In the event that the Court permits a buyer other than Mr. Geringer to bid on purchasing the Smyrna property, Mr. Geringer agrees that his offer to purchase shall remain in place for 45 days after Bankruptcy Court approval as a "back-up buyer" in the event that such overbidder does not close the purchase within 30 days of Bankruptcy Court approval. In the event that any such overbidder is approved by the Bankruptcy Court at a higher price than Mr. Geringer has offered, and closes on the purchase of the Smyrna Property, Mr. Geringer will not be entitled to a break-up fee, however the provisions contained in paragraphs 3, 4, 5 and 9 hereof will remain as binding obligations upon the Trustee and Mr.

Geringer, which will be reflected in the Purchase and Sale Agreement, a mutual general release and related documents.

D. Ray Strong, Liquidating Trustee

Robert Geringer