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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. **AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC; ROBERT J. JESENIK; BRIAN A. OLIVER; and N. SCOTT GILLIS**, Defendants.	Case No. 3:16-cv-00438-PK **DEFENDANT ROBERT J. JESENIK'S MOTION FOR RELIEF FROM RECEIVERSHIP ORDER, TO THE EXTENT NECESSARY, TO PERMIT PAYMENT OF DEFENSE COSTS** **EXPEDITED HEARING REQUESTED** **ORAL ARGUMENT REQUESTED** Complaint Filed: March 11, 2016

LOCAL RULE 7-1(a) COMPLIANCE

Pursuant to LR 7-1(a), counsel for Defendant Robert J. Jesenik met and conferred in good faith through email and telephone conferences with Plaintiff's counsel and counsel for Aequitas Management, LLC, Aequitas Holdings, LLC, Aequitas Commercial Finance, LLC, Aequitas Capital Management, Inc., and Aequitas Investment Management, LLC (collectively, "Aequitas") regarding this Motion, but Plaintiff and Aequitas declined to stipulate to the proposed order. In addition, pursuant to LR 7-1(g), counsel for Mr. Jesenik conferred in good faith through telephone conferences and via email with Plaintiffs' counsel and counsel for Aequitas regarding Mr. Jesenik's request for an expedited hearing on this Motion. Plaintiff takes no position on Mr. Jesenik's request, but Aequitas opposes the request.

MOTION

Plaintiff filed this lawsuit on March 10, 2016, at which time Plaintiff also filed a stipulation requesting a preliminary injunction and the appointment of a receiver. On April 14, 2016, this Court entered an Order Appointing Receiver ("Receivership Order"), appointing Ronald Greenspan as the Receiver for Aequitas and freezing Aequitas' assets. Dkt. No. 156, ¶¶ 1-2. On May 23, 2016, this Court ruled:

> It is hereby Ordered that the Receivership Order is lifted to the extent applicable, so that the Insurer shall be and is hereby authorized to make payments under the Policy to or for the benefit of the Executives for covered Defense Costs incurred in connection with the Investigation and Litigation. The Executives shall submit to the Receiver on a quarterly basis, commencing within 90 days of the entry of this Order, a report reflecting the aggregate amount of Defense Costs paid by the Insurer on behalf of the Executives during the prior quarter.

Dkt. No. 185. This Order permitted the first tier of insurance covering Mr. Jesenik, Catlin Specialty Insurance Company ("Catlin"), to pay covered Defense Costs to or on behalf of Mr. Jesenik in connection with this matter.

The Executives, including Mr. Jesenik, complied with this reporting requirement of the Court's Order, and this first tier of insurance has now been fully paid out. Despite this fact, and the fact that Mr. Jesenik is clearly entitled to continuing coverage under the second tier of insurance provided by Forge Underwriting Ltd ("Forge"), Mr. Jesenik is being denied coverage absent another Order from this Court authorizing continued payments. Accordingly, Mr. Jesenik now seek relief from the Receivership Order for the purpose of allowing Forge to advance past and future Defense Costs to or on behalf of Mr. Jesenik in connection with this matter. Mr. Jesenik requests oral argument and an expedited hearing on this Motion. An expedited hearing is appropriate here because Mr. Jesenik faces substantial prejudice in his ability to prepare his defenses while past Defense Costs continue to be withheld and future Defense Costs are not advanced, which prejudice only continues to increase with each passing day. [1]

MEMORANDUM OF LAW

I. INTRODUCTION

Mr. Jesenik respectfully moves this Court for an Order confirming that Forge, the second tier of insurance covering Mr. Jesenik, may advance Defense Costs on his behalf under an Excess Claims Made Private Equity Liability Insurance Policy issued by Forge. As noted, this Court has already ruled on this issue, entering an Order permitting the first tier of insurance, Catlin, to advance such costs. Forge has indicated that it is willing to advance certain defense costs as defined by the Policy ("Defense Costs"), in connection with the investigation by the United States Securities and Exchange Commission (the "Investigation") and this civil action, *SEC v. Aequitas Management, LLC*, et al., Case No. 3:16-cv-00438-PK (D. Or.) (the "Litigation"), subject to confirmation from this Court that advancement does not violate the

[1] Co-Defendants Brian Oliver and N. Scott Gillis have filed a motion seeking identical relief. Dkt. No. 496. As such, the motions are appropriate for joint argument on an expedited basis.

Court's April 14, 2016 Receivership Order. Once such confirmation is received, Forge has indicated that it will reimburse Defense Costs at the same rates and subject to the same conditions consented to by Catlin. Mr. Jesenik seeks such a confirmation from the Court now.

II. BACKGROUND

A. The SEC Litigation and the Receivership Order

The SEC initiated this Litigation against Aequitas and Mr. Jesenik through a Complaint dated March 10, 2016. The SEC filed a stipulation requesting a preliminary injunction and appointment of a receiver, and on April 14, 2016, this Court entered the Receivership Order appointing Ronald Greenspan as the Receiver for Aequitas and freezing Aequitas' assets. Dkt. No. 156, in 1-2. The Receivership Order provides that "all persons and entities with direct or indirect control over any property of the Receivership Entity, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of or withdrawing such assets." *Id*., ¶ 2.

B. The Policies

Catlin issued Private Equity Management Liability Insurance Policy No. MFP-686757-0714 (the “Catlin Policy”) to Aequitas Holdings, LLC (the "Company"), for the Policy Period of July 1, 2014 to November 1, 2015, as amended by Endorsement 8. A copy of the Catlin Policy is attached as Exhibit A to the Declaration of Jason P. Cronic in Support of Defendant Robert J. Jesenik's Motion for Relief from Receivership Order ("Cronic Decl."). The Catlin Policy has a $5 million Aggregate Limit of Liability, inclusive of Defense Costs. Cronic Decl., Exhibit A, Policy Declarations, Item 3. Catlin has paid out $5 million pursuant to the Catlin Policy and thus the Catlin Policy "has been fully exhausted." Cronic Decl., ¶ 3; Receiver's Report Dated July 31,

2017 (Dkt. No. 491) at 18-19. All of the Defense Costs paid by Catlin were determined to be "reasonable and necessary" in accordance with the Catlin Policy. Cronic Decl., ¶ 3.

Forge issued Excess Claims Made Private Equity Liability Insurance Policy No. B0146ERUSA1400543 to the Company for the Policy Period of July 1, 2014 to July 1, 2015 (the "Forge Policy"). The Forge Policy has a limit of $5 million, to begin once the initial $5 million in coverage provided by Catlin is exhausted. A copy of the Forge Policy is attached as Exhibit A to the to the Declaration of Jeffrey F. Robertson in Support of Defendant Robert J. Jesenik's Motion for Relief from Receivership Order. The Forge Policy provides that it follows the form of the primary Catlin Policy, except as specifically provided otherwise, and relies on the terms and conditions outlined in the Catlin Policy. Accordingly, the Catlin and Forge policies together are hereinafter referred to as the "Policy."

Like many director and officer ("D&O") liability insurance policies, the Policy contains three principal insuring agreements, generally referred to as Insuring Agreement A (payment directly to the insured directors and officers if their employer is unable or unwilling to hold them harmless); Insuring Agreement B (reimbursement to the employer for payments the employer made to hold the directors and officers harmless); and Insuring Agreement C (coverage for the named insured/employer for a more limited subset of liabilities).

The insuring agreement at issue in this Motion, Insuring Agreement A of the Policy, provides that the Insurer "shall pay on behalf of any Insured Person all Loss for which the Insured Organization has not indemnified such Insured Person, resulting from a Claim . . . first made against such Insured Person during the Policy Period . . . for a Wrongful Act." Cronic Decl., Exhibit A, Section I(A). Mr. Jesenik is an Insured Persons in his capacity as a former executive of the Company. *Id.*, Sections III(S) & (Z). The Insured Organization, his former

employer now in receivership, has not indemnified Mr. Jesenik in connection with this matter.

Other Insured Persons have sought coverage under the Policy in connection with the Investigation and may do so in the future. The Policy defines Loss to include "Defense Costs," which is defined as "reasonable and necessary fees and expenses incurred in the defense or appeal of a Claim." *Id*., Section III(K). Pursuant to Section VII of the Policy, the Insurer "shall advance Defense Costs . . . no later than ninety (90) days after the receipt by the Insurer of such defense invoices." *Id*., Section VII(B).

The Policy contains a Priority of Payments provision among the three insuring agreements. That provision provides in relevant part: "[i]f Loss is incurred that exceeds the remaining Limit of Liability for this Policy, the Insurer shall pay Loss under Insuring Agreement A. before paying any other Loss." *Id*., Section XIII(C). Given the magnitude of the Defense Costs that will likely be incurred by the multiple firms representing insured persons during this ongoing litigation (and potentially other Claims under the Policy), all potential Loss may exceed the Limit of Liability of the Policy, thereby triggering the Policy's Priority of Payments provision.

III. RELIEF REQUESTED

Mr. Jesenik seeks an Order permitting Forge to continue what this Court has already authorized – advancement on a current basis of Defense Costs incurred by or on behalf of Mr. Jesenik in connection with the Litigation and/or the Investigation and other Claims. Mr. Jesenik has incurred and continues to incur Defense Costs in connection with the Litigation and Investigation. If he is not able to access insurance proceeds, he faces immediate, extreme prejudice, including but not limited to the possibility that his counsel will seek to withdraw and leave him unrepresented and that he will be unable to retain vendors or third-party professionals, such as experts, that he needs for his defense.

IV. BASIS FOR RELIEF REQUESTED

To the extent necessary, Mr. Jesenik respectfully submits that sufficient cause exists to modify the Receivership Order to permit Forge to advance past and future Defense Costs to or on behalf of Mr. Jesenik in connection with the Litigation and/or the Investigation and other Claims. Although the Receivership Order states that all assets and property of Aequitas are assets and property under the control of the Receiver, as with Catlin, this Court should allow Forge to advance reasonable and necessary fees and costs on behalf of Mr. Jesenik in accordance with the terms of the Policy for three reasons.

First, while the Policy itself may be an asset of the Aequitas receivership estate, Policy *proceeds* due to Insured Persons like Mr. Jesenik are not assets of that estate subject to an asset freeze. The Policy provides that Forge will pay defense costs and indemnity to third parties, such as defense counsel, *on behalf of* the Insureds; the Policy only indemnifies the insured corporate entity for payments the entity made to hold the directors and officers harmless. No such payments have been made here. Second, the Policy's Priority-of-Payments provision requires that payments first be made directly to or on behalf of the insured directors and officers like Mr. Jesenik before they can go to the covered corporate entity (here, the Receiver). Third, even if neither of these facts were true, the Court has authority to and should permit the disbursement of insurance proceeds to Mr. Jesenik as a Covered Person to ensure the orderly processing of this matter.

A. Director and Officer Insurance Proceeds Are Not Subject to the Asset Freeze Because The Receiver Does Not Have a Property Interest in Them.

In administering a receivership, courts frequently look to bankruptcy law when deciding the treatment of issues like ownership of insurance policy proceeds. *See SEC v. Morriss*, No. 4:12-CV-80 CEJ, 2012 WL 1605225, at *2 n.7 (E.D. Mo. May 8, 2012)("Because there are

comparatively few cases examining the ownership of insurance proceeds in the context of a receivership, it is appropriate to consider the treatment of the issue under bankruptcy law . . . .").

While bankruptcy courts have long recognized that a liability insurance *policy* is the property of an estate in bankruptcy, policy *proceeds* paid "on behalf" of the insureds to third parties such as defense counsel or underlying claimants are not. That is because liability policy proceeds (like those at issue here) are not paid to the Receivership estate, and so never become a part of that estate. For that reason, bankruptcy courts frequently authorize the payment of policy proceeds for defense and indemnity for the insured directors and officers of insolvent business. *See, e.g., Matter of Edgeworth*, 933 F.2d 51 (5th Cir. 1993); *First Fidelity Bank v. McAteer*, 985 F.2d 114, 117 (3d Cir. 1993); *In re La. World Exposition, Inc.*, 832 F.2d 1391, 1399 (5th Cir. 1987); *In re Endoscopy Center of S. Nev., LLC*, 451 B.R. 527, 545-45 (Bankr. D. Nev. 2011).

Matter of Edgeworth explained: "The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have the right to receive and keep those proceeds *when the insurer paid on a claim*. When payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate." 993 F.2d at 55-56.

The answer to that overriding question here is very clear: the Receiver has no entitlement to the proceeds of a claim paid under Insuring Agreement A (sometimes called a "Side A claim") on behalf of Mr. Jesenik when those proceeds are paid. Because payments under Side A of the Policy can never "inure to the [receivership estate's] pecuniary benefit," those payments "neither enhance nor decrease the [] estate." *See id*. As such, those proceeds are not property of the estate subject to an asset freeze. There is no contractual mechanism or Policy language that would allow Aequitas to "receive and keep [the] proceeds" of a claim for payment made under

Side A of the Policy. The Receiver, by virtue of his judicial appointment here, has not gained some new and unwritten contractual right that Aequitas itself would not have had when the Policy was issued. *See Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003) ("The general rule is that a receiver acquires no greater rights in property than the debtor had."); *SEC v. Narayan*, No. 3:16-CV-1417-M, 2017 WL 447205, at *5 (N.D. Tex Feb. 2, 2017) ("Thus, if [the entity's] interest in the proceeds would have been limited under the terms of the Policy, the Receiver's right in the proceeds asserted on behalf of the Receivership Estate should be similarly limited."); *In re Caesars Entm't Operating Co., Inc.*, 533 B.R. 714, 735 (Bankr. N.D. Ill. 2015), *vacated and remanded on other grounds*, 808 F.3d 1186 (7th Cir. 2015) ("[a]llowing the debtors to hold up payments for [co-insured's] losses in favor of the debtors' own would give the debtors rights under the policy they did not have before these cases were filed. It is a truism that the [bankruptcy] Code does not grant debtors rights greater than they had outside of bankruptcy.").

Not surprisingly, courts have applied this rule from bankruptcy law in the context of receivership orders. In *SEC v. Morriss*, No. 4:12-CV-80 CEJ, 2012 WL 1605225, at *4-5 (E.D. Mo. May 8, 2012), for example, the court held that proceeds of a directors and officers insurance policy similar to the Policy here were "not a part of the receivership estate….[and] thus, the asset freeze order previously entered does not bar [the insurer] from disbursing proceeds to pay [the insured director's] defense costs in accordance with the policy's terms and conditions." *See also Exec. Risk Indem., Inc. v. Integral Equity, L.P.*, No. 3:03-CV-0269, 2004 WL 438936, at *14 (N.D. Tex. Mar. 10, 2004) (payments made on behalf of insured persons do not violate receivership stay because the entity in receivership had "no cognizable interest, in and of themselves, in the proceeds" of an insurance policy that contemplated only payments owed to

"third-party claimants against the Insured, as well as to the Insured's attorneys defending against those claims"). Because the Receiver here has not filed any insurable claims under the Policy, it has no property interest in the Policy proceeds such that those proceeds would be subject to this Court's asset freeze.

In re Adelphia Comms. Corp., 298 B.R. 49, 51 (S.D.N.Y. 2003), also supports Mr. Jesenik's position here. There, a co-insured employer undergoing bankruptcy proceedings attempted to prevent their co-insured directors and officers from accessing the proceeds of a policy that provided coverage for both the directors and the entity. The district court there overturned the finding of the bankruptcy judge, holding that the former employer had no property interest in the proceeds of insurance policies against which it had not actually made a claim. *See id*. at 53-54. Indeed, the *Adelphia* court held that:

> Claiming the debtors now have a property interest in those proceeds makes no sense at this juncture. Such argument would be akin to a car owner with collision coverage claiming he has the right to proceeds from his policy simply because there is a prospective possibility that his car will collide with another tomorrow, or a living person having a death benefit policy, and claiming his beneficiaries have a property interest in the proceeds even though he remains alive. No cognizable equitable and legal interest in the proceeds from the D&O policies has arisen here. Without legal and equitable interest in the proceeds, [the debtor's] estate cannot be ascribed to hold a property interest in those proceeds.

Id.

The circumstances here are identical to those presented to the *Adelphia* court. Even if the Receiver has the potential for some hypothetical future claim against the Policy, it does not have one today for the simple reason that it is not presently subject to any insurable Claim under that Policy. This fact alone confirms that the proceeds of the Policy are not property of the estate subject to an asset freeze, and justifies the Court's entry of the proposed Order.

On similar facts, the court in *Narayan* found "compelling reasons to permit the advancement of defense costs" to officers of a company that had been placed in receivership after the SEC sued the company and the officers for securities fraud. 2017 WL 447205, at *1. Relying on the "general rule … that a receiver acquires no greater rights in property than the debtor had," the court first concluded that any potential benefit to the receivership estate under the insurance policy did not "negate [the officers'] contractual rights" to coverage under the insurance policy, finding "no basis to expand [the company's] rights under the contract simply because the Court imposed a receivership." *Id.* at *5. Second, the court found that the potential harm to the officers in withholding defense costs far outweighed any harm to the estate, as the officers were experiencing "clear, immediate, and ongoing defense expenses arising from" the SEC litigation and a related derivative action. *Id.* at *6. Third, even if the receivership estate had a current claim for coverage on the company's behalf, the court reasoned, the priority of payments provision in the insurance policy similar to the one at issue here "appears to subordinate any claim that the Receiver may have for [the company's] defense costs or derivative investigation expenses to the coverage" for the officers. *Id.* at *7. Finally, the court rejected the Receiver's argument that any covered defense costs must be evaluated for reasonableness because "it is [the insurer's] responsibility to determine the reasonableness of any fees incurred by" the officers—not the Receiver's. *Id.* at *9.

The logic underlying *Adelphia* and *Narayan* is especially compelling here, where any objection by the Receiver would constitute an attempt to use the stay and asset freeze granted in this case to hinder Mr. Jesenik's ability to defend himself against a claim for which the Receiver

will *never* have an insurable loss, hypothetical or otherwise.[2] The insurable claim against Mr. Jesenik, by contrast, is present, actual and active. Further, a freeze on the Policy proceeds would have the effect of placing a party that has acted adversely to Mr. Jesenik's interests on multiple occasions, and is actively cooperating with the SEC in its claims against Mr. Jesenik, *in control of the pace and funding of Mr. Jesenik's defense*. Such a result would be unjust, and it would be inappropriate to permit the Receiver the power to control the defense of those subject to currently insurable claims.

B. Even if the Receiver Did Have An Insurable Claim, the Priority of Payments Provision Controls and Requires Advancement of Mr. Jesenik's Current Claims.

As in *Narayan*, the Policy at issue in this case contains a Priority of Payments provision. Cronic Decl., Exhibit A, Section XIII(C). This provision effectively subordinates any claim that the Receiver, standing in the shoes of Aequitas, would have against the Policy to those of Mr. Jesenik and any other officers and directors covered by the Policy.

In *Morriss*, a company's assets were frozen by a receivership order entered after the SEC filed suit against the company. 2012 WL 1605225, at *2. When the company's investors later filed an action against the company's directors, the directors sought coverage under a policy similar to the Policy at issue here, including incorporation of a priority of payments provision. Citing *Louisiana World Exposition* and other cases, the court granted the directors' motion for relief from the receivership order. The court held that advancement of the directors' defense costs was appropriate to avoid harming the directors by depriving them of a defense. The court

[2] While the Policy provides coverage for officers and directors for claims made by governmental and regulatory bodies like those advanced here, it expressly exempts corporate coverage for claims made by governmental and regulatory bodies. As such, even though claims by governmental and regulatory bodies are not subject to the stay here, the Receiver has no claim under the Policy for any such claims. Cronic Decl., Exhibit A, Regulatory Exclusion Endorsement.

found additional support under the terms of the policy, nothing that "the policy includes a priority of payments provision requiring [the insurer] to pay claims [against insured directors] before claims under any other insuring clause, including those of the organization. As a result, as a matter of contract, any claim that the receiver may have for defense costs is subordinate to the coverage for [the insured directors]." *Id*. at *4. In so holding, the court rejected the SEC's argument that potential future interests of investors or others that may seek to recover under the policy should trump the directors' contractual right to coverage. *Id.*

In similar cases in the bankruptcy context, courts have consistently held that where a policy contains a priority of payments provision, the advancement of defense costs to an insured person does not violate the automatic bankruptcy stay.[3] For example, *In re Downey Financial Corp.* held that any interest the bankruptcy trustee had in policy proceeds was subordinate to the coverage provided to the individual insureds pursuant to the policy's priority of payments provision. Because coverage for the entity was only available under the subordinate insuring clauses prior to the bankruptcy, the policy proceeds were not property of the estate subject to the stay. 428 B.R. 595, 607-08 (Bankr. D. Del. 2010). *In re Laminate Kingdom, LLC*, No. 07-10279-BKC-AJC 2008 WL 1766637 (Bankr. S.D. Fla. Mar. 13, 2008), reached a similar conclusion, noting that "[i]n determining a property interest in an insurance policy, courts are guided by the language and scope of the policy at issue," and that "[t]ypically, the proceeds of a directors and officers liability insurance policy are not considered property of a bankruptcy estate." *Id*. at *2.

[3] Earlier bankruptcy cases, like *Louisiana World Exposition, Inc.* and *Edgeworth* did not address the priority of payment issue because such provisions were added to standard director an officer insurance policies more recently, to confirm that the rights of the individual directors and officers take precedence over those of the corporate entity. *See* https://www.irmi.com/online/insurance-glossary/terms/p/priority-of-payments-provision.aspx ("Priority of payments provisions were added to D&O policies because in the early 2000s, numerous controversies began to arise as to whether the proceeds of a D&O policy belong to a bankruptcy trustee or to the individual insured directors and officers.").

Like the Policy at issue here, the policy in *Laminate Kingdom* insured both the entity and its officers and directors and had a priority of payments provision. The court acknowledged that the policy did provide entity coverage, but found that interest insufficient to render the policy proceeds part of the bankruptcy estate:

> Having noted that distinction, the Court believes the depletion of proceeds to pay the Costs of Defense does not diminish the protection afforded the estate's assets under the terms of the Policy. The Policy's "Priority of Payments Endorsement" specifically requires that the proceeds be used *first* to pay non-indemnifiable loss for which coverage [for directors and officers] is provided under Coverage A of this Policy, which coverage includes the Costs of Defense. Then, only after such payments are made, and only if proceeds remain after payment of such Costs of Defense, will the Trustee or the estate be paid any proceeds. Thus, under the language of the Policy itself, the estate has only a contingent, residual interest in the Policy's proceeds; and, payment of the proceeds in accordance with the "Priority of Payments Endorsement" does not diminish the protection the Policy affords the estate, as such protection is only available after the Costs of Defense are paid.

Id. at *3. The court therefore held that the policy proceeds were not part of the estate and not subject to an automatic stay.

> In these and other cases, courts consistently have refused to deprive corporate officers and directors of insurance benefits to which they are contractually entitled, particularly where, as here, there is a priority of payments provision in the policy. A contrary rule would undermine the very purpose of such policies, which is to protect an entity's officers and directors even when the entity is in financial distress: D&O policies are obtained for the protection of individual directors and officers . . . . In essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection.

Ochs v. Lipson (In re First Cent. Fin. Corp.), 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999); *see also Miller v. McDonald (In re World Health Alt., Inc.)*, 369 B.R. 805, 811 (Bankr. D. Del. 2007) (trustee failed to demonstrate that policy proceeds were property of estate where, among other things, the policy included a priority of payments provision).

Courts have applied the same rule in the context of receivership orders, recognizing that the proceeds of an insurance policy are not subject to an asset freeze issued in connection with receivership orders because a contrary ruling would prejudice the ability of insureds to mount a defense to claims brought against them. *See, e.g., S.E.C. v. Morriss*, No. 4:12-CV-80 CEJ, 2012 WL 1605225, at *4 (E.D. Mo. May 8, 2012) (granting insured's motion for relief from receivership order to permit insurer to advance defense costs despite SEC's and receiver's opposition); *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 309-CV-298-N, 2009 WL 8707814, at *4 (N.D. Tex. Oct. 9, 2009) (allowing advancement of defense expenses on behalf of insured individuals notwithstanding the receiver's opposition because receivership and asset freeze orders "do not bar [the insurer] from disbursing policy proceeds to fund directors' and officers' defense costs in accordance with the D&O policies' terms and conditions," finding that "the receivership's claim to the policy proceeds is presently speculative" but the "potential harm to [the insured directors and officers] if denied coverage is not speculative but real and immediate"); *Exec. Risk Indem., Inc. v. Integral Equity, L.P.*, No. 3:03-CV-0269, 2004 WL 438936, at *14 (N.D. Tex. Mar. 10, 2004) (insurer's payment of insureds' defense costs does not violate receivership order); *S.E.C. v. Narayan*, No. 3:16-CV-1417-M, 2017 WL 447205, at *6 (N.D. Tex. Feb. 2, 2017) (finding that the insured directors and officers were "experiencing clear, immediate, and ongoing defense expense arising from the litigation" and that "[w]ithout money to fund a defense, [their] ability to defend themselves in ongoing litigation will likely be substantially impaired") (internal quotation marks omitted).

C. Even If the Insurance Proceeds Were Property of the Estate, the Court Should Lift the Stay to Allow Payment of Mr. Jesenik's Claims.

Finally, even if this Court is disinclined to rule that the Policy proceeds are not presently a part of the estate, the Court can and should lift the asset freeze over the insurance proceeds to

allow payment Mr. Jesenik's reasonable and necessary Defense Costs. As the *Stanford International Bank* court held, courts have "discretion to allow disbursement of insurance proceeds [even] if they are part of the receivership estate." 2009 WL 8707814, at *3. Courts have frequently lifted automatic bankruptcy stays to allow advancement of policy proceeds where insured directors and officers would suffer prejudice if prevented from accessing coverage for defense costs, even if policy proceeds are considered property of the bankruptcy estate. *See, e.g., Groshong v. Sapp (In re Mila, Inc.)*, 423 B.R. 537, 543-44 (B.A.P. 9th Cir. 2010) (regardless of whether policy proceeds are considered property of the bankruptcy estate, a bankruptcy court has discretion to permit advancement of defense cost payments in light of the harm to insured persons if they are "prevented from executing their rights to defense costs"); *In re Hoku Corp.*, No. BR 13-40838-JDP, 2014 WL 1246884, at *4 (Bankr. D. Idaho Mar. 25, 2014) (permitting advancement of defense costs even under the assumption that policy proceeds are part of the bankruptcy estate because individual insured was "experiencing 'clear, immediate, and ongoing' defense costs expenses arising from the litigation in the District Court, which costs are likely covered by the Policy"); *In re Arter & Hadden, L.L.P.*, 335 B.R. 666, 674 (Bankr. N.D. Ohio 2005) ("that there is cause to lift the automatic stay because the [Executive insureds] may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments to fund their defense"); *In re CyberMedica, Inc.*, 280 B.R. 12, 17-18 (Bankr. D. Mass. 2002) (although policy proceeds were considered property of the bankruptcy estate, there was sufficient cause to lift the automatic stay because the insured directors and officers "may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments" as they "are in need *now* of their contractual right to payment of defense costs and may be harmed if disbursements are not presently made to fund their defense") (emphasis in original).

Similarly, in *Narayan*, the court found "strong justification to permit the advancement of defense costs to [co-insured directors and officers], regardless of whether or not the proceeds are deemed part of the Receivership Estate." 2017 WL 447205 at *5. The *Narayan* court's conclusion was based on two sets of facts, both of which are also present in this case.

First, the *Narayan* court held that the "potential benefit to the Estate under [the entity coverage provision] does not appear to negate [the co-insured directors and officers] contractual rights to [individual liability coverage] under the Policy, and the Receiver provides no basis to expand [the entity's] rights under the contract simply because the Court imposed a receivership." *Id*. The exact same is true here. Any future "potential benefit" to the Receivership Estate "does not…negate" the contractual right Mr. Jesenik holds under the Policy. Likewise, there is no basis to extend to the Receiver a contractual right (the ability to halt or review contractual insurance payments owing to Mr. Jesenik) that Aequitas did not hold at the signing of the Policy "simply because the Court imposed a receivership." *Id*.

Secondly, the *Narayan* court found "the potential harm to [the co-insured directors and officers] in withholding defense costs far outweighs harm to the estate" where the insurer had acknowledged that coverage existed for the co-insured directors' and officers' claims and the entity could offer only speculative future interests that "may" have been entitled to coverage. *See id*. at 6. Mr. Jesenik's losses are clear, immediate, and ongoing. The Receiver does not hold any presently insurable claims. Any future claims are hypothetical and speculative.[4] Where, as here, the "Receiver does not present evidence of a current right to payment under the Policy, or

[4] Indeed, if hypothetical and speculative interests are to be taken into account, Mr. Jesenik also "holds" the same interest in defending the claims he and the Receiver may have to defend in the future.

an acknowledgement from [the Insurer] that coverage has been triggered," the harm to Mr. Jesenik "greatly outweighs any speculative and potential harm to the Receivership Estate." *See id*. at 6-7.

Where, as here, Mr. Jesenik faces substantial prejudice if Forge is not allowed to advance Defense Costs, the Court, in its discretion, should allow advancement of Defense Costs pursuant to Mr. Jesenik's contractual right to payment under the Policy, even if the insurance proceeds are considered part of the receivership estate.

CONCLUSION

In light of the foregoing, Mr. Jesenik respectfully request that the Court grant this motion and enter an order, substantially in the form of the accompanying Proposed Order, to modify the Receivership Order for the purpose of allowing Forge to advance on his behalf past and future Defense Costs in connection with the Litigation and/or the Investigation and other Claims.

DATED: August 23, 2017 SCHULTE ROTH & ZABEL LLP

By: */s/ Peter H. White*
PETER H. WHITE (*Pro Hac Vice*)

Attorneys for Defendant Robert J. Jesenik