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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION, et al.

Plaintiffs,

v.

AEQUITAS MANAGEMENT, LLC, et al.,

Defendants.

Case No.: 3:16-cv-00438-PK

INTERESTED NON-PARTY INSURERS' MOTION TO INTERVENE FOR LIMITED PURPOSE AND FOR RELIEF FROM STAY

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In compliance with Local Rule 7.1, the parties have met and conferred in a good faith through telephone conferences in an effort to resolve the subject matter of this motion, but have been unable to do so.[1]

Forge Underwriting Ltd. ("Forge"), PartnerRe Ireland Insurance DAC ("PartnerRe"), Certain Underwriters at Lloyd's, London Subscribing to Policy No. B014ERUSA1500634 ("Underwriters"), and Starr Indemnity & Liability Company ("Starr") (collectively "Insurers") hereby move:

(1) to intervene in this action pursuant to Federal Rule of Civil Procedure 24 for the limited purpose of seeking relief from the litigation stay contained within the Order Appointing Receiver ("Stay Order") [Doc. 156.]; and

(2) for relief from the Stay Order to commence a declaratory relief action.

As set forth below, the Insurers issued Directors and Officers liability insurance policies to Aequitas Holdings, LLC ("Aequitas") which policies are deemed property of the Receivership Entity. Actual controversies within the meaning of 28 U.S.C. § 2201 exist between the Insurers, the Receiver for Aequitas and its related entities, and the individual Insured Persons regarding insurance coverage for certain "Claims" against Aequitas and/or the Insured Persons. The Insurers seek relief from the Stay Order for the purpose of filing a declaratory relief action so that a court may resolve those actual controversies.

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[1] The parties also attempted to resolve their underlying dispute through mediation. See, Receiver's Report (January 31, 2019) Docket No. 674 at p. 10.

I. BACKGROUND

A. The Movants

The Insurers insured Aequitas, its related entities, and its directors and officers under claims-made Directors & Officers liability insurance policies for the period November 1, 2015 to November 1, 2016. Two of the Insurers – Forge and Starr – also insured Aequitas under excess claims-made Directors & Officers liability insurance policies for the period July 1, 2014 to November 1, 2015.

Forge is a managing general agent of PartnerRe. Forge, on PartnerRe's behalf, issued the 2015 primary policy (the "Forge 2015 Primary Policy"), with a $5,000,000 limit including defense costs. Underwriters and Starr issued first and second layer excess policies, respectively, for the 2015-2016 policy period. The Underwriters and Starr excess policies also each have a $5,000,000 limit and follow form to the terms and conditions of the Forge 2015 Primary Policy (collectively "the 2015-2016 Policies").

Forge and Starr also insured Aequitas under claims-made Directors & Officers liability insurance policies for the period July 1, 2014 through November 1, 2015. Catlin Specialty Insurance Company ("Catlin") issued the 2014 primary policy to Aequitas Holdings (the "Catlin 2014 Primary Policy"), with a $5,000,000 limit including defense costs.[2] Forge and Starr also insured Aequitas under $5,000,000 first and second layer excess policies for the 2014-2015 policy period (collectively "the 2014-2015 Policies").

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[2] The Catlin 2014 Primary Policy exhausted in July 2017 through court-approved advancement of defense costs incurred by Insured Persons. Docket No. 551. Catlin is not a party to these motions or the proposed declaratory relief action.

The Insurers submit that Forge's 2014 Excess Policy has exhausted by advancement of defense costs incurred by Insured Persons in this action. On August 16, 2018, this Court lifted the Receivership stay so that Starr could, at its discretion and consistent with the terms of the Policies, pay up to $237,522.23 in defense costs for the Insured Persons under its 2014 Excess Policy. Doc. 645. On November 6, 2018, the court again lifted the stay so that Starr could advance the Insured Persons $90,000 in defense costs for their representation at the November 12, 2018 mediation. Doc. 660.

B. The Actual Controversy

Aequitas, its related entities, and the Insured Persons allegedly perpetrated a scheme to defraud Aequitas' investors. The SEC began investigating these matters in 2014. Aequitas and the Insured Persons notified the Insurers of the SEC investigation in June 2015, during the 2014-2015 policy period, pursuant to the "Notice of Circumstances" provisions of the 2014-2015 Policies. See Catlin Policy No. MFP-686757-0714, at § IX. Under those provisions, any "Claim" later arising out of the "noticed circumstances" is deemed made in the 2014-2015 policy period. *Id.* Thus, although the SEC ultimately filed this action in 2016, this action and any other "Claim" arising out of or alleging facts that were the subject of the prior notice constitute a "Claim" deemed first made during the 2014-2015 policy period.

While managing the Receivership Estate, the Receiver notified the Insurers of the various purported "Claims" and circumstances asserted against Aequitas and its related entities, including demands from Aequitas' investors. The individual Insured Persons likewise notified the Insurers of purported "Claims" including the SEC Investigation, the SEC Action, and the

CFPB Investigation. The Receivership and the Insured Persons seek coverage for those "Claims" under the Insurers' 2014-2015 and the Insurers' 2015-2016 Policies.

Regarding the 2014-2015 Policies, the Receivership contends that the Forge 2014 Excess Policy is not exhausted because (1) Forge's policy forms were not approved by the Oregon Department of Consumer and Business Services; and/or (2) the amounts Forge paid for the Insured Persons' defense of this action were unreasonable. Forge disagrees and contends that it has fully and properly exhausted the limit of its 2014 Excess Policy and therefore no further sums are payable under that policy.

Further, the Insurers each declined coverage under their 2015-2016 Policies for the purported "Claims" against Aequitas, its related entities, and the Insured Persons; principally on the grounds that they arise from the same "Wrongful Act" or "Interrelated Wrongful Acts" as defined by the Policies. Consequently, all of the "Claims" noticed to the Insurers constitute a single "Claim" first made during the 2014-2015 policy period and are excluded under the 2015-2016 Policies. *See, e.g., Alexander Mfg. v. Illinois Union Ins. Co.*, 666 F. Supp. 2d 1185, 1203 (D. Or. 2009); *Zunenshine v. Executive Risk Indemn., Inc.*, No. 97 Civ. 5525 (MBM), 1998 WL 483475 *4-5 (S.D.N.Y. Aug. 17, 1998), *aff'd*, 182 F.3d 902 (2d Cir. 1999).

Notwithstanding the 2015-2016 Policies' plain terms, the Receivership and/or the Insured Persons take the position that the 2015-2016 Policies apply to some or all of the various liability claims asserted against them. The Receivership, the Insurers, and the investor claimants engaged in mediation on August 22 and November 12, 2018 to resolve the investor demands against Aequitas and its related entities. Receiver's Report, Doc. 674 at 9-10. To date, no resolution has been achieved.

Given the foregoing, an actual justiciable controversy exists between the Insurers, the Receivership, and the Insured Persons regarding coverage under the 2014-2015 and 2015-2016 Policies for claims against Aequitas, its related entities, and the Insured Persons. That controversy is ripe for adjudication and warrants lifting the Stay Order to allow the parties to seek judicial resolution of their dispute.

II. ARGUMENT IN SUPPORT OF MOTION TO INTERVENE

The Insurers seek intervention as of right, or alternatively, permissively, for the sole purpose of seeking relief from the Court's blanket stay which precludes them from filing a declaratory relief action regarding the foregoing insurance coverage issues. *See, e.g., State Farm Fire & Cas. Co. v. Reuter*, 294 Or. 446, 449, 453 (1983) (holding that declaratory relief is "proper proceeding" for resolving insurance coverage disputes and insurers "should not be precluded from seeking a declaration of their rights and liabilities"); *Camico Mut. Ins. Co. v. McCoy Float & Co., CPAs*, P.C., 2018 LEXIS 154338 (D. Or. September 6, 2018)

Federal Rule of Civil Procedure 24(a)(2) states that "the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The court applies a four-part test to applications for intervention as of right, finding intervention appropriate when: "(1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not

adequately represented by the existing parties." *U.S. ex rel. McGough v. Covington Technologies*, 967 F.2d 1391, 1394 (9th Cir. 1992), *citing County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). "Generally, Rule 24 (a)(2) is construed broadly in favor of proposed intervenors and '[courts] are guided primarily by practical considerations.'" *Id., quoting U.S. v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987).

The Insurers' motion to intervene for the limited purpose of seeking relief from the Stay Order satisfies all the elements of intervention as of right. As to the first factor—timeliness—"three factors are weighed: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County of Orange*, 799 F.2d at 537. Resolving the insurance coverage dispute now is in the Receivership's and Insured Persons' best interests because it will remove any uncertainty regarding the availability of insurance coverage to resolve liability claims. No party will be prejudiced by the Insurers' intervention for the purpose of seeking relief from the Stay Order.

Evaluating the second factor—an interest in the property or transaction—"is a practical, threshold inquiry." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). "No specific legal or equitable interest need be established. It is generally enough that the interest asserted is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.* The Insurers' policies are part of the Receivership Estate and their interest in those policies is self-evident.

Regarding the third factor —impairment of the interest—"if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a

general rule, be entitled to intervene." *Id.* at 822, *quoting* Fed. R. Civ. P. 24 advisory committee's note to 1966 amendment (alteration omitted). Here, the Insurers' interests could be substantially affected by determinations in this action if they have not had the opportunity to assert rights in a declaratory relief action. For example, the Court has already rendered an opinion regarding advancements for defense costs under certain of the 2014-2015 Policies without any representation of the affected insurers. *See* Opinion and Order, Docs. 551, 645, 660. Thus, the Insurers should be permitted to intervene to protect their interests in their respective policies.

Considering the fourth factor—whether existing parties adequately protect the movant's interests— the "applicant-intervenor's burden . . . is minimal: it is sufficient to show that representation may be inadequate." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995), *abrogated on other grounds*, *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). A non-party is adequately represented by existing parties only if: "(1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Sw. Ctr. for Biological Diversity*, 150 F.3d at 1153-54. Here, the arguments and rights the Insurers will assert in the proposed declaratory relief action are uniquely their own—no existing party has either the incentive or ability to represent the Insurers' interests in this matter.

Alternatively, if the Court concludes that the Insurers are not entitled to the limited intervention they seek as of right, the Insurers should be allowed to permissively intervene.

Under Federal Rule of Civil Procedure 24(b)(1)(B), "the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The district court has broad discretion to allow permissive intervention. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Again, the Insurers seek intervention solely for the purpose of seeking relief from the Stay Order.

III. ARGUMENT IN SUPPORT OF RELIEF FROM STAY

The Insurers seek limited relief from the Stay Order so that they may seek declaratory relief determining the parties' respective rights and obligations under the 2014-2015 and 2015-2016 Policies issued to Aequitas. The Insurers' proposed Complaint for Declaratory Relief is attached as Exhibit A to the Declaration of John L. Williams in support of this motion.

As the Ninth Circuit explained, "[d]etermining whether an exception should be made in a particular case to a previously entered blanket stay involves a comparison of the interests of the receiver (and the parties the receiver seeks to protect) and of the moving party." *SEC v. Wencke*, 622 F.2d 1363, 1373 (9th Cir. 1980). While stays may be necessary to assist the receiver, "[t]he interests of the moving party are also relevant." *Id.* "The district court should consider whether refusing to lift the stay genuinely preserves the *status quo* or whether the moving party will suffer substantial injury if it is not permitted to proceed." *Id.* Determining when to lift a litigation stay "is one of timing, that is *when* during the course of a receivership a stay should be lifted and claims allowed to proceed, *not* whether the stay should be lifted *at all*. At some point, persons with claims against the receivership should have their day in court. The receivership cannot be protected from suit forever." *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) (original emphasis).

The court balances three factors in determining whether to lift a blanket stay: (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) whether the moving party's underlying claim is "colorable." *Id.* The Insurers submit that they are entitled to their day in court to resolve their insurance coverage disputes with the Receiver and that each of the *Wencke* factors warrant lifting the litigation stay for that purpose.

As the Ninth Circuit observed, the fundamental purpose of a blanket stay where, as here, a receiver has been appointed in the wake of a securities fraud scheme, is to allow the receiver to marshal and preserve the assets of the receivership entity, clarify its financial affairs, investigate potential claims, and avoid the potential dissipation of assets that would occur if the receiver had to defend collusive or fraudulent claims. *Wencke*, 622 F.2d at 1372. None of those purposes are served by barring the Insurers from seeking declaratory relief as to the parties' respective rights and obligations under the D&O policies. On the contrary, a judicial determination of those rights serves the Receiver's interest.

As it currently stands, the Receiver and the Insurers dispute whether the Forge 2014 Excess Policy is exhausted and whether the 2015-2016 Policies apply to any of the myriad claims asserted against the Receivership entities. The Insurers contend they do not apply and the Receivership contends they do. A judicial resolution of that dispute will serve the Receivership's need—indeed, obligation—to determine what assets are available to resolve claims against the Receivership entities. Further, the Insurers will be prejudiced if their right to seek judicial guidance regarding their rights and obligations is further delayed.

The second *Wencke* factor considers the duration of the receivership at the time the motion to lift the stay is made, with particular attention being paid to "the receiver's need to organize and understand the entities under his [or her] control[.]" *Wencke*, 742 F.2d at 1231. "Timing in a receivership process is fact specific, based on the number of entities, the complexity of the scheme, and any number of other factors." *S.E.C. v. Stanford Int'l Bank Ltd.*, 424 F'Appx. 338, 341 (5th Cir. 2001) (citing *Wencke*, 742 F.2d at 1231). However, "as the receivership progresses…it becomes less plausible for the receiver to contend that he [or she] needs more time to explore the affairs of the entities. The merits of the party's claim may then loom larger in the balance." *Wencke*, 622 F.2d at 1374.

Here, timing weighs heavily in favor of lifting the stay for purposes of the Insurers' proposed declaratory relief action. The Receivership and Stay Order have been in place for more than two years. Order Appointing Receiver, Docket No. 156. The Receiver has had extensive time to organize and familiarize itself with the Receivership entities' structure, business and assets, and more significantly, their D&O liability insurance. Indeed, the Receivership long-ago retained (and has been advised by) insurance coverage counsel. *See* Shure Decl., Doc. 531, at 2 ("I am the principal and owner of the Law Offices of Stanley H. Shure, which is the duly appointed insurance coverage counsel for the Receivership."). The Receiver is engaged in settlement negotiations with investor claimants and is seeking coverage from the Insurers for those claims. As of January 31, 2019, a majority of the Receivership Entity's assets have been sold or monetized—generating over $316 million—and much of the outstanding government litigation has been resolved. Receiver's Report, Docket No. 674 at 7, 15. By the Receiver's own

admission, "resources can be redirected to litigation-related matters without jeopardizing the Receivership's other vital activities." *Id.* at 15.

The Insurers submit that, under these circumstances, there is no reasonable basis for continuing to delay exercise of their right to seek judicial resolution of the actual controversies between them and the Receiver and the Insured Persons. *See SEC v. Private Equity Mgmt. Group, LLC*, No. CV 09-2901 PSG (Ex), 2010 WL 4794701 *3 (C.D. Cal. Nov. 10, 2010) (granting motion to lift litigation stay where the receivership was in place for more than a year and had "kept [the court] abreast of the Receiver's efforts to 'organize and understand the entities' under his control."). *See also U.S. v. JHW Greentree Capital, L.P.*, No. 3:12-CV-00116, 2014 WL 2608516 *8 (D. Conn. June 11, 2014) (holding that receivership's twenty-eight month existence favored lifting stay); *S.E.C. v. Provident Royalties, LLC*, No. 3:09-CV-1238-L, 2011 WL 2678840 *4 (N.D. Tex. July 7, 2011) (holding that receivership's almost two year existence favored lifting litigation stay where "the receiver has marshaled almost all of the receivership assets and proposed a plan of distribution.")

The last *Wencke* factor evaluates "the merit of the moving party's underlying claim." *Wencke*, 742 F.2d at 1231. "Where the claim is unlikely to succeed…there may be less reason to require the receiver to defend the action now rather than defer its resolution." *Wencke*, 622 F.2d 1363, 1373 (9th Cir. 1980). But, where the receiver is less likely to prevail "there is less reason to permit the receiver to avoid resolving the claim." *Id.* The receiver's position regarding a movant's underlying claims must be "considered realistically and not in the abstract." *Id.* Further, the movant need not prove that it will prevail on its claim, but rather that the claim is merely "colorable." *SEC v. Wencke*, 742 F.3d 1230, 1232 (9th Cir. 1984). When a district court

is "asked to lift a stay it would usually be improper for [it] to attempt to actually judge the merits of the moving party's claims[.] A district court need only determine whether the party has *colorable* claims to assert which justify lifting the receivership stay." *U.S. v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 444 (3d Cir. 2005).

Here, the Insurers' proposed claims for declaratory relief are, at the very least, colorable. First, all that the Insurers seek is judicial resolution of the existing disputes about the scope of coverage afforded by their policies. There is nothing frivolous, collusive, or fraudulent about the Insurers seeking judicial guidance as to their obligations. On the contrary, courts encourage insurers to seek declaratory relief when they have a coverage dispute with their insureds. *See State Farm Fire and Cas. Co. v. Reuter*, 294 Or. 446, 454 (1983) (noting that "[i]n this case declaratory relief is particularly appropriate to determine the liabilities of the insurer."). Moreover, the substantive issues that are the subject of the Insurers' proposed declaratory relief action are meritorious and ripe for adjudication. Specifically, there are five issues on which the Insurers seek declaratory relief, each of which is grounded on plain policy terms and well-established case law:

1. The Forge 2014 Excess Policy Is Exhausted

Forge seeks a declaration that its 2014 Excess Policy exhausted through the advancement of defense costs to the Insured Persons. The Receivership does not dispute that Forge advanced $5,000,000 to the Insured Persons for their defense costs. Rather, the Receivership argues that the Forge 2014 Excess Policy did not exhaust because Forge allegedly failed to have its policy forms approved by the Oregon Department of Consumer and Business Services under ORS 742.003. Forge contends that its 2014 Excess Policy was issued on a surplus lines basis

and therefore it was not subject to ORS 742.003. *See* ORS 742.001 ("Except as specifically provided in ORS 750.055 and 750.333, this chapter and ORS Chapters 743, 743A and 753 B apply to all insurance policies delivered or issued for delivery in this state except…Surplus lines insurance policies."). *See also A & T Siding, Inc. v. Capitol Spec. Ins. Corp.*, No. 3:10-CV-980-AC, 2012 WL 707100 *12 (D. Or. May 1, 2012) ("Surplus lines policies, however, are not covered by the provisions of Chapter 742 of the Oregon Statutory code…."), *vacated on other grounds*, 673 F'Appx. 393 (9th Cir. 2016). Further, even if the Forge 2014 Excess policy were subject to ORS 742.003, the policy term providing that the Forge $5,000,000 limit includes, and is not in addition to, defense costs is enforceable. *See, e.g., Baylor v. Continental Cas. Co.*, 190 Or. App. 25, 31 (2003).

Alternatively, the Receivership argues that Forge did not properly exhaust its 2014 Excess Policy because Forge advanced allegedly unreasonable sums for the defense of the individual Insured Persons. Forge submits that the sums advanced were reasonable and reflected the amounts actually charged by the Insured Persons' attorneys. In any event, the Receivership's recourse for recovery of any purportedly unreasonable defense costs paid under the Forge 2014 Excess Policy is against the individual Insured Persons; not Forge. *See In re Breach First Nat. Banchsares, Inc.*, 451 B.R. 406, 412 (Bankr. D.S.C. 2011) (holding that where an insurer advances unreasonable defense costs to individual insured persons under a D&O policy, the insured persons "may be subject to disgorgement").

Accordingly, Forge has at least a colorable claim that it is entitled to a judicial declaration that its 2014 Excess Policy is exhausted.

2. The 2015-2016 Policies Do Not Apply To Any Claims Against Aequitas

The Insurers seek a declaration that the 2015-2016 Policies do not apply to any noticed "Claim" asserted against Aequitas, its related entities, or the Insured Persons because any such "Claim" is based on the same "Wrongful Act" or "Interrelated Wrongful Acts" as the "Claim" first made during the 2014-2015 policy period. Because the first "Claim" based on these acts was made during the 2014-2015 policy period, they are excluded from coverage under the 2015-2016 Policies. Courts across the country have consistently enforced such provisions to bar coverage. *See, e.g.*, *Alexander Mfg. v. Illinois Union Ins. Co.*, 666 F.Supp. 2d 1185, 1203 (D. Or. 2009); *HR Acquisition Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1316 n.8 (11th Cir. 2008); *Federal Ins. Co. v. Raytheon Co.*, 426 F.3d 491, 499-500 (1st Cir. 2005); *Ciber, Inc. v. ACE Am. Ins. Co.*, 261 F.Supp. 3d 1119, 1127 (D. Colo. 2017); *Associated Indus. Ins. Co. v. Brad Williams, LLC*, No. 3:17-CV-37-DPJ-FKB, 2018 WL 2308767 *7 (S.D. Miss. May 21, 2018); *Twin City Fire Ins. Co. v. Permatron Corp.*, No. 15 C 10252, 2018 WL 1565599 *6 (N.D. Ill. Mar. 30, 2018); *Old Bridge Mun. Utilities Auth. v. Westchester Fire Ins. Co.*, No. 12-6232 (MAS) (TJB), 2016 WL 4083220 *4 (D.N.J. July 29, 2016); *The One James Plaza Condo. Ass'n, Inc. v. Rsui Grp., Inc.*, No. 15 Civ. 294, 2015 WL 7760179 *5 (D.N.J. Dec. 2, 2015); *Zunenshine v. Executive Risk Indemn., Inc.*, No. 97 Civ. 5525, 1998 WL 483475 *4 (S.D.N.Y. Aug. 17, 1998), *aff'd*, 182 F.3d 902 (2d Cir. 1999).

In light of the foregoing, the Insurers have at least a colorable claim that they are entitled to a judicial declaration that the 2015-2016 Policies do not apply to any "Claim" and/or circumstance at issue.

3. The Insurers Have No Duty To Indemnify Defendants for Disgorgement

The Insurers seek a declaration that they have no obligation to indemnify Aequitas, its related entities, or the Insured Persons to the extent that any settlement or judgment is for restitution or disgorgement of ill-gotten gains under any of the Policies. The majority of courts in the United States that have addressed this issue have held that restitution or disgorgement is uninsurable as a matter of law. *See, e.g.*, *Level 3 Communications, Inc. v. Federal Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001); *Unified W. Grocers Inv. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1115 (9th Cir. 2006); *CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co.*, 291 F' Appx. 220, 223 (11th Cir. 2008); *Ryerson, Inc. v Federal Ins. Co.*, 796 F.Supp. 2d 911, 913 (N.D. Ill. 2010), *aff'd*, 676 F.3d 610 (7th Cir. 2012); *Bank of the West v. Superior Court*, 833 P.2d 545, 552–553 (Cal. 1992); *Vigilant Ins. Co. v. Credit Suisse First Boston Corp.*, 10 A.D.3d 528, 529 (N.Y. App. Div. 2004); *Conseco, Inc. v. National Union Fire Ins. Co.*, No. 49D130202CP000348, 2002 WL 31961447 *6 (Ind. Cir. Ct. Dec. 31, 2002).

In light of the foregoing, the Insurers have at least a colorable claim that they are entitled to a judicial declaration that their policies do not apply to any liability or amount an insured entity or person may incur for restitution or disgorgement.

4. Starr Seeks A Declaration That Coverage Is Barred By The "Prior Litigation/Investigation" Exclusion

In addition to the "Interrelated Wrongful Acts" and restitution/disgorgement issues applicable to all the Insurers, Starr seeks a declaration that the "prior investigation" exclusion of both its 2014 and 2015 Excess Policies bar coverage to the extent that any insured under those policies had notice of the SEC investigation (or other regulatory investigations) pending before July 1, 2014. That exclusion (which appears only in the Starr policies) provides, in pertinent

part, that the policies do not cover losses "in connection with any claim alleging, arising out of, based upon or attributable to, as of July 1, 2014, any pending or prior: (1) litigation; or (2) administrative or regulatory proceeding *or investigation* of which an Insured had notice." *See, e.g.*, Starr 2014 Excess Policy, End. 6 (emphasis added). Given this plain term, Starr has at least a colorable claim for declaratory relief that the exclusion bars coverage to the extent any insured person or entity had notice of the SEC investigation, or any related investigation or litigation, before July 1, 2014. Courts across the country have consistently enforced such "prior litigation/investigation" exclusions. *See, e.g., Zunenshine v. Executive Risk Indem., Inc.*, No. 97 Civ. 5525 (MBM), 1998 WL 483475 *5 (S.D.N.Y. Aug. 17, 1998); *HR Acquisition Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1316 n.8 (11th Cir. 2008); *Federal Ins. Co. v. Raytheon Co.*, 426 F.3d 491, 499-500 (1st Cir. 2005).

5. The Insureds' Warranty Bars Coverage Under The Starr Excess Policies

Finally, Starr seeks a declaration that coverage for any "Claim" against Aequitas, its related entities, and/or the individual Insured Persons is barred to the extent that the written warranty they gave Starr, and that Starr relied upon in agreeing to insure Aequitas, was inaccurate. Specifically, in its July 2, 2014 Warranty and Representation Letter, Aequitas warranted that it, its subsidiaries, officers and directors had no knowledge of any investigation, act, error or omission that "might give rise to claim(s), suit(s) or actions(s)" under the (then) "proposed [2014] policy." In its November 21, 2018 report, the Receiver concluded that between January 1, 2014 and March 10, 2016, Aequitas was operating as a "Ponzi-like" scheme, that Aequitas should legally be designated as a Ponzi scheme, and that Aequitas and its representatives committed "actual fraud." Receivership Report, Doc. 663, at p. 7-10. Further,

the Receiver noted that "Aequitas was likely insolvent substantially prior to July 3, 2014," but declined to undertake "the extensive analysis necessary" to determine Aequitas' solvency prior to that date. *Id.* Thus, Starr has a good faith basis to believe that Aequitas' warranty was inaccurate when made and thus there is no coverage under the Starr 2014 excess policy for any "Claim" at issue.

The Insurers submit that their positions on each of these coverage issues are meritorious (and certainly "colorable") and that allowing the Insurers to seek judicial resolution of them is in the bests in interests of all the parties because it will provide the Receivership, the Insured Persons, and the Insurers with certainty as to the amount of insurance, if any, available to resolve claims.

IV. CONCLUSION

For the foregoing reasons, the Insurers respectfully request that the motions for limited intervention and relief from the Stay Order be granted.

DATED this 26th day of April 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR-7(2)(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 4,870 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 26th day of April 2019.

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