Docket #0701 Date Filed: 5/22/2019

William G. Earle, OSB No. 831859
Email: wearle@davisrothwell.com
Christopher M. Parker, OSB No. 104776
Email: cparker@davisrothwell.com
DAVIS ROTHWELL EARLE & XÓCHIHUA P.C.
200 Southwest Market Street, Suite 1800
Portland, Oregon 97201-5745
Telephone: (503) 222-4422
Facsimile: (503) 222-4428

John L. Williams, *admitted pro hac vice*
Email: jlwilliams@cozen.com
Jordan A. Hess, *admitted pro hac vice*
Email: jhess@cozen.com
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, Washington 98104-0428
Telephone: (206) 340-1000
Toll Free Phone: 800-423-1950
Facsimile: (206) 621-8783

Attorneys for Forge Underwriting Limited, PartnerRe Ireland Insurance DAC, Starr Indemnity & Liability Company and Certain Underwriters at Lloyd's, London

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

AEQUITAS MANAGEMENT, LLC; et al.,

Defendants.

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

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

1600438190523000000000001

I. INTRODUCTION

The Receiver does not dispute the *merits* of the Insurers' motion which seeks only a lifting of the three-year old litigation stay for the limited purpose of permitting the Insurers to file their complaint for declaratory relief.[1] *United States v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005) (potential litigants allowed to petition the court for permission to sue so that they "are not denied a day in court during a lengthy stay"). To the contrary, the Receiver states that the "stay should be lifted to the extent necessary to allow the Receiver and [Insurers] to litigate their insurance coverage disputes." (Dkt. 695 at p. 6.) Rather than contest the merits of the Insurers' request that the stay be lifted for a limited purpose, the Receiver instead argues that the Court should simply bar the Insurers from filing their declaratory relief action and thereby set an uneven "playing field." (Dkt. 695 at p. 7.) As demonstrated below, the Receiver's argument is predicated on the specious notion that the Insurers should be sanctioned because they purportedly did not adequately meet and confer before filing their motion. Further, there is no legal authority for the Receiver's proposition that the Court can or should deprive the Insurers of their right to sue for declaratory relief simply because they moved for relief from the stay. The Insurers submit that their motion should be granted and that the Court should enter a *neutral* order lifting the stay to allow the parties to litigate their insurance coverage disputes. In the event the Insurers and the Receiver file competing complaints, the Court can consolidate them pursuant to Federal Rule of Civil Procedure 42 just as it would in any other case.

---

[1] Unlike the Receiver, the Insurers have not sought to bar the Receiver from suing if the Court agrees to lift the stay for insurance coverage litigation.

II. THE INSURERS COMPLIED IN GOOD FAITH WITH RULE 7-1

The Receiver's contention that the Insurers should be barred from filing a declaratory relief action because they did not "meaningfully compl[y]" with Local Rule 7-1 has no merit. (Dkt. No. 695 at p. 2.)

The Receiver's principal contention is that the Insurers precipitously raced to the courthouse rather than accept his one-sided proposal that they sit back and wait to be sued. The Receiver's argument is both revisionist history and disingenuous. The Insurers did not "rac[e] to the courthouse" The Insurers began the meet-and-confer process with the Receiver ten months ago, in August 2018, shortly after the actual controversies within the meaning of 28 U.S.C. section 2201 that are the subject of their proposed declaratory relief action first arose. Williams Decl. ¶2 1. (Dkt. No. 686.) At that time, the Receiver effectively asked that the Insurers defer their motion pending mediation and stated that if the mediation proved unsuccessful the Receiver "*will recommend that the Court lift the stay to allow for the prosecution of the declaratory judgment action*...." Second Supp. Decl. Williams, Ex. 1 (emphasis added). Despite the parties' good faith efforts, the mediation proved unsuccessful, but the Insurers heard nothing further from the Receiver. The Insurers therefore renewed the discussions in April 2019. Williams Decl. ¶2. (Dkt. No. 686); Second Supp. Decl. Williams, Ex. 1. At that time, the Receiver took a materially different position. Rather than "recommend that the Court lift the stay to allow for the prosecution of the declaratory judgment action," as represented in August, the Receiver took the positions that good cause did not even exist to lift the stay and that declaratory relief itself was

"unavailable as a matter of law."[2] Shure Decl., Ex. 2 (Dkt. No. 696). These facts belie the Receiver's contention that the Insurers improperly raced to the courthouse and provide no basis for barring the Insurers from filing a complaint for declaratory relief.

The Receiver notes that the Insurers did not confer with the SEC or other parties to the SEC enforcement action (Messrs. Jesenik, Gillis and Oliver) before filing their motion. (Dkt. No. 695 at p. 3 and n. 3.) As used in Local Rule 7-1, "party" obviously refers to the parties to the dispute at issue in the motion; not all "parties" to the case.[3] Whether the stay order should be lifted is the only issue presented by the Insurers' motion. The stay order exists solely for the benefit of the Receiver. *Acorn Tech.*, 429 F.3d at 443. Accordingly, the Insurers' counsel appropriately met and conferred with the Receiver's counsel on this issue as set for the above.

The SEC is unaffected by the Insurers' request to lift that stay—that is, it would not be a party to the Insurers' declaratory relief action or to a complaint the Receiver elects to file against the Insurers. In that regard, the Insurers cleared up the SEC's misimpression that the Insurers sought to have their declaratory relief action prosecuted as part of or otherwise consolidated with

---

[2] The Receiver's latter position is that the Insurers are barred from seeking declaratory relief because they purportedly breached the insurance contracts before seeking such relief. The Insurers deny that they have committed any breach and, of course, the stay has precluded them from seeking declaratory relief at any time. In any event, the merits of the Insurers' claims are not before the Court at this juncture. *See, Acorn Technology*, 429 F.3d at 444 (noting "it would usually be improper for a district court to actually judge the merits of the moving party's claims" on a motion to lift a stay). *See also Home Indem. Co. v. Stimson Lumber Co.*, 229 F. Supp. 2d 1075, 1079 (D. Or. 2001) (permitting insurer's declaratory judgment action after insurer declined coverage).

[3] Consider the following hypothetical. Ms. Smith sues Mr. Jones and Ms. Green. Ms. Green plans to move to dismiss the claims against her. Nothing in the letter or spirit of Rule 7.1 suggests that Ms. Green must meet and confer with Mr. Jones before filing her motion to dismiss against Ms. Smith.

the SEC enforcement action. (Dkt. No. 697.)[4] To be sure, the SEC has filed a nominal joinder in the Receiver's opposition to the Insurers' motion, but, with all due respect to the SEC, that joinder is off the mark and does not add any weight or merit to the Receiver's arguments. The SEC states that the Insurers "seek adjudication of a number of matters that do not appear germane to the Receiver's claims on the relevant insurance policies." (Dkt. No. 697 at p. 1.) That is incorrect. The Insurers seek declaratory relief on "actual controversies" that exist between them and their insureds which insureds include, but are not limited to, the Receivership Entity. The SEC notes that the Insurers seek an adjudication that "they are not required to pay disgorgement … [b]ut the Receiver does not appear to be making disgorgement claims against the Insurers." (Dkt. No. 697 at p. 1.) The Insurers' complaint, however, seeks an adjudication that claims for restitution or disgorgement made *against* the Receivership Entity or any of the other insureds is not covered by the policies, not that they do not have to pay disgorgement to the Receivership Entity. *See, e.g., Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106 (9th Cir. 2006); *Level 3 Comm., Inc. v. Fed. Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001). Finally, the SEC suggests that allowing the Receiver to sue the Insurers, but barring the Insurers from filing their declaratory relief complaint will somehow better preserve the assets of the Receivership Entity. Even the Receiver does not make that argument because there is no merit to it.

---

[4] In the May 1 telephone conversation with the Insurers' counsel, the SEC's counsel also suggested that SEC's consent was required before the Insurers could move to intervene for the limited purpose. The SEC does not advance that argument here. The majority of courts hold that the SEC's to consent to a non-party's intervention is not required. *See, e.g., S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 950 (8th Cir. 1983); *S.E.C. v. Kings real Estate Inv. Trust*, 222 F.R.D. 660, 663 (D. Kan. 2004); *S.E.C. v. Pvt. Eq. Mgmt. Grp., Inc.*, 2009 WL 10672291 *2 (C.D. Cal. Aug. 5, 2009).

With respect to Messrs. Jesenik, Gillis, and Oliver, none of them have filed any objection to the Insurers' motion (or, for that matter, joined in the Receiver's opposition). Even if the Insurers were obligated to meet and confer with Messrs. Jesenik, Gillis, and Oliver, the dispute between the Insurers and the Receiver that is the subject of the motion before the Court would still exist.

The Receiver's suggestion that the Insurers have intentionally mischaracterized the Receiver's proposed stipulation is likewise without merit. According to the Receiver, the stipulation would have allowed the Insurers to file a counterclaim in response to the Receiver's complaint and therefore the Insurers' motion was unnecessary. The Receiver's offer to allow the Insurers to counterclaim after first being sued is an offer of nothing. Counterclaims asserting the Insurers' "positions and defenses" in response to the Receiver's complaint would be *compulsory* and part of their defense of the Receiver's suit. Simply stated, the Receiver offered to allow the Insurers to do what they would be obligated to do regardless of whether or not the Receiver's stipulation included the word "counterclaim."[5] Nor is being in the posture of a defendant/counterclaimant the same as being a plaintiff. There are benefits (and burdens) to being a plaintiff, which the Receiver undoubtedly knows.

Further, despite what the Receiver implies, there are no greater efficiencies inherent in allowing the Receiver to sue in the first instance, but not the Insurers. Among other things, the Insurers' complaint seeks declaratory relief against *all* insureds under the policies, not just the Receivership Entity, because all the insureds are necessary parties pursuant to Federal Rule of

---

[5] The Insurers could have just as easily proposed that the Receiver instead be barred from filing its suit and relegated to filing counterclaims, but they did not. As stated at the outset, the Insurers seek only neutral order.

Civil Procedure 19. Thus, in addition to asserting their defenses and counterclaims in response to the Receiver's complaint, the Insurers would have to file third-party complaints against the numerous insureds who are not named in the Receiver's complaint. Indeed, the Insurers submit that their more comprehensive complaint for declaratory relief promotes judicial efficiency.

At bottom, the issue raised by the Receiver's one-sided proposal is one of fundamental fairness and equity. By virtue of the three-year-old stay, the Insurers have thus far been precluded from having their day in court and exercising their right to seek a declaratory judgment as to their rights and obligations. In reliance on the Receiver's representation that he would "recommend that the Court lift the stay to allow for the prosecution of the declaratory judgment action," the Insurers deferred from seeking relief from the stay for ten months only to be met by the Receiver's baseless contentions that their motion is precipitous and their proposed complaint is too late.[6] The Insurers' motion to lift the stay is meritorious and should be granted and the Receiver's request that the Insurers be barred from filing their complaint should be denied.[7]

---

[6] With regard to delay, it bears noting that the Receiver took the position in the recent meet and confer that his complaint was nearly finalized and that he was prepared to litigate coverage issues. In his April 30 quarterly report to the Court, however, "the Receiver continues to recommend that the Court refrain from lifting the stay of litigation against the Receiver until after June 30, 2019" when a further report will be provided. (Dkt. 700 at pp.14, 22.) The Receiver's report to the Court conspicuously fails to mention of the pending motion or the Receiver's claimed readiness to proceed with litigation of the insurance coverage issues.

[7] An order adopting the Receiver's proposal that the Insurers are barred from filing their declaratory relief would be tantamount to a dispositive ruling. 28 U.S.C. § 636(b)(1).

III. JUDICIAL ASSIGNMENT SHOULD BE MADE UNDER RULE 16-1

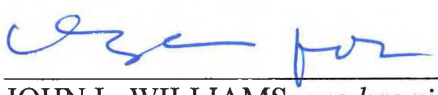
The Receiver's further request that the Court pre-assign the parties' coverage litigation to a specific judge is improper and should be denied. *See Tripp v. EOP*, 196 F.R.D. 201, 202 (D.D.C. 2000) ("The rule [requiring the random assignment of cases] guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping"). Upon filing, the Court should assign the parties respective complaints in accordance with Local Rule 16-1.

IV. CONCLUSION

For the foregoing reasons, the Insurers respectfully request their motion to lift the stay be granted.

DATED this 22nd day of May 2019.

COZEN O'CONNOR



JOHN L. WILLIAMS, *pro hac vice*
206.340.1000

DAVIS ROTHWELL
EARLE & XÓCHIHUA P.C.

WILLIAM G. EARLE, OSB #831859
503.222.4422

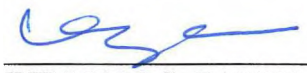
Attorneys for Forge Underwriting Limited; PartnerRe Ireland Insurance DAC; Certain Underwriters at Lloyds, London; and Starr Indemnity & Liability Company

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 2,463 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.

DATED this 22nd day of May 2019.

DAVIS ROTHWELL
EARLE & XÓCHIHUA P.C.



WILLIAM G. EARLE, OSB #831859
503.222.4422

Attorneys for Forge Underwriting Limited; PartnerRe Ireland Insurance DAC; Certain Underwriters at Lloyds, London; and Starr Indemnity & Liability Company