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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

DEFENDANTS BRIAN A. OLIVER AND N. SCOTT GILLIS' (1) REPLY TO RECEIVERSHIP ENTITY'S OPPOSITION [DKT. NO. 536] AND INVESTOR OBJECTIONS [DKT. NO. 533] TO MOTION FOR RELIEF FROM RECEIVERSHIP ORDER AND (2) RESPONSE TO RECEIVERSHIP ENTITY'S EVIDENTIARY OBJECTIONS TO DECLARATION OF JASON P. CRONIC [DKT. NO. 535]

ORAL ARGUMENT REQUESTED

Complaint Filed: March 10, 2016

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Brian Oliver and Scott Gillis (the "Individual Defendants") bring this motion to confirm their right to access their director and officer liability insurance coverage ("D&O Coverage") necessary to defend themselves in a lawsuit that the SEC brought against them. Aequitas' Receiver concedes that he stipulated to the Individual Defendants' access to the first tier of D&O Coverage ("Catlin Policy"), and that the bills submitted by Messrs. Oliver and Gillis do not appear unreasonable. However, the Receiver seeks to block their access to the next tier of D&O Coverage ("Forge Policy"), based primarily on his objection to the fees of an entirely different party. But the relief sought by the Receiver is contrary to the explicit terms of the Catlin and Forge Policies (together, the "Policy"); misdirected to the extent it penalizes the Individual Defendants as a remedy against another party; and in direct conflict with the vast weight of the legal authorities cited by any of the parties.

Indeed, there exists *no* precedent for what the Receiver is seeking here. In every case the parties cited (on both sides) that address whether to permit the advancement of defense costs under a similar D&O policy, the court permitted the advancement of defense costs. Lacking any valid basis to oppose the Individual Defendants' motion, the Receiver advances meritless evidentiary objections. The Receiver argues that Catlin's counsel, Jason P. Cronic, lacks personal knowledge to attest that the Catlin Policy is exhausted. However, all that is required for the Forge Policy to attach is (1) Catlin's payment of $5 million *or* (2) Catlin's admission of liability to pay $5 million. Both predicates are established by the Declaration of Mr. Cronic. There is no genuine dispute as to these facts and, indeed, the Receiver himself has relied on reports from Catlin's counsel in representing to this Court that the Catlin Policy is exhausted. Nevertheless, to quell any possible doubt, the Individual Defendants submit herewith the Declaration of Matthew Abreu, Senior Claims Specialist at Catlin, attesting that Catlin has paid $5 million in Defense Costs.

The Receiver's legal arguments fare no better. *First*, the Policy proceeds are not the property of the Receivership Estate. The Receivership Order's definition of "Receivership Property" cannot transform property in which the Receivership Entity has no legally cognizable interest into property of the Estate, as the Receiver proposes. The Receiver's argument that such

proceeds somehow belong to the Estate relies upon a Ninth Circuit case that did not address the question presented here: whether liability policy *proceeds* payable to third parties are property of the estate. Courts that have actually addressed this question have repeatedly held that they are not the property of the estate where, as here, a D&O liability policy provides for payment of proceeds to third parties and not directly to the Receivership Entity.

Second, even if the Policy proceeds could be construed as property of the Receivership Estate, the Receiver provides no authority for his argument that the Court should deny the advancement of Defense Costs here. To the contrary, in every single case that considered whether to permit the advancement of defense costs under a similar D&O policy, the court permitted the advancement of defense costs.

Third, there is no basis for this Court to impose any of the "safeguards" proposed by the Receiver. While the Receiver concedes that the court cannot re-write the parties' contract, that is exactly what he asks the Court to do through his request for a partitioning of proceeds or a soft cap on Defense Costs—both of which would directly violate the terms of the Policy. Moreover, the justification proffered by the Receiver for imposing these safeguards is that a *different party* has incurred legal fees that the Receiver questions. Accordingly, even if there were a basis to impose safeguards on another party, there is no basis to impose them on Mr. Oliver or Mr. Gillis.

The Defense Costs that Mr. Oliver and Mr. Gillis incurred over the last six months have not been paid, even though the Policy expressly *requires* the insurer to pay them within 90 days of submission, even if the Aequitas entities are in receivership. As a result, the Individual Defendants have had to delay critical preparation and discovery as this litigation moves toward trial. There is no basis for the Receiver to deny Mr. Oliver and Mr. Gillis the defense to which they are entitled under the Policy, and their motion accordingly should be granted.

I. ARGUMENT

A. The Catlin Policy Is Indisputably Exhausted.

In support of their motion, the Individual Defendants submitted a declaration from Catlin's counsel attesting that "Catlin has paid $5 million in Loss on behalf of Insured Persons under the

Catlin Policy through the advancement of Defense Costs and the Catlin Policy has thus been fully exhausted." Cronic Decl. (Dkt. No. 497) ¶ 3. The Receiver argues that this declaration lacks foundation, contains hearsay, and does not establish that the Forge Policy has been triggered. Opp. (Dkt. No. 536) at 2-3; Evidentiary Objections (Dkt. No. 535) at 3-4.[1]

But there is no genuine dispute as to whether Catlin has in fact paid the $5 million. Indeed, the Receiver himself represented to this Court in August—based solely on information he received from "counsel for XL Catlin"—that Catlin's "payments to date as of July 7, 2017 [were] $5,000,000." Dkt. No. 491 at 18. The Receiver even supplied the Court with the following detailed chart showing that Catlin has paid $5 million in Defense Costs (*id.* at 19):

	Payment Date Per Catlin (now XL Group)					
Defendant/Law Firm	**Q3 2016**	**Q4 2016**	**Q1 2017**	**Q2 2017**	**Q3 2017**	**Grand Total**
E-discovery	-	**18,293**	**244,170**	**192,168**	**19,596**	**474,227**
Discovia (discovery vendor)	-	18,293	244,170	192,168	19,596	474,227
Gillis	**173,330**	**387,451**	**74,477**	**184,276**	**86,088**	**905,621**
Covington & Burling LLP	165,307	380,053	71,450	175,062	84,600	876,470
Whipple & Duyck, P.C.	8,024	7,398	3,028	9,214	1,488	29,151
Jenke	-	-	-	-	**92,087**	**92,087**
Dechert LLP	-	-	-	-	92,087	92,087
Jesenik	**326,668**	**212,556**	**277,482**	**937,497**	**959,481**	**2,713,683**
Gibson, Dunn & Crutcher LLP	325,435	174,429	-	515,809	-	1,015,673
Rose Law Firm	-	-	53,727	52,507	101,366	207,601
Schulte Roth & Zabel LLP	-	-	207,739	369,180	858,114	1,435,034
Stoel Rives LLP	1,233	38,128	16,015	-	-	55,375
Oliver	**71,101**	**145,624**	**89,691**	**251,251**	**256,714**	**814,382**
Black Helterline LLP	-	8,128	1,155	3,470	2,485	15,238
Shartsis Friese LLP	71,101	137,496	88,536	247,781	254,229	799,144
Grand Total	**571,099**	**763,924**	**685,820**	**1,565,191**	**1,413,966**	**5,000,000**

In any event, the Cronic Declaration establishes that (1) Catlin has paid $5 million in Defense Costs and (2) Catlin has admitted liability to pay that amount. Either of those events is sufficient to trigger the Forge Policy, which provides that liability to pay Defense Costs attaches when Catlin "shall have paid *or* have admitted liability … to pay … the full amount of [its] indemnity inclusive of costs and expenses." Meisenheimer Decl. (Dkt. No. 498) Ex. A, WNM

[1] Since the Receiver's opposition to the Individual Defendants' motion ("Opp.") (Dkt. No. 536) incorporates by reference his arguments in opposition to Mr. Jesenik's motion ("Opp. to Jesenik Mot.") (Dkt. No. 527), *see* Opp. at 8, the Individual Defendants also respond to those arguments herein. In addition, this Reply constitutes their response to the "Investor Objections" (Dkt. No. 522) which "join in" the Receiver's opposition to Mr. Jesenik's motion. *Id.* at 1.

Professional Indemnity ¶ 1 (ECF Page 7) (emphasis added).

Specifically, in his declaration, Mr. Cronic attests that he has personal knowledge of the facts he provides, that he is Catlin's counsel, and that Catlin has in fact "paid" the full amount of Catlin's indemnity. Cronic Decl. ¶ 3. In his declaration, Catlin's counsel also has admitted liability to pay the full amount of Catlin's indemnity under the Catlin Policy by declaring that Insured Persons incurred $5 million in "Loss"—a separate and independent basis for establishing exhaustion. Cronic Decl. ¶ 3; *see also* Supplemental Declaration of Larisa A. Meisenheimer in Support of Motion for Relief from Receivership Order ("Supp. Meisenheimer Decl.") ¶ 3 & Ex. A (counsel for Catlin admitting that the "Catlin policy has been exhausted"). The Receiver cannot reasonably dispute that Mr. Cronic, as Catlin's counsel, has authority to make this admission on Catlin's behalf. Nevertheless, to dispel any possible doubt, the Individual Defendants submit herewith the Declaration of Matthew Abreu, Senior Claims Specialist at Catlin, confirming that Catlin has in fact paid $5 million in Defense Costs. *See* Declaration of Matthew Abreu in Support of Motions for Relief from Receivership Order ("Abreu Decl.") ¶¶ 4, 6 & Ex. A; *see also* Supplemental Declaration of Jason P. Cronic in Support of Motions for Relief from Receivership Order ("Supp. Cronic Decl.") ¶¶ 20, 22 & Ex. A.

The Receiver raises several other arguments for why the Forge Policy has not been triggered. All are meritless. First, the Receiver argues that Messrs. Oliver and Gillis must establish that the Catlin Policy has been "properly exhausted" before they can access the Forge Policy. Opp. at 1, 2, 9; Opp. to Jesenik Mot. at 7, 12, 13 n.8. But this is inconsistent with the Forge Policy, which only requires that Catlin pay *or* admit liability to pay $5 million, not that it be "properly exhausted." Moreover, such a standard of "proper exhaustion" would be unworkable, and result in insurance payments to all insureds grinding to a halt any time someone questioned any individual insured's bill.

Second, the Receiver argues that Forge's "positions on Catlin's supposed exhaustion" or "willingness to pay Defense Costs" are somehow essential to this motion. Opp. at 2-3; Opp. to Jesenik Mot. at 1, 17. But the Receiver fails to explain why Forge's position is necessary to

determine whether the Catlin Policy has been fully paid out or whether payments from D&O policies violate the Receivership Order. In any event, for background, the Individual Defendants submit the email from counsel for Forge requesting that Messrs. Oliver and Gillis file this motion to confirm that it can advance Defense Costs. Supp. Meisenheimer Decl. ¶ 9 & Ex. B.

Third, the Receiver submits a declaration that questions the legitimacy of Mr. Jesenik's fees. *See* Declaration of James P. Schratz (Dkt. No. 530) ¶ 17. But a dispute between the Receiver and Mr. Jesenik or Catlin about the legitimacy of Mr. Jesenik's fees provides no basis for the Court to disregard the terms of the Forge Policy. Those terms expressly grant Messrs. Oliver and Gillis the right to receive Defense Costs from Forge once Catlin has paid or admitted liability to pay $5 million, both of which have occurred here.[2]

B. The Policy Proceeds Are Not Property of the Receivership Estate.

The Receiver next argues that the proceeds of the Policy are the property of the Receivership Estate. None of his arguments has merit.

1. Liability policy proceeds payable to third parties are not property of the Estate.

The Receiver's argument that Policy proceeds are property of the Receivership Estate fails at the threshold because the Policy proceeds are liability policy proceeds payable *only* to third parties; they are never payable directly to the Receivership Entity.

The "overriding question" when determining whether insurance *proceeds* are property of an insolvent estate "is whether the debtor would have a right to *receive and keep* those proceeds when the insurer paid on a claim." *In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 541-47

[2] The Receiver also implies that there was something improper in the fact that he was notified that the Catlin Policy was exhausted before Catlin mailed out its final checks. *See* Opp. to Jesenik Mot. at 8-9. To the contrary, insurers typically consider their policy limits to be exhausted once they acknowledge coverage for their limits, even if payment takes a bit longer to complete. Here, Ms. Meisenheimer contacted the Receiver shortly after Catlin informed her that the Policy was exhausted by claims for which Catlin acknowledged coverage; checks to satisfy those pending claims were then distributed to counsel for each of the Individual Defendants shortly thereafter. *See* Supp. Meisenheimer Decl. ¶¶ 5-6 & Ex. A.

(Bankr. D. Nev. 2011) ("*Endoscopy Center*") (emphasis added); *accord In re Edgeworth*, 993 F.2d 51, 55-56 (5th Cir. 1993); *see also* Mot. at 6 (citing these and additional cases). The Policy here is a liability policy, under which the Receivership Entity has no right to "receive and keep" any Policy proceeds. *Endoscopy Center*, 451 B.R. at 545 ("In the liability insurance context the debtor has no cognizable claim to the proceeds paid by an insurer on account of a covered claim"). Rather, those proceeds are paid by the Insurer directly to *third parties* (defense counsel or, potentially, claimants) on behalf of Insured Persons (like the Individual Defendants) under Coverage A, or on behalf of Insured Organizations (like the Receivership Entity) under Coverage C. Cronic Decl. Ex. A §§ I(A)-(C).[3] Under no circumstances are the proceeds ever paid directly to the Receivership Entity. Accordingly, those proceeds are not property of the Receivership Estate. *Endoscopy Center*, 451 B.R. at 544-547 (where liability policy provides no right to debtor to receive proceeds, proceeds are not property of the estate); *In re Edgeworth*, 993 F.2d at 56 ("when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate").

The Receiver does not argue that Policy proceeds paid on behalf of Insured Persons under Coverage A are property of the Receivership Estate. Rather, the Receiver argues that Policy proceeds that might theoretically become payable in the future on behalf of the Receivership Entity to claimants like SYK under Coverage C are property of the Receivership Estate. Opp. at 4-5; Opp. to Jesenik Mot. at 23. But again, the Receivership Entity has no right to "receive and keep" whatever Policy proceeds may (or may not) *someday* be paid to SYK. As the *Endoscopy Center* court explained:

> When a covered claim arises, the injured debtor may have an interest, albeit a self-serving interest, in having a third party (the insurance

[3] There is no dispute that the Policy is a third-party liability policy. *See, e.g.*, Opp. to Jesenik Mot. at 24 n.15 ("Jesenik concedes that the Policies at issue here are liability policies"); *see also Okada v. MGIC Indem. Corp.*, 823 F.2d 276, 280 (9th Cir. 1986) ("The policy here, based on loss incurred and not as loss paid out by insureds is a liability policy."); *see also Mt. Hawley Ins. Co. v. Fed. Sav. & Loan Ins. Corp.*, 695 F.Supp. 469, 474-75 (C.D. Cal. 1987) ("The plain meaning of 'pay on behalf of' is to disburse to a third party money owed by the insured. The policy could have promised only to indemnify the insureds against loss, but it does not. The insuring clause, setting forth the fundamental obligation of the policy, establishes this as a liability policy.").

> company) pay for its wrongdoing, *but this is not a legal or equitable interest in the property used to pay the claim*. The interest the insured debtor has is the contractual right to have its own assets protected from exposure by means of the insurance coverage, according to the terms of the contract.

451 B.R. at 545 (emphasis added) (quoting *Landry v. Exxon Pipeline Co.*, 260 B.R. 769, 786-87 (Bankr. M.D. La. 2001)). Thus, courts have repeatedly held that liability policy proceeds payable to third parties on behalf of an insured organization like the Receivership Entity here are not property of the estate. *See Endoscopy Center*, 451 B.R. at 543, 545-47; *Exec. Risk Indem., Inc. v. Integral Equity, L.P.*, 2004 WL 438936, at *14 (N.D. Tex. Mar. 10, 2004) (insured receivership entities had "no cognizable interest, in and of themselves" in proceeds of insurance policy because such proceeds "are owed not to the Insured but to successful third-party claimants against the Insured, as well as to the Insured's attorneys defending against those claims").

By contrast, the cases relied upon by the Receiver involve *indemnity* policies where at least some of the policy proceeds were *directly payable* to the insured debtors. *See In re Metro. Mortg. & Sec. Co.*, 325 B.R. 851, 853, 857 (Bankr. E.D. Wash. 2005) (policy provided for "payment *to the debtors* for any indemnification claims" and gave debtors "non-derivative right to receive [policy] proceeds" (emphasis added)); *In re Circle K Corp.*, 121 B.R. 257, 261 (Bankr. D. Ariz. 1990) ("In certain instances, debtor can make a claim for *reimbursement* for indemnification claims paid" (emphasis added)); Opp. to Jesenik Mot. at 22-23. In concluding that the proceeds were property of the estate, both courts expressly distinguished (1) proceeds payable to third parties under D&O liability policies that pay "on behalf of" the insured from (2) proceeds payable directly to insured debtors under indemnity policies where the insurer agrees to "indemnify" the insured. *See In re Metro. Mortg. & Sec. Co.*, 325 B.R. at 855 ("The [*Circle K*] court reasoned that since the policies at issue were indemnity policies and not just liability policies, the debtor had a right to the proceeds"); *In re Circle K Corp.*, 121 B.R. at 260. Here, the liability Policy proceeds

are not payable to the Receivership Estate. These cases are accordingly inapposite.[4]

2. The Receiver confuses a liability policy, which may be the property of an estate, with the *proceeds* of a liability policy, which are not the property of the estate.

The Receiver argues that the "fundamental test of whether a *policy* is property of the estate is whether the estate is worth more with it than without it." Opp. to Jesenik Mot. at 21 (emphasis added) (citing *In re Minoco Grp. of Cos.*, 799 F.2d 517, 519 (9th Cir. 1986) ("*Minoco*")); *see also* Opp. at 5. But in *Minoco* the issue before the Court was whether the *policy* was the property of the estate—not the *proceeds* of the policy. Here, unlike in *Minoco*, there is no dispute that the *Policy* is the property of the Receivership Estate. *See* Mot. at 6. The disputed issue is whether Policy *proceeds* paid to third parties on behalf of Insured Persons and Organizations are property of the Estate. The distinction is important, as the court in *In re Edgeworth* explained:

> Acknowledging that the debtor owns the policy … does not end the inquiry. The question is not who owns the policies, but who owns the liability proceeds. In *In re Louisiana World Exposition, Inc.*, for example, even though the policy was property of the estate, the proceeds of the liability policy were payable to the directors and officers of the corporation and were not part of the debtor's estate.

993 F.2d at 55 (internal marks omitted). As the Receiver recognizes, *Minoco* "did not directly address" the issue of whether policy proceeds are the property of the estate. Opp. to Jesenik Mot. at 21. The case therefore has no application here.

Notably, while urging this Court to rely on *Minoco*, the Receiver ignores the Ninth Circuit B.A.P. decision, cited in the Individual Defendants' motion (at page 11), which expressly rejects the very argument the Receiver presents here. *See Groshong v. Sapp (In re Mila, Inc.)*, 423 B.R. 537, 543 (B.A.P. 9th Cir. 2010) ("it does not appear that *Minoco* compels the outcome Trustee suggests: that a D & O policy's *proceeds* … are property of the policy owner's bankruptcy estate" (emphasis added)). In reaching that conclusion, the Ninth Circuit relied on *Minoco*'s supposition

[4] Coverage B under the Policy is not an agreement to indemnify, but rather to pay *on behalf of* an Insured Organization Loss for which the Insured Organization is permitted or required to indemnify any Insured Person. Cronic Decl. Ex. A § I(B).

that proceeds paid to the insured debtor to satisfy indemnification claims by officers and directors might constitute property held in trust by the debtor for the directors and officers, "and thus would not constitute property of the estate." *Id.* at 543; *see Minoco*, 799 F.2d at 519-20. This suggests that even proceeds paid *directly* to the insured debtor to satisfy indemnification claims by directors and officers are not property of the estate. Thus, to the extent *Minoco* has any application here, it bolsters the Individual Defendants' authority that proceeds paid to *third parties* on behalf of the insured debtor are not property of the estate, while simultaneously undermining the Receiver's reliance on cases involving indemnity policies (discussed above). As numerous courts (including in the Ninth Circuit) have held, liability policy proceeds payable on behalf of insured persons and organizations to third parties are *not* estate property. *See Endoscopy Center*, 451 B.R. at 547; *see also In re Edgeworth*, 993 F.2d at 55-56; *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); Mot. at 6 (citing cases).

3. Courts have rejected the Receiver's "secondary-impact" argument and assertions of speculative future Loss from Claims on insurance proceeds.

In a related argument, the Receiver contends that the Policy proceeds should be treated as property of the Estate because the proceeds are "inadequate to cover all claims." Opp. to Jesenik Mot. at 5-6, 24-25 (citing *Schmidt v. Villarreal (In re OGA Charters, LLC)*, 2017 WL 3141918, at *21 (Bankr. S.D. Tex. July 24, 2017)). However, courts have expressly rejected this "secondary impact" rationale, too, reasoning that property

> does not become property of the estate merely because such property has the effect of reducing the estate's liability, or because of some other beneficial effect such property has on the estate. **The estate must have a legal or equitable interest in the property which benefits the estate.**

Endoscopy Center, 451 B.R. at 546-47 (quoting *Landry*, 260 B.R. at 790). "[T]o hold that the debtor has a legal or equitable interest in property used to pay the covered claims because payment of the covered claims by some other party with that party's property may decrease the debtor's

overall liability, is utterly backward." *Id.* at 546 (quoting *Landry*, 260 B.R. at 787).

Even if it were proper to consider whether the payment of Defense Costs could reduce the value of the Receivership Estate, no such finding could be made here because the third-party "Claims" identified by the Receiver do not constitute a "Loss" currently payable under the Policy. *See* Cronic Decl. Ex. A § III(DD) (defining "Loss" to mean "Defense Costs, compensatory and other damages, settlements, judgments, pre- and post-judgment interest, and legal fees and costs awarded pursuant to judgments and appeals"). The Receiver cannot point to any Loss it has incurred that falls within Coverage C. The Receiver's claim to insurance proceeds is therefore speculative. Indeed, courts have held that bankruptcy estates had "no cognizable equitable or legal interest" in proceeds from entity coverage where, as here, the bankrupt debtors had not "committed themselves to *payments* using their entity coverage." *In re Adelphia Commc'ns Corp.*, 298 B.R. 49, 53 (S.D.N.Y. 2003) (emphasis added); *see also SEC v. Stanford Int'l Bank, Ltd.*, 2009 WL 8707814, at *3 (N.D. Tex. Oct. 9, 2009) (receivership's claim to insurance proceeds was "presently hypothetical" where it was unclear whether insurer "will ever *pay* a claim" (emphasis added)); *In re Downey Fin. Corp.*, 428 B.R. 595, 605 (Bankr. D. Del. 2010) ("when the liability policy provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate"); *see also* Mot. at 7, 9-10, 11 (citing cases). By contrast, in the principal case on which the Receiver relies for his argument, the insurer had "entered into sufficient settlements to exhaust the Policy's Proceeds." *Schmidt v. Villarreal (In re OGA Charters, LLC)*, 2017 WL 3141918, at *21. No such exhaustion has been shown here. *Schmidt* is in any event readily distinguishable as it did not involve a D&O policy, let alone address whether to permit the advancement of defense costs. *See id.* at *2.

4. The priority of payments provision subordinates any future claim the Estate may have.

Even if the Receivership Estate had already incurred Loss under the Policy (which it has not), the priority of payments provision in the Policy "appears to subordinate any claim that the Receiver may have" to coverage for the Individual Defendants under Coverage A. *SEC v.*

Narayan, 2017 WL 447205, at *7 (N.D. Tex. Feb. 2, 2017). As other courts have held, this further undermines any argument that the Policy protects the Estate's other assets from diminution. *See id.*; *SEC v. Morriss*, 2012 WL 1605225, at *4 (E.D. Mo. May 8, 2012); Mot. at 7-11. The Receiver claims that the priority of payments provisions in *Narayan* and *Morriss* are "distinguishable" (Opp. to Jesenik Mot. at 25-26), but that is wrong. The priority of payments provision in *Narayan*, like the priority of payments provision here, provides that Loss for directors and officers is paid first if "Loss, *in the aggregate*, exceeds the remaining available Limits of Liability." 2017 WL 447205, at *8 n.3 (emphasis added); *see* Cronic Decl. Ex. A § XIII(C). The priority of payments provision in *Morriss* similarly provides that Loss incurred by directors and officers gets paid before Loss incurred by the company. *See* 2012 WL 1605225, at *1; *see also* discussion *infra* Part I.C.

The Receiver also argues that "any priority-of-payments rights … the … Individual Defendants may have is limited in scope to the situation where the available Limits of Liability are insufficient to pay all Loss." Opp. to Jesenik Mot. at 6. But that is beside the point; the Individual Defendants' right under the Policy to current payment of Defense Costs comes from Section VII.B promising payment within 90 days—not the priority of payments provision. *See* Cronic Decl. Ex. A § VII(B) (obligating Forge to advance Defense Costs "no later than ninety (90) days after the receipt by the Insurer of such defense invoices"). Moreover, the Policy here explicitly provides that the insolvency or receivership of the Aequitas entities will have no effect on the entitlement of the Individual Defendants to the current advancement of their defense costs. *Id.* Ex. A §§ XIII(D) & III(W). Where the insurer is "required to advance defense costs on a current basis without regard to the potential for other future payment obligations," the secondary impact rationale does not apply. *Morriss*, 2012 WL 1605225, at *4 (holding that in these circumstances "there is no basis for concluding that the policy actually protects the estate's other assets from diminution").

5. The creation of a receivership estate cannot create property rights that did not previously exist.

Perhaps recognizing that there is no support in the case law for his argument, the Receiver

also contends that the Policy proceeds are property of the Estate because the Receivership Order defines "Receivership Property" to include "monies [and] … rights …, together with all … income attributable thereto, … which the Receivership Entity own, possess, [or has] a beneficial interest in." Dkt. No. 156 ¶ 6; *see* Opp. at 4-5. The Receiver offers no authority or explanation whatsoever for his assertion that Policy proceeds potentially payable in the future "on behalf of" the Receivership Estate constitute "money" or "rights"—or "income attributable" to such money or rights—that the Receivership Entity owns or possesses, or in which the Receivership Entity has a beneficial interest. Receivership Order ¶ 6. The argument fails on that basis alone.

Instead, whether something is property of the estate depends "solely on whether an interest in that property exists" under applicable law outside the context of a bankruptcy or receivership. *Narayan*, 2017 WL 447205, at *5; *see* Mot. at 8. This follows from the general rule that a receiver (like a bankruptcy trustee) acquires no greater rights in property than the debtor had, but rather stands in the shoes of the entities. *See Narayan*, 2017 WL 447205, at *5 (citing cases; rejecting receiver's attempt "to expand [the receivership entity's] rights under [an insurance] contract simply because the Court imposed a receivership"); *see also In re Great Gulfcan Energy Tex., Inc.*, 488 B.R. 898, 910 (Bankr. S.D. Tex. 2013) ("[I]f a debtor's interest in property is limited at the time of filing, the estate's right in the property is also so limited."). As discussed above, the Receivership Estate has no property interest in the Policy proceeds. This Court's definition of "Receivership Property" cannot alter this result.

C. Even if the Policy Proceeds Were Property of the Receivership Estate, This Court Should Permit Advancement of Defense Costs.

1. In every case cited by the parties that addressed whether to permit the advancement of defense costs under a similar D&O policy, the court permitted the advancement of defense costs.

Even if the Policy proceeds were deemed property of the Receivership Estate, courts routinely permit the advancement of Defense Costs where directors and officers are incurring actual expenses for which they have a current right to payment. *See* Mot. at 7-9 (citing, *inter alia*, *Narayan*, 2017 WL 447205, at *5; *Morriss*, 2012 WL 1605225, at *4-*5; *Stanford Int'l Bank*,

2009 WL 8707814, at *4). Indeed, in every one of the cases cited by the parties (on both sides) that addressed whether to permit the advancement of defense costs under a similar D&O policy, the court permitted the advancement of defense costs.

Narayan is instructive. In that case, the court held on very similar facts that it need not reach the issue of whether proceeds were property of the estate, because in any event it would permit the advancement of defense costs. *Narayan*, 2017 WL 447205, at *5; *see* Mot. at 8-9 (discussing *Narayan* in detail). As noted above, the priority of payments provision at issue in *Narayan* was substantively identical to the priority of payments provision in the Policy here. *See* 2017 WL 447205, at *8 n.3. The *Narayan* court held that the directors and officers could access their D&O policies because: (1) "a receiver acquires no greater right in property than the debtor had," and outside of receivership the entities could not have blocked the directors and officers' access to their D&O insurance (*id.* at *5); (2) the directors and officers had "clear, immediate and ongoing defense expenses" whereas the receivership estate had "only pointed to claims that may be paid out in the future" (*id.* at *6-*7); and (3) the priority of payments provision "appears to subordinate any claim that the Receiver may have for [the company's] defense costs" to the officers and directors' defense costs (*id.* at *7).

The Receiver attempts to distinguish *Narayan* on three grounds, all of which fail. First, the Receiver claims that the priority of payments provision in *Narayan* is "readily distinguishable." Opp. to Jesenik Mot. at 25. But the Receiver provides no explanation for his assertion, and in fact, as noted above, the *Narayan* priority of payments provision is nearly identical to the one at issue here on the key argument made by the Receiver about when the priority of payments provision is triggered. *See* 2017 WL 447205, at *8 n.3. Second, the Receiver argues *Narayan* did not decide whether the policies were property of the receivership estate. But that misses the point: the *Narayan* court specifically stated that it did not need to reach that issue because it held that the directors and officers were entitled to advancement of defense costs *whether or not* the policy proceeds were property of the estate. Finally, the Receiver argues that *Narayan* is distinguishable because the receivership entities had "failed to submit evidence of right to *payment*." Opp. to

Jesenik Mot. at 25 (emphasis added). But the same is true here: the Receiver has submitted zero evidence of any current right to *payment* for Loss. Instead, as in *Narayan*, the Receiver has "only pointed to claims that may be paid out in the future." 2017 WL 447205, at *7. In such circumstances, "there is a clear, immediate, and actual harm to Movants that greatly outweighs any speculative and potential harm to the Receivership Estate." *Id.*

In addition to *Narayan*, in every case cited by both the Receiver and the Individual Defendants that addressed whether to permit the advancement of defense costs under a similar D&O policy, the court held that the directors and officers had a right to access their D&O policies (even though the entities were in receivership or bankruptcy)—either under the court's discretionary authority or because the proceeds were not the property of the estate. Thus:

- *In re Hoku Corp.*, 2014 WL 1246884, at *4 (Bankr. D. Idaho Mar. 25, 2014) (assuming without deciding that policy proceeds were part of bankruptcy estate, permitting advancement of defense costs 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" (internal marks omitted));
- *SEC v. Morriss*, 2012 WL 1605225, at *4 (E.D. Mo. May 8, 2012) (holding that D&O policy proceeds were not property of receivership estate where insurer was "required to advance defense costs on a current basis without regard to the potential for other future payment obligations" and priority of payments provision subordinated receiver's claim under separate insuring clause);
- *In re MF Glob. Holdings Ltd.*, 469 B.R. 177, 191-193 (Bankr. S.D.N.Y. 2012) (assuming without deciding that debtors had an interest in the proceeds of D&O policies, cause existed to lift stay to permit advancement of defense costs because "failure to do so would significantly injure the Individual Insureds"; D&O policies "are obtained for the protection of individual directors and officers" and at their core remain "a safeguard of officer and director interests");
- *Groshong v. Sapp (In re Mila, Inc.)*, 423 B.R. 537, 545 (B.A.P. 9th Cir. 2010) (holding that regardless of whether policy proceeds were considered property of the bankruptcy estate, bankruptcy court properly exercised its discretion to permit advancement of defense costs where officer's "defense losses were clear, immediate, and ongoing");
- *In re Downey Fin. Corp.*, 428 B.R. 595, 609 (Bankr. D. Del. 2010) (holding that liability policy proceeds were not property of the estate and, even if they were, "the Insureds would suffer a very real—and easily identifiable—hardship if the stay is not lifted. Specifically, the Insureds would have to pay the $880,000 in defense costs, as well as any defense costs incurred subsequent to the filing of this motion, out of their own pockets.");
- *In re World Health Alternatives, Inc.*, 369 B.R. 805, 811 (Bankr. D. Del. 2007) (holding that

there was not a reasonable probability that the trustee would succeed on the merits of his claim that proceeds of D&O policy were property of the estate);

- *SEC v. Stanford Int'l Bank, Ltd.*, 2009 WL 8707814, at *3-*4 (N.D. Tex. Oct. 9, 2009) (permitting advancement of defense costs to insured individuals without deciding whether policy proceeds were part of receivership estate, because denying coverage would expose them to "real and immediate" harm—the inability to defend themselves in civil actions in which they did not have the right to appointed counsel—while the receivership's claim to the policy proceeds was "hypothetical" and "speculative");
- *In re Laminate Kingdom, LLC*, 2008 WL 1766637, at *3-*4 (Bankr. S.D. Fla. Mar. 13, 2008) (holding that D&O liability policy proceeds were not property of the estate and, even if they were, cause existed to grant relief from stay; "bankruptcy courts should be wary of impairing the contractual rights of directors and officers even in cases where the policies provide entity coverage");
- *In re Arter & Hadden, L.L.P.*, 335 B.R. 666, 674 (Bankr. N.D. Ohio 2005) ("The Court finds 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 Adelphia Commc'ns Corp.*, 298 B.R. 49, 53-54 (S.D.N.Y. 2003) (debtor had "[n]o cognizable equitable and legal interest in the proceeds from the D & O policies," which therefore were not subject to automatic stay);
- *In re Cybermedica, Inc.*, 280 B.R. 12, 17-18 (Bankr. D. Mass. 2002) (holding that although policy proceeds were property of the bankruptcy estate, cause existed to lift stay because insured directors and officers "may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments. [The insureds] 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");
- *In re La. World Exposition, Inc.*, 832 F.2d 1391, 1400 (5th Cir. 1987) (holding that "liability proceeds payable to the directors and officers are not part of the bankrupt's estate").

Accordingly, the authorities cited by all parties support granting the relief requested by the Individual Defendants here.[5]

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[5] In the only case in which the court declined to permit the advancement of defense costs, proceeds of the policy were payable directly to the debtors. *See In re Metro. Mortg. & Sec. Co.*, 325 B.R. at 857. The Receiver relies on two other cases in which courts did not address the question of whether to permit the advancement of defense costs. *See In re Circle K Corp.*, 121 B.R. at 261-62 (enjoining continued litigation of securities fraud actions against insureds; distinguishable for the additional reason that policy proceeds were payable directly to debtor); *Schmidt v. Villarreal (In re OGA Charters, LLC)*, 2017 WL 3141918, at *2, *21 (addressing whether to certify appeal from district court's order holding that proceeds of non-D&O policy were property of estate). All three of these cases are distinguishable for the additional reason that there was no indication of any priority of payments provision in the policies at issue.

The Receiver attempts to distinguish these cases by arguing that the priority of payments provision in the Policy here is more limited. Opp. to Jesenik Mot. at 25-27. But in many of the above cases, the courts permitted advancement of defense costs without citing *any* priority of payments provision in the applicable policies. *See, e.g.*, *Stanford Int'l Bank, Ltd.*, 2009 WL 8707814, at *3-*4; *In re Arter & Hadden, L.L.P.*, 335 B.R. at 674; *In re Adelphia Commc'ns Corp.*, 298 B.R. at 53-54; *In re CyberMedica, Inc.*, 280 B.R. at 18. Moreover, the Receiver's argument ignores the other relevant provisions of the Policy, which must be read together. Specifically, the Policy provides: (1) that the Individual Defendants have a right to have their Defense Costs advanced "no later than ninety (90) days after the receipt by the Insurer of such defense invoices"; (2) that in the event Loss exceeds the total amount of the Policy, the directors and officers' Defense Costs have priority of payment; and (3) that such terms will remain in force even in the event of insolvency or receivership. Cronic Decl. Ex. A §§ VII(B) & XIII(C),(D). The Policy thus implements the contractual intent of the parties that the Individual Defendants receive prompt payment of Defense Costs and that, if a claim arises in which Loss exceeds the Policy limits, the insurer will pay the directors and officers before it pays any of the Aequitas entities. Accordingly, outside of receivership, the Aequitas entities would have no right or ability to block the Individual Defendants from accessing their D&O policies, and as discussed above, there is no authority to support the notion that the Receiver has a right to block such access here. *See, e.g., Narayan*, 2017 WL 447205, at *5 ("The general rule is that a receiver acquires no greater rights in property than the debtor had" (citing cases)). To the contrary, the Policy provides that the insureds will continue to be paid in the event of a receivership.

2. The Individual Defendants will suffer real and immediate harm if they are denied access to their D&O coverage.

The Receiver then argues that this Court should nevertheless deprive the Individual Defendants of the defense to which they are entitled under the Policy because there is no "***evidence*** of prejudice that would establish good cause for paying their legal fees and expenses." The Receiver thus suggests the Individual Defendants should be required to submit evidence of their

"financial ability to fund the defense of the SEC Action or the terms upon which their attorneys have agreed to represent them." Opp. at 9 & n.2. The Receiver cites no authority from any jurisdiction anywhere to support the novel contention that an Insured Person must present evidence that it needs insurance in order to assert that person's contractual right to a defense under the Policy.

Moreover, the premise underlying the Receiver's argument is wrong. Messrs. Oliver and Gillis will suffer real and immediate harm if they are denied access to their D&O Coverage. The Policy provided a promise of defense against Claims, with prompt payments to counsel, and priority over the Receivership Entity. The Individual Defendants are prejudiced by having to pay defense bills "out of their own pockets," in contravention of their *contractual right* to payment of Defense Costs under the Policy. *In re Downey Fin. Corp.*, 428 B.R. at 609; *In re MF Global Holdings, Ltd.*, 469 B.R. at 193-94 (granting individuals access to insurance proceeds after listing various harms that denial would cause, including future failure to pay defense costs, deprival of settlement opportunities, and an increase in out-of-pocket costs). In addition, like all corporate directors and officers, they relied on the existence of D&O insurance in deciding to serve. On this point, the Receiver does not even attempt to distinguish any of the authority cited by the Individual Defendants and catalogued above, establishing that this constitutes prejudice. *See* Mot. at 11-12; *supra* Part I.C.1. His argument consists entirely of a meritless evidentiary objection. *See* Opp. at 9; Opp. to Jesenik Mot. at 6-7. It cannot be disputed that a ruling that deprives the Individual Defendants of their contractual right to Defense Costs would prejudice them. Cronic Decl. Ex. A § VII(B). Nothing more is required.[6]

[6] The Receiver's position also threatens to undermine the very purpose of D&O insurance: to ensure that there are funds to provide a defense in the event the company is unable to do so. *See, e.g.*, *In re First Central Fin. Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999) ("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"); *In re MF Global Holdings Ltd.*, 469 B.R. at 193 ("The [D&O] Policies provide equal status to the Individual Insureds and the Debtors. However, in essence and at their core, the [D&O] Policies were obtained for the protection of the Individual Insureds and are not a vehicle for corporate protection." (internal marks omitted)).

In contrast, the Receiver will suffer no real or immediate harm if relief is granted from the stay. The Receiver currently has no claim for any Loss; to the contrary, the only "Claim" he asserts is for a potential, theoretical future Loss. *See, e.g.*, *Stanford Int'l Bank, Ltd.*, 2009 WL 8707814, at *4 (finding that "the receivership's claim to the policy proceeds is presently speculative" where it was unclear whether insurer would ever "pay" a claim, but the "potential harm to [the insured D&Os] if denied coverage is not speculative but real and immediate"); *accord In re Downey Fin. Corp.*, 428 B.R. at 610 ("harm to the directors and officers from not lifting the stay is real and identifiable, whereas the harm to the estate from lifting the stay is purely hypothetical"). Moreover, to the extent that incurred Loss exceeds the amount of insurance coverage, the Individual Defendants have priority of payment over the Receivership Entity under the Policy, and so those proceeds would still be disbursed to the Individual Defendants. Cronic Decl. Ex. A § XIII(C). The Receiver also acknowledges that he currently controls $150 million in liquid assets; accordingly, he is at no risk of losing his counsel or being unable to defend the estate against claims. This is substantially different from the risks faced by Messrs. Oliver and Gillis of being unable to defend themselves in an action brought by the SEC seeking extremely serious personal, career, and financial penalties, of losing their current counsel, and of incurring substantial out-of-pocket costs despite having satisfied the requirements to trigger their D&O coverage.

D. There Is No Basis to Impose the "Safeguards" Proposed by the Receiver.

Recognizing that the weight of authority requires the advancement of Defense Costs to Messrs. Oliver and Gillis, the Receiver asks the Court to use its "equitable powers to impose a number of basic safeguards to protect against further unreasonable diminution of Receivership Property attributable to Jesenik's out-of-control Defense Costs." Opp. to Jesenik Mot. at 28; *see also* Opp. at 10. Insofar as those proposed safeguards would apply to Mr. Oliver and Mr. Gillis, they include:

- partitioning the remaining $10 million in Policy proceeds, with $2.5 million going to the Individual Defendants and $7.5 million going to the Receivership;
- imposing a "soft cap" of $1.25 million for Defense Costs; and

- requiring Forge monthly to provide the Receiver with the amount of each invoice submitted by each of the Individual Defendants and each of their vendors, broken down by fees and expenses, so that he has "the ability to contemporaneously monitor the amount of **Defense Costs** and, if necessary intervene."

Opp. at 10 & n.3. This Court should deny the Receiver's request. *See, e.g.*, *Narayan*, 2017 WL 447205, at *9 (rejecting receiver's request that various conditions, including judicial review of defense costs and the provision of a security for reimbursement).

First, the Receiver's request to either partition the insurance proceeds or impose a "soft cap" would violate governing law. As the Receiver concedes, "[a] court may not rewrite the terms of a contract for the parties." Opp. to Jesenik Mot. at 19 (citing *Usinger v. Campbell*, 280 Or. 751, 754 (1977)); *see also Narayan*, 2017 WL 447205, at *5 (if the Receivership 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"). Here, the Policy explicitly states that the Insureds, including Messrs. Oliver and Gillis, have a contractual right to payment of their reasonable Defense Costs within 90 days of their submission to the Insurer, that to the extent incurred Loss exceeds the available Policy limits, Messrs. Oliver's and Gillis's claims will be paid before the Receivership Entity's claims, and that such terms will remain in force even in the event of insolvency. Cronic Decl. Ex. A §§ VII(B) & XIII(C),(D). The Receiver's request for a partitioning of proceeds or a "soft cap" would directly violate all of these provisions and constitute an improper attempt to "rewrite the contract for the parties." *Usinger*, 280 Or. at 755.

Second, none of the three cases cited by the Receiver supports his contention that this Court has "equitable powers" to impose the remedies he requests. Opp. to Jesenik Mot. at 28-29. In one of the cases, the parties had *agreed* to establish procedures to monitor expenditures and the court imposed a "soft cap" of $30 million on the proceeds available to pay defense expenses subject to further adjustment *by agreement* among the parties. *See In re MF Glob. Holdings Ltd.*, 469 B.R. at 197. There is no such agreement here. Moreover, the cap in *In re MF Global* was imposed early in the case, when it was unclear whether total defense costs would ever even approach the

amount of the cap. *See id.* at *183, *197 (imposing $30 million soft cap where total claims for reimbursement or advancement of legal fees and expenses totaled $8.3 million). Here, by contrast, it is a virtual certainty that the Individual Defendants will incur another $1.25 million in Defense Costs, if they have not already. In the other two cases cited by the Receiver, the courts imposed fee submission requirements under a specific Rule of the Federal Rules of Bankruptcy Procedure that is not at issue here.[7] Other courts have expressly rejected receivers' requests to monitor directors' and officers' legal fees, reasoning that "it is [the insurer's] responsibility to determine the reasonableness of any fees incurred by" the insureds (*Narayan*, 2017 WL 447205, at *9)—not the Court's, and certainly not the Receiver's.

Third, the Policy itself provides that the initial allocation of Defense Expenses is to be determined by the Insurer—not this Court or the Receiver. *See* Cronic Decl. Ex. A § VIII(B). Even independent of the Policy language, it is the duty of the Insurer—again, not the Receiver or this Court—to ensure the allocation of Policy proceeds among multiple Insureds in a fair and equitable manner. Moreover, if Mr. Jesenik's lawyers were in fact overpaid, the remedy is not to impose draconian "safeguards" on other parties, but for Catlin to seek reimbursement from Mr. Jesenik's counsel for the amount of any overpayment.

Finally, the Receiver does not even attempt to articulate a reason why Mr. Oliver and Mr. Gillis—whose Defense Costs the Receiver does not challenge—should be subject to any such "safeguards" or restrictions. The Receiver concedes that he has no objection to the amount of Mr. Oliver's and Mr. Gillis' bills incurred to date, and that he stipulated to the Individual Defendants' access to their D&O insurance policy for the first tier of insurance. By the time of the hearing on this motion, Messrs. Oliver and Gillis will have at least six months of unpaid legal bills in the

[7] *See In re Laminate Kingdom, LLC*, 2008 WL 1766637, at *5 (Bankr. S.D. Fla. Mar. 13, 2008); *In re Arter & Hadden*, 335 B.R. at 674. Moreover, the courts did so based on their apparent conclusion that the payment of defense costs constituted "reimbursement of necessary expenses … *from the estate*." *In re Laminate*, 2008 WL 1766637, at *5 (emphasis added); *In re Arter & Hadden*, 335 B.R. at 674. For the reasons explained *supra* Part I.B, the proceeds used to pay Defense Costs here do not come not from the Estate, which has no property interest in them.

middle of an active litigation (in which the SEC recently produced approximately 500,000 more documents and depositions are about to commence), causing immediate and potentially irreparable harm. The sole proffered basis for the Receiver's request for these additional restrictions, and for an ill-defined meet and confer process that has the potential indefinitely to delay insurance payments, is *Mr. Jesenik's* allegedly excessive legal fees. Thus, at a minimum, the requested restrictions should not apply to Messrs. Oliver and Gillis.[8]

II. CONCLUSION

Messrs. Oliver and Gillis request confirmation from the Court that they can access their D&O insurance policy without violating the Receivership Order. Every single case cited by either the Individual Defendants or the Receiver that addressed the question of whether to permit the advancement of defense costs under a similar D&O Policy has permitted such payment to officers and directors. The Receiver stipulated to this result for the first tier of insurance and concedes that the amount of the bills submitted by Messrs. Oliver and Gillis since that time do not appear unreasonable. Accordingly, Messrs. Oliver and Gillis respectfully request that the Court resolve this matter as expeditiously as possible and grant their motion for relief from the Receivership Order, to the extent necessary, to permit the advancement of defense costs.

DATED: September 28, 2017

COVINGTON & BURLING LLP
By: */s/ W. DOUGLAS SPRAGUE*
W. DOUGLAS SPRAGUE (*Pro Hac Vice*)
Attorneys for Defendant N. Scott Gillis

[8] Although the Receiver has not established a basis for it, in an effort to resolve this matter, the Individual Defendants have no objection to each Individual Defendant providing monthly information to the Receiver conveying the total amount of paid claims and the total amount of pending claims that he has submitted to the Insurer.

DATED: September 28, 2017

SHARTSIS FRIESE LLP
By: */s/ LARISA A. MEISENHEIMER*
LARISA A. MEISENHEIMER (*Pro Hac Vice*)

Attorneys for Defendant Brian A. Oliver

LR 11-1(D)(2) CERTIFICATION

I hereby attest that all other signatories listed, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing.

/s/ W. DOUGLAS SPRAGUE
W. DOUGLAS SPRAGUE (*Pro Hac Vice*)