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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.	**REPLY BRIEF OF JEFF AUSTIN, KEITH GREEN, WILLIAM GRUNDY, AND DOUGLAS CHILD IN FURTHER SUPPORT OF THEIR 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 Reply Brief in response to the Trustee's Opposition ("Opposition" or "Op.") to the Moving Defendants' cross-motion for summary judgment to deny the Trustee any distribution from the Interpleaded Funds (the "Cross-Motion" or "Cross-Mot.") and in further support of the Cross-Motion.

PRELIMINARY STATEMENT

In the Opposition, the Trustee[1] presents 10 pages of argument without citing a single case that would support his position. The Trustee also tries to distance himself from the very Draft Complaint that formed the basis for his declaration and for his motion. *E.g.*, Op. at 16 (reversing position and describing Draft Complaint as "irrelevant"). That is because his position -- that merely reaching a settlement permits him *as a matter of law* to withdraw more than 1/3 of the amount presently in interpleader -- has no basis in the law or fact. The discharge injunction in the Plan prevents the Trustee from withdrawing any amounts from the interpleader, as do the Policy exclusions. The Trustee cannot seek monies from the interpleader fund under any circumstances, and certainly not just by virtue of the fact that there is a settlement. The Cross-Motion should be granted and the Trustee should be denied any amounts from the interpleader.

I. Response to 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**

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

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.

Response: Denied as this is not the entire provision regarding allocation.

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.

Response: Denied. The lawsuits were not filed on October 30, 2015.

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.

Response: Denied. The lawsuits were not filed on October 30, 2015.

II. Argument

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

The Plan that the Trustee proposed, and the Bankruptcy Court entered, prohibited diminution of Estate assets without permission from the Bankruptcy Court. Cross-Mot. at 3. Citing to the arguments made *by the Moving Defendants* before the Bankruptcy Court, the Trustee asserts that the Policy is not property of the Estate and therefore he can move against the Policy and obtain proceeds from the Interpleader. Op. at 11-13. As the Trustee admits, he is now taking the exact opposite position that he took before the Bankruptcy Court. Op. at 12.

Importantly, there was a decision by the Bankruptcy Court: it adopted a portion of the Trustee's initial argument (i.e., the Policy is an asset of the Estate) but ultimately favored the Moving Defendants in lifting the stay to permit advancement of Defense Costs. The Trustee's assertion that the Bankruptcy Court "chose not to decide the issues the motion presented" is simply wrong. Op. at 12. The transcript from the hearing leaves no doubt that the Bankruptcy Court, through the Bankruptcy Court Order, established both that the Policy was subject to the Plan Injunction and that it was specifically lifting the stay to permit the advancement of Defense Costs to the Moving Defendants. Ex. 1 (Tr. at 23:5-24:11) (holding that the Policy was an estate asset and that "the balance of hurt weighs in favor of granting relief from the discharge injunction"). The Plan Injunction remains in effect to bar further distributions from the Policy without the Bankruptcy Court first lifting the stay.

The Trustee also asserts that the Plan Injunction is no bar to indemnification because the Plan Injunction "does not bar actions by the Trustee, and it does not bar collections into the Estate by the Trustee." Op. at 13. That argument makes no sense. The Trustee stands in the shoes of Mr. Warwick in seeking indemnification from the Policy, an estate asset. Mr. Warwick cannot diminish the value of that asset without permission from the Bankruptcy Court, nor can the Trustee as his assignee. The Trustee has "no more interest in the proceeds of the policy than any other party making a claim against the individuals." Ex. 1, Tr. at 23:12-14. The Plan Injunction has not been lifted and it bars distribution to the Trustee from the interpleader due to a settlement.

The Trustee is not above the law. He needed to get permission from the Bankruptcy Court before seeking indemnification from the interpleader for the Settlement. He did not do so and the Settlement may not be indemnified from the interpleader.

B. The Policy Excludes Coverage For The Settlement.

The Trustee does not dispute and apparently concedes that the Court must make a separate factual finding as to whether the Settlement included any claims that are covered by the Policy, and if so, to make an appropriate allocation among indemnifiable and non-indemnifiable claims. Cross-Mot. at 15-16. The only "evidence" cited by the Trustee in the Opposition is a portion of the argument he made in a prior reply brief to Defendant Geringer's objection. Op. at 14. The Trustee's argument in a reply brief, of course, is no "evidence" at all and certainly is not sufficient to oppose the Cross-Motion. The Trustee also cites to his affidavit in which he generally states that various settled claims might "include without limitation" certain causes of action -- but the Trustee never identified what causes of action were *actually* settled or the allocation of the Settlement to each particular settled claim. Op. at 15. Regardless, the "evidence" to date was, as the Trustee admits, developed only in the context of a fairness determination under Federal Rule of Bankruptcy Procedure 9019 and not in the context of the broader indemnification dispute and as such, involved entirely different matters. Op. at 14-16.

In any event, the Trustee's attempt to get a $200,000 distribution from the Interpleader fails as a matter of law and his Settlement may not be indemnified. *First*, the loss for which the Trustee seeks a distribution is not "Loss" under the Policy. Cross-Mot. at 17-19. The Trustee appears to acknowledge that the entire premise on which he moved nearly 16 months ago for summary judgment makes no sense -- *i.e.*, that Mr. Warwick paid him $200,000 and that the Trustee agreed to seek the second $200,000 payment from the Policy. Nonetheless, the Trustee glibly argues that he can change the premise of his settlement, his motion, and his affidavit and seek reimbursement of the <u>first</u> $200,000 because "[c]ash is fungible" and "[t]he Trustee does not care what theory it is available under." Op. at 19.

While the Trustee states now that he "does not care", the Trustee's wishes are not the issue: the Trustee and Warwick both testified *under oath* as to their intent in the parties' negotiations over the Settlement. The Trustee's brand new interpretation of Paragraph 1.b should be disregarded. This was a two-part settlement and Paragraph 1.b cannot be read without the context of the other paragraphs. The goal and the structure of the settlement was to have Mr. Warwick provide the Trustee with $200,000 that would not be indemnified by anyone, and then the Trustee would seek an additional $200,000 from the Policy. Indeed, that has been the Trustee's *modus operandi* with respect to his attempts to settle with various parties: he demands monies from individuals themselves to which no recourse is available under the Policy, and then separately seeks from the Policy *additional* amounts. Perhaps the Trustee regrets having taken that position, but he cannot divorce himself from it by asserting that now he "does not care". Other claimants to the Policy, who are largely destitute without it, *deeply* care about whether the Policy will be available to advance Defense Costs so that they can defend themselves against the Trustee's outrageous charges.

Second, the Trustee asserts that Exclusion 16 does not apply because, according to the Trustee, he "never contended that Warwick (or CAREIC for that matter) acted as an Underwriter or Broker or Dealer." (Op. at 16.) That is simply not true. The Trustee grouped Mr. Warwick with all other "Defendants" and alleged in numerous places that Mr. Warwick was responsible for allegedly "illegal sales" of securities, including the following:

> **8. Illegal Sales of CAREIC Securities By Unlicensed Broker Dealers**
>
> 373. As described in the sections above, throughout the Company's existence, the bulk of the securities it sold were illegally sold by unlicensed broker dealers.
>
> 374. The Company's Defendants breached their fiduciary duties by allowing and being involved in this illegal activity.

Ex. 6 to Aug. 31, 2015 Decl. of David F. Olsky at 80 (Draft Complaint), Docket No. 136-7.

The Trustee's attempt to characterize the Draft Complaint as "irrelevant" (Op. at 16) underscores that he now recognizes the fallacy of his initial allegations: neither CAREIC nor any of its employees in fact acted as brokers, dealers, or underwriters. Op. at 16. They were employees of the issuer and cannot be held liable under Section 1933 of the Securities Act or any state broker-dealer laws for selling those securities on CAREIC's behalf. But the fact remains that the Trustee alleged such claims against Mr. Warwick and from the limited information provided, it appears that the Settlement was premised at least in part in settling these claims. The Trustee may now regret bringing (and settling) specious charges that cannot be indemnified by the Settlement, but that is what he did. The Settlement may not be indemnified.

The Trustee asserts that by pointing to this exclusion, the "Moving Defendants are at risk not only for further distributions from the Policy, but also for any past draws on the Policy." Op. at 17 n.10. That is not true. The Trustee has made numerous allegations (all false) against the Moving Defendants, including claims that are not subject to exclusions under the Policy. So long as a judgment on one such claim may be indemnified, the Insurer (and now the interpleader) is required by law to advance Defense Costs. *See, e.g., Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1216 (Utah 2006) ("[W]hen there are covered and non-covered claims in the same lawsuit, the insurer is obligated to provide a defense to the entire suit, at least until it can limit the suit to those claims outside of the policy coverage.") (citation omitted). The Moving Defendants will defeat the excluded claims, and will be obligated for nothing. There is no comparison to the Trustee's attempt to indemnify a settlement from the Interpleader that may not be indemnified under the Policy. *See Bankwest v. Fidelity & Deposit Co. of Md.*, 63 F.3d 974, 978 (10th Cir. 1995) ("The duty to indemnify is narrower than the duty to defend. Although the

duty to defend is determined by the allegations of the underlying complaint and by facts discoverable to the insurer, the duty to indemnify is determined by the facts as they are established at trial or as they are finally determined by some other means (e.g., summary judgment or settlement).") (citation omitted).

Finally, the Trustee asserts that he is the only one who has "proved any entitlement to the Policy proceeds." Op. at 20. To the contrary, he has shown no entitlement whatsoever and indeed, he cannot point to a single piece of admissible evidence or a single case citation that supports his position that the Settlement is indemnified. The Moving Defendants have not provided their legal bills to the Court for reimbursement for obvious reasons: AXIS was not granted summary judgment until two months ago and distribution matters will not even be considered until the hearing next week. Submitting legal bills to the Court was premature and would potentially require that the Moving Defendants disclose privileged information without a process in place for such a disclosure (such as a sealing order). The Trustee admits that he has aggressively pursued the Moving Defendants over the past two years (including the recent filing of an arbitration demand), so there is no question that they have incurred legal costs to date that at this point likely exceed the remaining amount left in the interpleader.

III. Conclusion

For the reasons stated herein and in the Cross-Motion, the Court should deny the Trustee's motion for summary judgment and instead rule that the Settlement may not be indemnified from the Interpleader. The Moving Defendants also respectfully request that the Court establish a process at the November 12, 2015 hearing by which they may submit their legal bills to Court for payment, while maintaining the protection for potentially privileged information on those bills.

Dated: November 6, 2015

Respectfully submitted,

/s/David F. Olsky
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CERTIFICATE OF SERVICE

I hereby certify that on this date, November 6, 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

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

BC

In re:	)
CASTLE ARCH REAL ESTATE	)
INVESTMENT COMPANY, LLC,	) Bankruptcy No. 11-35082-JTM
Debtor.	)

BEFORE THE HONORABLE JOEL T. MARKER

January 6, 2014

Motion for Relief for Stay

Filed by Former Directors and Officers

Transcript Prepared from an Electronically Recorded Hearing

REPORTED BY: Patti Walker, CSR, RPR, CP

351 South West Temple, #8.431, Salt Lake City, Utah 84101

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A P P E A R A N C E S

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SALT LAKE CITY, UTAH; MONDAY, JANUARY 6, 2014; 2:00 P.M.

PROCEEDINGS

THE COURT: Good afternoon. Please call the calendar.

THE CLERK: This is in the matter of Castle Arch Real Estate Investment Company.

THE COURT: Could I get appearances, please.

MR. HOFMANN: George Hofmann appearing on behalf of Robert Geringer.

MR. KAPLAN: Good afternoon, Your Honor. Neil Kaplan appearing on behalf of Kirby Cochran.

MR. CARROLL: Good afternoon, Your Honor. Schuyler Carroll of Perkins Coie on behalf of Jeff Austin, Bill Grundy and Keith Green.

THE COURT: Welcome.

MR. WEISS: Loren Weiss on behalf of Douglas Child.

THE COURT: Mr. Weiss, I need you at a microphone. Sorry.

MR. WEISS: I thought I'd project into the microphone, Your Honor.

Loren Weiss on behalf of Douglas Child.

THE COURT: Thank you.

MR. MYERS: And Oliver Myers appearing for William Davidson and William Warwick.

MS. HUNT: Your Honor, Peggy Hunt and Steve Marsden of Dorsey & Whitney on behalf of the trustee.

THE COURT: Mr. Hofmann, are you the lead on this?

MR. HOFMANN: I guess it depends how you define it, Your Honor. I'm happy to address the motion.

THE COURT: Are you going to take responsibility for the pleadings you filed?

MR. HOFMANN: Yes, I am.

So, Your Honor, this is obviously a motion on behalf of certain former directors and officers of Castle Arch for relief from the automatic stay for the purpose of allowing the reimbursement of defense costs incurred by the defendants.

There's been a claim asserted by the trustee, it hasn't been filed in any court that I'm aware of yet, but there has been a draft complaint that has been provided probably to trigger coverage under this very insurance policy that's at issue here this afternoon.

And the insureds under that policy are asking the Court for relief from the automatic stay out of an abundance of caution to allow the reimbursement of defense costs. The reason I say out of an abundance of caution is because the automatic stay, of course, applies to certain acts against the debtor and against property of the estate. Clearly this is not an act against the debtor, nor is it an act against

property of the estate. I think that's the core of the issue before the Court this afternoon.

THE COURT: Well, we're really now talking about the automatic stay, right?

MR. HOFMANN: Well, true enough. I think we're talking about a plan injunction. The standards are functionally the same and, yes, I would agree with the Court.

THE COURT: So let's focus on that.

MR. HOFMANN: Yes. So the factors that are applied on relief from a plan injunction are the same. It's the Curtis standards that were established in this court in 1984 and have been in place since that time.

What we're talking about is an insurance policy. The policy does not cover the debtor. The debtor is not an insured.

THE COURT: Let me ask, Ms. Hunt, is that agreed?

MS. HUNT: That is agreed, but not as of the petition date. As of the petition date, the debtor was insured not only for monies that would pay out on an indemnification basis, but also monies that it had to pay out on claims for wrongful acts.

THE COURT: Right. We're talking about the contract as it exists now?

MS. HUNT: That's correct, Your Honor.

MR. HOFMANN: The policy is not property of the estate, Your Honor.

THE COURT: Well, the policy is property of the estate. I mean, the cases that you've cited stand for that proposition. The question is whether the proceeds are property of the estate.

MR. HOFMANN: I think that's a debatable point. I wouldn't concede that, but clearly the proceeds in this case are not under the applicable standards.

And reviewing not only the cases that we cited -- actually every single one of the cases that the trustee cited, as far as I can tell, stands for the proposition that if the debtor is not an insured under the policy, which is the case here, the trustee agrees with that factual proposition, then the proceeds are not property of the estate, and therefore the stay, or, in this case, the post-confirmation injunction is no impediment whatsoever.

The only reason we're here is because the insurance company, out of an abundance of caution, was unwilling to make advances under the policy unless we had effectively a comfort order from this Court saying the automatic stay does not apply.

The debtor is not a party to the contract. The estate is not a third-party beneficiary of the contract.

THE COURT: Well, the debtor owns the policy,

correct?

MR. HOFMANN: I am not sure exactly what ownership of the policy is. I mean, the policy relates to Castle Arch, there is no doubt about that, but the insureds under the policy are the directors and officers.

THE COURT: Right, but you can have insureds under a policy being different than the person or entity that owns the policy, correct?

MR. HOFMANN: I think that's true. But the only thing I'm struggling with is the word ownership and exactly what that means.

There is no doubt when you look at the insurance policy it says at the top of the first page Castle Arch. There is no question about that. And I think the terms of the policy are uncontestable. They are what they are. But there is nowhere where the insurance policy says -- that I can tell, that says this entity or person is the owner of the policy. It defines who insureds are. It says Castle Arch at the top. But I'm not sure what exactly ownership means.

THE COURT: Well, one of the provisions you've cited to me defined Castle Arch as the insuring organization.

MR. HOFMANN: That is probably correct.

THE COURT: And that is also defined as the

policyholder.

MR. HOFMANN: I think that is correct as well.

THE COURT: Okay.

MR. HOFMANN: And I don't want to draw too fine a distinction. I'm not trying to tap dance. Ownership is not a term that necessarily I understand what that means in this context.

THE COURT: All right.

MR. HOFMANN: Your Honor, the estate is simply a tort claimant against the insureds under the policy. It's just exactly in the position as, for example, Longview was in earlier in this case. I filed a motion for relief from stay with respect to a different insurance policy in this same case a year ago and that was because of Longview, a third-party entity, filed a claim. And functionally the trustee in this case is in exactly the same position that Longview was in there. It's not entitled to any of the proceeds of the policy. The insureds are for the purpose of advancing defense costs.

It's true that the policy could be a source of recovery to the estate, but that is completely irrelevant to the matter, Your Honor.

There has been a status report filed by the trustee in this matter. I don't know if the Court has reviewed it or not.

THE COURT: I have.

MR. HOFMANN: I think it was filed today.

As I understand that status report, it refers to the insurance company, and I suppose I would characterize it as expressing an opinion that the insurance company has not proceeded reasonably in resolving claims the trustee has asserted.

I would submit that whether the insurance company is acting reasonably, unreasonably or otherwise is completely irrelevant to this position of this motion, Your Honor. I would submit that the only relevant issue is whether the proceeds are property of the estate or not, and I think that is absolutely clear as a matter of even the case law that's cited by the trustee.

With respect to the plan injunction issue, Your Honor, there's no doubt this is a matter of the plan injunction. But again, the cases cited by the trustee, including the WorldCom case, support the proposition the Court views in exactly the same way.

THE COURT: How do you understand the plan injunction to apply here, because I'm not sure that I understand that?

MR. HOFMANN: I am not sure I do either, Your Honor.

THE COURT: Okay. But you just said it was, so I

thought maybe you had some insight that I didn't.

MR. HOFMANN: No. I won't -- I'll leave that to Ms. Hunt to address that.

So with that, Your Honor, unless the Court has any additional questions, I would submit it on that basis.

THE COURT: One question I had is -- well, I have two questions. One is the endorsement number 17 that was added or -- added, I don't know, attached to the policy post-petition --

MR. HOFMANN: Yes.

THE COURT: -- did that expand the group of individuals who would be covered as insureds or is it the same group? In other words, those who were covered by the policy as it existed on the petition date is the same as the group that are covered through endorsement 17.

MR. HOFMANN: At the risk of -- I'll tell the Court my understanding of it, which is that other than the entity, Castle Arch, the list is exactly the same.

THE COURT: All right. So it's not like Mr. Child and the other individuals added other people to be covered?

MR. HOFMANN: Not to my knowledge.

THE COURT: All right. Then the second thing is the trustee has asked for alternative relief in his objections saying if you grant relief to these parties, we want you to include some affirmative relief to the trustee,

direct that prior to any payment out of the policy the insiders be required to provide the trustee with copies of all invoices or other requests for reimbursement, be prohibited from making any disbursements in the policy without providing trustee at least ten days written notice, et cetera. And the trustee may not like this, but I'm viewing this as a contract issue, so do you have any insight for me on what the contract allows Castle Arch with respect to these requests?

MR. HOFMANN: As far as I know, and I did review the policy this morning --

THE COURT: Let's assume there was no bankruptcy here and the company was suing Mr. Child and others. Would the company be entitled to that sort of information from the insurance company as it performs its defense?

MR. HOFMANN: I don't believe so, Your Honor.

THE COURT: But you don't know?

MR. HOFMANN: Well, I reviewed the policy again this morning. I didn't see a provision that would grant it that right. In the absence of a provision that indicates that the trustee or the debtor has that right, then I don't think it can exist. And that relief is opposed, I think the Court is aware. Fundamentally I think what that would do is slow the process to the advantage of the trustee, which is not provided for in the contract, and also potentially

expose attorney/client privilege information to a litigation adversary, and I don't think that's appropriate.

I can look at the contract when I sit down, but I don't think there is a provision in the contract, that I'm aware of, that would give Castle Arch or the trustee those kinds of rights.

THE COURT: All right. Thank you.

Anyone else representing the movants wish to address the Court?

MR. KAPLAN: Your Honor, Neil Kaplan. Only two points to address.

THE COURT: And I need you at the microphone, Mr. Kaplan.

MR. KAPLAN: I just realized that.

Only two things and I think we'll all review the contract. If there was no bankruptcy, I don't believe Castle Arch could sue and trigger the policy because there's an insured versus insured exclusion. The only reason that Mr. Strong, in his capacity as basically an independent third-party claimant, can sue is because he's not the insured, and the policy made that clear. So if there was no bankruptcy, they couldn't trigger the policy at all.

Secondly, I believe in answer to your question could they review the bills, I don't know of any provision that would allow them to do that unless they would argue

that if they are indemnifying us, it may make some sense for them to review the bills that they are paying. But they've refused to indemnify, they are suing us, they are not indemnifying. It's just the opposite.

THE COURT: Ms. Hunt.

First of all, do you need some time to review the policy on the issue of the company, through the trustee's rights, to review defense billings and that sort of thing, or do you know if that's in there or not?

MS. HUNT: I don't know offhand. If you would like, we could take a minute or two and review it and then I will be able to address that.

THE COURT: When you're done. I would be glad to give you the time you need, sure.

So I think the policy is property of the estate, but I'm following -- you are both citing to the Allied Digital case where Judge Case was sitting in Delaware and he makes some general statements that are followed by Judge Glenn in the MF Global case, which make perfect sense to me, the overwhelming majority of courts have concluded that liability insurance policies fall within 541(a)(1)'s definition of estate property.

So the company owns the policy. It wasn't an executory contract. The premium was paid. The company has a duty to defend under the contract. It's property of the

estate. I understand the trustee is complaining that the policy was changed post-petition. I'm not really sure that that's the issue for today.

MS. HUNT: Okay, Your Honor.

THE COURT: But if you agree that there's no indemnification provision in the policy anymore that would provide payment to the trustee, then I think that the trustee, as in the Allied case, is simply a third party making claims against these individuals who are insureds under the policy.

MS. HUNT: I understand what you're saying, and I think everybody agrees that the Allied analysis is applicable, and that analysis does make clear that as the policyholder, the policy is property of the estate. The difference is the proceeds. And the proceeds here -- the Court goes into a lot about whether they are indemnification type proceeds or just direct coverage proceeds. Here, Your Honor, and probably not pointed out as well as it could be in our papers, is the fact that on the petition date, the debtor had both indemnification coverage and it had actual direct coverage under the policy. So on the petition date, the proceeds were property of the estate.

And so then after the petition date, we had a set of circumstances whereby -- let me back up.

One more thing you should understand under the

policy is that also on the petition date the debtor had the right -- the unconditional right to extend the coverage for another year by paying an extended period premium. It also could have made claims under the policy during the coverage period and it would have had $5 million worth of insurance.

It chose post-petition not to do any of those things. It chose to basically take out all provisions for the debtor to be directly an insured under the policy and have coverage under the policy. It took out the rights for the debtors to receive money in the event that they did indemnify these folks. And now these parties are claiming that somehow that should be used against the estate to allow them to have access to the policy.

I think that, Your Honor, what we're arguing here is really an equitable issue. And I understand that the Court doesn't want to hear evidence on that today, and this isn't noticed as an evidentiary hearing. So --

THE COURT: Excuse me.

Mr. Carroll, do you have some colleagues who want to join by phone?

MR. CARROLL: I don't believe so, Your Honor. I believe that the gentlemen representing AXIS may have wanted to join by phone.

THE COURT: All right. But they are not -- they haven't entered an appearance in the case.

MR. CARROLL: I don't know that, Your Honor.

MR. HOFMANN: That's correct.

THE COURT: All right. They can listen.

Do you want to put them in.

All right. So any objection to me allowing the AXIS attorneys to listen?

MR. HOFMANN: None.

THE COURT: All right.

THE CLERK: Hi, Mr. Watson. Are you on the phone?

MR. MINKIN: Hi. My name is Jason Minkin. I believe my colleague, Brian Watson, is either on the phone or will be joining us momentarily.

THE CLERK: Okay. You are connected to the courtroom.

MR. MINKIN: I'm sorry. My name is Jason Minkin and I am counsel for AXIS Insurance Company.

THE COURT: All right. Mr. Minkin, this is Judge Marker. I'm going to allow you to listen to the proceedings, but you haven't entered an appearance in the case and I won't allow you to make any statements. All right?

MR. MINKIN: I understand, Your Honor.

THE COURT: All right. Go ahead.

Ms. Hunt.

MS. HUNT: So, Your Honor, I think that it just

can't be disputed that on the petition date the debtor had the policy. The debtor is the policyholder. The debtor still holds contract rights under that policy as the policyholder. The policy provided $5 million in coverage, and this was not just coverage for the insured individuals, but it was coverage for the debtor itself.

THE COURT: But the moving parties are asking for relief as to the policy the way it exists now.

MS. HUNT: Right, and I understand that.

THE COURT: The trustee may have some claims against somebody for what happened post-petition, but that's really not before me here today.

MS. HUNT: I think in a way it is, Your Honor, and this is why, is because it would be our contention that given the facts that exist in this case that I understand have not been established by any evidence, but this isn't an evidentiary hearing on that issue --

THE COURT: Well, but the trustee has known about this for over a year.

MS. HUNT: And I understand that, Your Honor. And I think the issue here is that we have been trying to deal with this as efficiently as possible. This is a very difficult case. It's very fact intensive. We've been trying not to spend money on collateral issues and getting right to the heart of this, providing the parties the

complaint and then moving on to trying to get a mediation set up and a settlement agreement.

It is our hope that we're going to get a settlement agreement with Mr. Child within the policy limits and have a mediation, and that is going to be the most efficient way to deal with this, and also be able to use the policy proceeds as an effective avenue of recovery for the investors in this case who were defrauded.

Now the fact that we haven't conducted discovery at this point is primarily because our hand wasn't forced until now on this issue. Nobody has made a claim, that we knew of, for reimbursement of costs under the policy, and it was brought to light today that the insured required this motion to be able to make those payments out. And I understand that that's the normal course of these proceedings.

THE COURT: But is there any dispute? The question I asked Mr. Hofmann was this group of insureds who are asking for some clarification if the insurance company can extend defense costs, they're the same as the group that were insureds under the policy as it existed on the petition date. I mean, it makes a difference to me. This is not the situation where post-petition the insiders, without telling anybody, added themselves to the policy so that they could get something that they weren't entitled to on the petition

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date.

MS. HUNT: Your Honor, I agree with you and I think that's the correct view. I mean, they didn't add themselves. They were insured under the policy. The debtor was insured under the policy.

I think at this point -- I mean, frankly, I am a little bit embarrassed to bring this up because we today -- I asked for some information about what was the policy premium. And in doing this, I came up with an e-mail trail that we've known about since 2012 but had not realized the relevance to this proceeding until today.

The e-mail trail, which I have copies of and I can provide, and I did provide to opposing counsel today, show that what these -- what these individuals did was that -- there was Mr. Hunt and Mr. Austin, who were representing themselves as representatives of CAREIC to this Court as debtors in possession. After the petition date, they went to get extended coverage under this policy. We have e-mail correspondence from the agent saying, listen, you are entitled to make claims under the policy for five million. You are entitled to get extended coverage under this policy. You have an unconditional right under the policy to do that. Or you can cut the debtor out and pay a reduced premium and get coverage for yourselves, and that's what they chose to do.

There was discussion in this e-mail chain about whether they needed court approval to get financing to pay the premium and decided that they weren't going to do that.

Given the facts and circumstances that I understand are not in evidence before the Court but that I can represent to the Court that I have reviewed, I think that there's at least grounds for imposition of a constructive trust on these funds to allow us an opportunity -- before they are wasted away, that we be given an opportunity to collect on them for purposes of obtaining a settlement with Mr. Child or obtaining some type of recovery for investors. Because I think -- look at all the attorneys in the room here today. There's even one who's traveled here from New York City. Those proceeds won't even make it through mediation.

So that's the position we're in. And I understand what the Court is saying, but I also think that there are equitable grounds for at least continuing this hearing to allow this to be treated as a preliminary hearing so that we can explore these issues related to the equities of them whittling down these proceeds before we can enter into a settlement with Mr. Child.

And if I may, Your Honor, also, even if the Court were to grant the motion, I do think that it would be appropriate to allow us to have even redacted invoices so as

to allow us to be able to see what kind of costs are being imposed against this policy.

And let me just point out a few things that we're concerned about. The policy, we're now dealing with claims that we are asserting for pre-petition actions of this management. As the Court is aware, Mr. Geringer had a several day trial in this court related to his proof of claim. We want to make sure that those types of claims are not being asserted against the policy. We want to make sure that today's hearing, where they are trying to get money from the policy, is not being charged against the policy so that in the event that we can reach a settlement in this case, there are some funds left for us to be able to draw on to make payments to investors.

And if I may confer with Mr. Marsden for a moment. He's been looking at the policy.

THE COURT: I don't want to pressure you because I wasn't able to alert you to my question on this issue beforehand. If you need more time, that's fine.

MS. HUNT: Thanks.

But I do think on that point -- and I'm just thinking out loud here, I do think that we are a policyholder. The policy is property of this estate. Somehow it seems to me that there should be a right under that policy as a policyholder to be able to review how it's

being drawn down, because when the million dollars is gone, the clear terms of the policy are that there will be no more coverage. So I think as the policyholder, we have a right to be able to review invoices.

THE COURT: Well, what I'm looking for is either there's something in the policy or something, God forbid, as you've pointed out in -- somebody's pointed out in their papers something under Illinois or Texas or New Jersey insurance law that allows the policyholder access to that information.

MS. HUNT: It's a good question, and I don't know it off the top of my head, Your Honor.

THE COURT: All right. Thank you.

Mr. Carroll, anything?

MR. CARROLL: Yes, Your Honor. Thank you.

And just very briefly actually to address the last issue that you raised as to whether Illinois, New Jersey or Texas law, or otherwise, would provide for the trustee to receive that information. I can't cite anything to Your Honor, but I can tell Your Honor that I have seen this in numerous instances where the trustee or the plaintiff has asked for this type of stuff. In fact, in the MF Global case they did that, and in every case I've been involved in that has always been denied.

So I don't think there is anything in the law or

this contract, and I have looked at this contract and I don't see anything in there.

THE COURT: All right. Thank you.

MR. CARROLL: Thank you, Your Honor.

THE COURT: So what I have is a motion for relief from the discharge injunction by several individuals to get defense coverage and settlement coverage I guess from the insurance company AXIS on the claims made by the trustee, and I'm going to grant the motion. The policy is property of the estate. It's undisputed that there's -- at this point the contract does not provide indemnification coverage for the reorganized debtor. So the reorganized debtor has no more interest in the proceeds of the policy than any other party making a claim against the individuals.

There is no stay in effect, but there is cause to grant relief from the discharge injunction. In general terms, I think the -- I'm sympathetic to the trustee's efforts to do the best he can with a difficult case to provide as much money as possible to the beneficiaries of the trusts that were established by confirmation of the plans, and I hope the trustee understands I'm sympathetic to that, but in this particular case it's a very dry, I think, contract issue and God help those who have to do this for a living.

So I think the balance of hurt weighs in favor of

granting relief from the discharge injunction, to the extent it's implicated, to allow them to make those claims as to the insurance company.

As to the other remedies requested by the trustee, I am not going to manufacture any additional affirmative relief for the trustee. If it exists under any applicable state law or in the contract, the trustee is going to be entitled to what those laws or that contract provide. So I'm not diminishing anything the trustee, as the policyholder, has right now, but I'm not going to add to it either.

Anything else?

MR. HOFMANN: No, Your Honor.

There was a proposed order that was attached to the motion. It may need to be modified slightly to reference the discharge injunction as opposed to Section 362, but otherwise I think it was fairly plain vanilla. So I would probably revise it and send it to Ms. Hunt for review, if that's acceptance to the Court.

THE COURT: It is. Thank you.

Court's in recess.

(Whereupon, the proceeding was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

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