Dwain M. Clifford, OSB 025074
Email: dclifford@balljanik.com
Ball Janik LLP
101 SW Main St., Ste. 1100
Portland, OR 97204
Telephone: 503.944.6059
Facsimile: 503.295.1058

Franklin D. Cordell (*pro hac vice* pending)
Email: fcordell@gordontilden.com
Greg D. Pendleton (*pro hac vice* pending)
Email: gpendleton@gordontilden.com
Gordon Tilden Thomas & Cordell LLP
600 University Street, Suite 600
Seattle, WA 98101
Telephone: 206.467.6477
Facsimile: 206.467.6292

Attorneys for Intervenor Brian Rice

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SECURITIES AND EXCHANGE COMMISSION, et al., Plaintiffs, v. AEQUITAS MANAGEMENT, LLC, et al., Defendants.	NO. 3:16-cv-00438-JR NON-PARTY BRIAN RICE'S MOTION TO INTERVENE AND FOR LIMITED RELIEF FROM STAY TO PERMIT PAYMENT OF DEFENSE COSTS BY STARR INDEMNITY & LIABILITY COMPANY

Brian Rice, the former Executive Vice President of Aequitas Capital Management Inc., respectfully submits the following Motion to Intervene and for Limited Relief from Stay to Permit Payment of Defense Costs by Starr Indemnity & Liability Company. Pursuant to Fed. R. Civ. P. 24, Mr. Rice seeks to intervene for the sole purpose of seeking relief from this Court's stay to permit Starr to begin paying his defense costs incurred in connection with a recent investigation by the United States Attorney's Office.

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1. LR 7-1 Certification

Counsel for Mr. Rice and counsel for the Receiver made a good-faith effort through two telephone conferences to resolve the issues set forth in this motion, but were unable to do so. Counsel for Mr. Rice also spoke with counsel for the SEC, Starr, and for defendants Robert J. Jesenik, Brian A. Oliver, and N. Scott Gillis ("Individual Defendants"); these parties either take no position or have no objection to the instant motion. (The Individual Defendants may oppose Mr. Rice's motion to the extent it argues that his defense-cost payments should be prioritized over their future defense-cost payments.)

2. Factual Background

Mr. Rice is a former Executive Vice President of Aequitas Capital. He is not a named defendant in this action. On April 23, 2019, Mr. Rice received a letter from the United States Attorney's Office informing him "of a federal criminal investigation concerning fraud that occurred at Aequitas Commercial Finance and related entities." Declaration of Dwain M. Clifford ("Clifford Decl."), Ex. A. Mr. Rice provided this letter to Starr Indemnity and Liability Company ("Starr"), the insurer that issued excess Directors & Officers liability management liability policies to Aequitas, its related entities, and its directors and officers. *Id.*, Ex. B at 1. Mr. Rice also tendered his defense to Starr. *Id.*

On June 24, 2019, Starr acknowledged Mr. Rice's tender under its 2014–2015 Policy (Starr Policy"). *Id.*, Ex. C at 1. Starr noted that it is not permitted to advance defense costs from the Starr Policy "without the approval of the District Court in the SEC Lawsuit," *id.* at 1, but otherwise accepted Mr. Rice's tender as follows: "In the event that Mr. Rice obtains such approval in the SEC Lawsuit, then Starr will advance Defense Costs incurred in the defense of the DOJ Investigation subject to any limitations set forth by the District Court and a reservation of Starr's rights." *Id.*

3. Summary of Argument

Mr. Rice and the Receiver disagree over the application and interpretation of the Starr Policy's "Priority of Payments" provision. Under that provision, "If Loss is incurred that exceeds the remaining Limit of Liability for this Policy, the Insurer shall pay Loss under Insuring Agreement A. *before paying any other Loss*." Clifford Decl., Ex. D at 30 (emphasis added). The Priority of Payments term establishes a two-step process as relevant to Mr. Rice's defense costs:

- The term does not apply at all unless and until Loss—meaning defense costs and settlement or judgment liability—has been incurred in excess of the $5 million policy limit. This threshold condition is simply a logical requirement: there is no need to allocate coverage proceeds among the insureds until Loss has been incurred in an amount in excess of the policy limit.
- Once that threshold condition is satisfied, "the Insurer shall pay Loss under Insuring Agreement A. [that is, costs of defending the individual insureds] before paying any other Loss." Importantly, this term lacks any temporal restriction — it does not provide that the priority is accorded only to defense costs that were incurred at the time that the total incurred Loss reached $5 million. The plain reading of this term is clear: when incurred Loss exceeds $5 million, Starr must pay the defense costs of the individual insureds—not just past costs, but the entire ongoing cost of the defense—and only upon the full payment of such defense costs may the insurer pay lower-priority claims, including those under Insuring Agreement C, the "entity" coverage applicable to Aequitas.

Mr. Rice has suffered "Loss" covered under Insuring Agreement A—namely, his Defense Costs related to the investigation by the United States Attorney's Office. Declaration of Angelo Calfo ("Calfo Decl.") ¶ 2. The Receiver has suffered its own Loss allegedly covered under Insuring Agreement C—namely, the $30 million settlement with the investors. ("Investor Settlement"). Dkt. 696-1 at ¶ 80. The combined Loss incurred by Mr. Rice and the Receiver exceeds the $5 million limit on the Starr Policy, which triggers application of the above Priority of Payments provision. That provision obligates Starr to pay Mr. Rice's Loss—including both past and future defense costs—under Insuring Agreement A *before* paying the Receiver's Loss under Insuring Agreement C.

The Receiver would have this Court ignore that plain language and instead add a time element to the Priority of Payments term. Specifically, the Receiver will apparently argue that because the Investor Settlement was entered into before Mr. Rice was notified about the investigation against him, Starr must pay the $30 million settlement first. This turns the Priority of Payments term explicit ordering of claims on its head. The fact the Investor Settlement pre-dates Mr. Rice's need to hire defense counsel is of no consequence under the Priority of Payments provision. Indeed, the provision is entirely silent about the chronology of incurred Loss. It does not, for example, state:

> If Loss is incurred that exceeds the remaining Limit of Liability for this Policy, the Insurer shall pay Loss under Insuring Agreement A. before paying any other Loss, *unless Loss under Insuring Agreement C was agreed to earlier in time than the Defense Costs for Loss under Insuring Agreement A, in which case the Loss under Insuring Agreement C will be paid first*.

Clifford Decl.; Ex. D at 30 (words in italics added). While the Receiver may wish the Priority of Payments provision included the foregoing italicized language, the Receiver cannot rewrite the Starr Policy to make it so. Nor should it be rewritten, because to adopt the Receiver's contentions would be to ignore the primary and fundamental purpose of Directors & Officers insurance: providing liability coverage to directors and officers.

4. This Court should permit Mr. Rice to intervene in this action in order to protect and preserve his right to insurance coverage from Starr.

Pursuant to Fed. R. Civ. P. 24, Mr. Rice moves to intervene as of right (or, alternatively, permissively) to seek relief from the stay so Starr can pay his Defense Costs for the investigation by the United States Attorney's Office. Intervention as of right is 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. This test essentially mirrors the language of Fed. R. Civ. P. 24(a)(2). Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations.

U.S. ex rel. McGough v. Covington Technologies, 967 F.2d 1391, 1394 (9th Cir. 1992) (internal citations and quotations omitted).

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." *Id*. at 1395. Here, the stage of the proceeding is of no concern; discovery in this matter has long been stayed (with the stay being recently lifted), and Mr. Rice's proposed intervention does not warrant or necessitate any adjustment to the scheduling order. For the same reason, neither the Receiver nor any other party to this action will be prejudiced if Mr. Rice intervenes. Finally, there was no meaningful delay. Mr. Rice had no reason to intervene prior to receiving the April 23, 2019 letter from the United States Attorney's Office. Following receipt of that letter, he sought advice from legal counsel, who then timely engaged in discussions with the Receiver in an effort to reach agreement on a stipulated motion before bringing this opposed motion. Mr. Rice's motion, therefore, is timely.

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). Mr. Rice plainly has an interest in the remaining limits on the Starr Policy. That right has been impliedly recognized by the Court in its various orders permitting other insured directors and officers to access policy proceeds for the purposes of paying Defense Costs. *See, e.g.*, Dkts. 185, 435, 551, 646, and 660. It has also been explicitly recognized by Starr's response to Mr. Rice's tender of defense. *See* Clifford Decl., Ex. C (Starr letter stating it "will advance Defense Costs incurred in the defense of the DOJ Investigation" if Mr. Rice obtains approval from this Court).

The third factor is "impairment of the interest." Where an individual's interest "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." *Berg*, 268 F.3d at 822. Mr. Rice, the Individual Defendants, and the Receiver all have competing interests in the Starr Policy; if Mr. Rice is not permitted to intervene, that interest will never be heard.

The fourth factor—whether existing parties adequately protect the movant's interests—is readily dispatched. 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 v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998). As noted above, Mr. Rice, the Individual Defendants, and the Receiver are all vying for the proceeds of the Starr Policy.[1] Their interests on the issue at hand are not aligned insofar as (i) the Individual Defendants will not be arguing for the stay to be lifted for Mr. Rice's benefit; and (ii) the Receiver will not be arguing for the same application and interpretation of the Priority of Payment clause as Mr. Rice.

If the Court concludes that Mr. Rice is not entitled to the intervene as of right, he should be allowed to intervene permissively. Under Rule 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." Permissive intervention is appropriate where the moving party "meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). All three factors are satisfied here. The Court should thus exercise its discretion and permit Mr. Rice to intervene for the limited purpose of seeking relief from the stay.

[1] Mr. Rice acknowledges that the Receiver has asserted that the Starr Policy and other policies issued to Aequitas provide for payment of defense costs in addition to the applicable indemnity limit. That assertion, if it prevails, could affect the apparent dispute over the Priority of Payments term. However, the Court should not delay ruling on the instant motion on grounds that the limits issue is not yet decided because Mr. Rice is actively defending against a federal criminal investigation without the benefit of insurance proceeds. Further, given the amount of the Investor Settlement and the total indemnity limits, which figure is disputed, the insurers may contend that a ruling that defense costs must be paid in addition to those limits will not moot the dispute over the operation of the Priority of Payments term.

5. This Court should lift the stay to permit Starr to begin paying for Mr. Rice's defense costs, just as Starr has been doing for other individual defendants.

5.1. The Starr Policy indisputably covers all of Mr. Rice's defense costs in connection with the investigation by the United States Attorney's office.

On April 14, 2016, the Court entered an Order Appointing Receiver and froze the assets of the Receivership Entity ("Receivership Order"). Dkt. 156. Since then, several orders have been entered—stipulated and otherwise—granting limited relief from the Receivership Order to permit certain insurers to pay defense costs to the Individual Defendants and to Olaf Janke, the former CFO of Aequitas Holdings, LLC. *See, e.g.*, Dkts. 185, 435, 551, 646, and 660.

The two most recent of these orders, Dkts. 646 and 660, have permitted the Individual Defendants to access the Starr Policy. This Court, based on the parties' stipulation, found:

> 1. Starr issued the Starr Policy for the Policy Period of July l, 2014 to July 1, 2015, subsequently extended to November 1, 2015, with limits of liability in the amount of $5 million, as set forth in the Starr Policy;
>
> 2. The Starr Policy provides coverage for "Claim(s)," including Claims made by governmental entities (such as the Investigation and Litigation) against Insured Persons (such as the Individual Defendants) under the Policy's Insuring Agreement A, as set forth in the Catlin Policy, which is incorporated by reference into the Starr Policy[.]

Dkt. 660 at 5. These findings apply with equal force to Mr. Rice. He is similarly situated and entitled to coverage for his defense costs incurred in connection with the recent investigation initiated by the United States Attorney's Office.

Just as the Starr Policy indisputably provides coverage for claims made by governmental entities against the Individual Defendants under Insuring Agreement A, so too does it provide coverage for the claims made by the United States Attorney's Office against Mr. Rice. Starr does not dispute this. *See* Clifford Decl., Ex. C at 1 (conditionally accepting the duty to defend Mr. Rice because "the DOJ Letter implicates coverage under [Starr's] Excess Policy"); *Bresee Homes, Inc. v. Farmers Ins. Exch.*, 353 Or. 112, 117 (2012) (holding that, for the duty to defend, "the key question is whether the court can reasonably interpret the allegations to include an incident or injury that falls within the coverage of the policy"); *Abrams v. Gen. Star Indem. Co.*, 335 Or. 392, 400 (2003) (holding that if a complaint "contains allegations of covered conduct" then "the insurer has a duty to defend, even if the complaint also includes allegations of excluded conduct").

Neither the Receiver nor the Individual Defendants can or should reasonably dispute this. *See* Dkt. 659 (stipulating that Starr's policy "provides coverage for "Claim(s)," including Claims made by governmental entities (such as the Investigation and Litigation) against Insured Persons (such as the Individual Defendants) under the Policy's Insuring Agreement A"). And this Court has impliedly recognized the same:

> For the foregoing reasons, I find that good grounds do not exist for thwarting the individual defendants' legitimate expectation that their insurers will cover their attorney fees and costs reasonably incurred in the course of defending this action. The asset freeze is therefore lifted to the limited extent necessary to permit Forge [the insurer providing coverage in a layer before Starr's excess coverage] to pay the reasonably incurred defense costs *of any insured under its policy*.

Dkt. 551 at 11 (emphasis added).

5.2. Starr's "Priority of Payments" clause mandates payment of Mr. Rice's defense costs *before* any payment for the Investor Settlement on behalf of Aequitas.

The Starr Policy incorporates the Priority of Payments clause in the underlying Catlin Policy. Dkt. 551 at 8; Clifford Decl., Ex. E. Under this provision, individual insureds are explicitly preferred as to the order of defense and liability payments to entity insureds when the policy's limits are potentially exceeded:

> C. Priority of Payments
>
> 1. If **Loss** is incurred that exceeds the remaining Limit of Liability for this Policy, the **Insurer** shall pay Loss under **Insuring Agreement A**. *before paying any other **Loss***.

Clifford Decl.; Ex. D at 30 (italics added). "Insuring Agreement A" provides coverage for individual defendants like Mr. Rice for "Insured Person Liability." *Id*. at 13. Another coverage part, "Insuring Agreement C" covers "Insured Organization Liability" for entities covered under the Starr policy. *Id*. The Priority of Payments clause, consistent with the fundamental purpose of Directors and Officers insurance, unambiguously gives priority to Starr's payments to individual insureds over its payments to "Insured Organizations" as entities.

This priority includes all defense costs throughout the life a claim for individual insureds once Starr assumes its duty to defend those insureds. Under the policy, "Loss" means "means **Defense Costs**, compensatory and other damages, settlements, judgments, pre- and post-judgment interest, and legal fees and costs awarded pursuant to judgments and appeals." *Id*. at 20. "Defense Costs," in turn, means all of an insured's defense costs and attorney's fees throughout the defense of a claim, including any appeals:

> "**Defense Costs**" means reasonable and necessary fees and expenses incurred in the defense or appeal of a Claim, including **Extradition Costs**. **Defense Costs** shall include the costs of any appeal, attachment or similar bond, provided that the **Insurer** shall have no obligation to issue such bond. **Defense Costs** shall not include any compensation, benefit expenses, or overhead of any **Insureds**.

Id. at 17. Critically, Starr's obligation to first pay Mr. Rice's attorney's fees includes everything "incurred in the defense or appeal of a Claim," which necessarily includes Defense Costs an insured will have to pay, but that have not yet been incurred to defense counsel until a case (or investigation) is completed. Stated another way, there is no requirement that Mr. Rice win some kind of race with "Organization" insureds in submitting claims for payment to Starr. The Priority of Payments clause guarantees that individual insureds like Mr. Rice will have their defense paid for by Starr for the *entirety* of the "defense or appeal" of claims against them.

The Receiver will apparently argue a mistaken and unsupportable view of the Priority of Payments clause that would permit Starr to first make payments under "Insuring Agreement C" that would deplete every remaining dollar of Starr's $5 million limit, leaving Mr. Rice and any other individual defendant with nothing of the coverage promised under Starr's policy. The Receiver will apparently argue that Starr must pay as much of the Investor Settlement as remains within limits because the Receivership Entity first incurred this Loss by agreeing to the settlement. But this is not how the Priority of Payments works.

The provision, once in play, obligates Starr to first "pay Loss under Insuring Agreement A" before paying any Loss under Insuring Agreement C (or any other coverage part, for that matter). The lack of a modifier before "Loss" here necessarily means that it refers to the entire "Loss," not just some *portion* of such a "Loss" already billed in the middle of the defense of claim (and "Loss," by definition, includes all "Defense Costs," which means "reasonable and necessary fees and expenses incurred in the defense or appeal of a Claim"). Stated another way, the provision does not obligate Starr to first pay only any "*present*, *owing* Loss" to the individual insured and then pay other present, owing Losses to other Organization insureds, including under the disfavored-in-priority Insuring Agreement C. Instead, the "Loss" incurred by the Investor Settlement merely triggered the application of the "Priority" clause. The clause plainly does not provide that Losses are paid on a first-come-first-served basis. It is just the opposite: when incurred Loss would exceed Starr's coverage limit, the clause prioritizes payments to individual insureds such as Mr. Rice, no matter when he actually incurs covered defense costs (or liability on a settlement or judgment).

Adopting the Receiver's view requires adding language to the Starr Policy, which is flatly impermissible under Oregon law. *See Am. States Ins. Co. v. PIH Beaverton LLC*, 2016 WL 3473349, at *4 (D. Or. May 3, 2016) ("The Court simply cannot read a provision into the policy that does not exist") (citing *Bergen v. Grinnell Mut. Reinsurance Co.*, 946 F Supp 2d 867, 873 (D Minn 2013) with approval); *Colony Ins. Co. v. Victory Constr. LLC*, 239 F. Supp. 3d 1279, 1283 (D. Or. 2017) ("interpretation of an insurance policy is a question of law that is confined to the four corners of the policy"); *Nw. Pipe Co. v. RLI Ins. Co.*, 734 F Supp 2d 1122, 1130 (D. Or. 2010), *adh'd to on recons*, 09-CV-1126-PK, 2010 WL 11519493 (D. Or. Nov 19, 2010) (noting that "when interpreting an insurance policy, the Court must 'ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted'").

Case law supports this result. While Mr. Rice was unable to locate any decisions construing the precise Priority of Payments language in the Starr Policy, what clearly emerges from related precedent is (i) the mandate to adhere to the contractual language, and (ii) the primacy of individual insureds over organizational insureds in the context of D&O policies. Instructive is *In re MF Glob. Holdings Ltd.*, 469 B.R. 177 (Bankr. S.D.N.Y. 2012):

> The parties are bound by the contractual provisions of the policy. The Debtors' interest in the policy is limited by its contractual provisions including a priority advancement and payment obligations contained in those policies. The Court cannot rewrite the provisions of the contract. […] In this case, the Priority of Payment provisions cannot be excised because doing so would rewrite the Specialty Policies and expand the Debtors' rights under them. The Individual Insureds' rights are clearly delineated in the Specialty Policies, and the Court cannot modify those rights.

Id. at 193 (internal citation omitted). The same sentiment appears in *S.E.C. v. Morriss*, 2012 WL 1605225 (E.D. Mo. May 8, 2012):

> [T]he policy includes a priority of payments provision requiring Federal to pay claims under Insuring Clause 1 (providing coverage to an insured individual) before claims under any other insuring clause, including those of the organization. As a result, as a matter of contract, any claim that the receiver may have for defense costs is subordinate to the coverage for Morriss and any other insured persons under Insuring Clause 1. Similarly, Federal is required to advance defense costs on a current basis without regard to the potential for other future payment obligations. Given these two provisions of the insurance policy, the investment entities' claims to the proceeds do not take priority over those of Morriss or other directors.

Id. at *4. *See also In re Petters Co.*, 419 B.R. 369, 376 (Bankr. D. Minn. 2009) (recognizing that a "first-come, first-served" distribution of insurance policy proceeds can be "restrained" and "controlled" by the terms of the policy).

These holdings make perfect sense when one considers the primary purpose of D&O insurance. As the name implies, first and foremost D&O insurance protects individual directors and officers, not the entity they served:

> D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose. There is an important distinction between the individual liability and the reimbursement portions of a D&O policy. The liability portion of the policy provides coverage directly to officers and directors, insuring the individuals from personal loss for claims that are not indemnified by the corporation. Unlike an ordinary liability insurance policy, in which a corporate purchaser obtains primary protection from lawsuits, a corporation does not enjoy direct coverage under a D&O policy. It is insured indirectly for its indemnification obligations. In essence and at its core, a D&O policy remains a safeguard of officer and director interest and not a vehicle for corporate protection.

In re CyberMedica, Inc., 280 B.R. 12, 16–17 (Bankr. D. Mass. 2002) (citation omitted). *See also In re TierOne Corp.*, 2012 WL 4513554, at *3 (Bankr. D. Neb. Oct. 2, 2012) ("The directors and officers have a right to make claims under the policies and to receive payment of the policy proceeds to the exclusion of the bankruptcy estate since they are the insureds who are first in line."); *In re Nat'l Century Fin. Enterprises, Inc.*, 2005 WL 6242169, at *9 (Bankr. S.D. Ohio Jan. 10, 2005) ("the actual intent of D & O insurance policies … [is] primarily for the benefit of directors and officers").

The Receiver would have this essential purpose turned on its head, with the "Organization" insured taking priority over the individual directors and officers because the entity agreed to pay its arguably covered Loss first. This would be particularly unjust in Mr. Rice's case because the order in which Loss was incurred is simply a matter of chance: the government has been investigating the Aequitas entities for many years, but it elected to wait until April 2019—after the Receiver had entered into the Investor Settlement—to send a target letter to Mr. Rice. Mr. Rice should not be denied access to his bargained-for defense under the Starr Policy in these circumstances.

Accordingly, based on the plain language of the Starr Policy, the stay should be lifted to permit Starr to pay Mr. Rice's entire Loss (including all of his Defense Costs). This Court should find that, based on the Priority of Payments clause in Starr's policy, Mr. Rice's Loss must be paid first and, if there are funds remaining after Mr. Rice's Loss is paid, and after whatever additional Loss the Individual Defendants incur, then—and only then—is the Receiver potentially entitled to be paid by Starr for payment of the Investor Settlement under the second-in-line coverage for Loss under Insuring Agreement C.

5.3. Equity dictates that coverage for Mr. Rice's liability for defense costs be prioritized over the Investor Settlement.

Yet more reasons support the conclusion that Mr. Rice's defense costs should be paid by Starr before the Investor Settlement exhausts the remaining coverage limit. First, Mr. Rice tendered his defense to the Receiver based on Aequitas's contractual obligation to indemnify and advance defense costs to Mr. Rice, but the Receiver responded by stating that Mr. Rice's attorney fees "will not be paid from the assets of the receivership estate." Calfo Decl., Exs. A and B. The Receiver then referred Mr. Rice to the D&O policy at issue in this motion. *Id.*, Ex. B. It is unfair for the Receiver to refuse to indemnify Mr. Rice, tell him to look to insurance, and then claim priority over that very same insurance with a claim for payment that would leave absolutely nothing for Mr. Rice.

Second, Starr disputes whether the Starr Policy covers the Investor Settlement, whereas there is no dispute that Mr. Rice's Defense Costs are a covered Loss. There are two separate, pending declaratory judgment actions in which the dispute over coverage for the Investor Settlement will be decided. Starr's denial of liability in those actions renders the Receiver's claim to the proceeds of the Starr Policy uncertain and hypothetical. By contrast, Mr. Rice's claim to Defense Costs is concrete and immediate. Moreover, it will take many months, if not years, before the coverage dispute between Starr and the Receiver is resolved. Were the Court to adopt the Receiver's interpretation of the Priority of Payments provision and preclude Starr from paying Mr. Rice's defense costs because of the mere possibility that Starr will eventually have to pay some portion of the Investor Settlement, Mr. Rice will be severely prejudiced because he will be required to fund his entire defense out of his own pocket (or proceed without representation if his Defense Costs outstrip his ability to pay) while he waits for the litigation between Starr and the Receiver to run its course. This harm, including the risk to Mr. Rice's liberty and the very real possibility of financial ruin just to defend himself, is precisely what D&O liability insurance is designed to avoid.

Consider again *S.E.C. v. Morriss*. Citing one of "the few cases addressing D&O proceeds in the context of a receivership," the *Morriss* court observed:

> The receiver in [*S.E.C. v. Stanford Int'l Bank, Ltd.,* 3:09–CV–298–N (N.D.Tex. Oct. 9, 2009)] argued that allowing the insurer to pay defense costs would decrease coverage dollars for possible distribution to defrauded investors. Although a primary purpose of receivership was to redress injury to the investors, the court nonetheless concluded that it was appropriate to permit payment of defense costs because the receivership's claim to the policy proceeds was "hypothetical" and "speculative." By contrast, denying the directors and officers coverage would expose them to a real and immediate harm—the inability to defend themselves in civil actions in which they did not have the right to appointed counsel.

Id. at *4. Likewise, in *In re Locateplus Holdings Corp.*, 2011 WL 5240279 (Bankr. D. Mass. Oct. 31, 2011) the court wrote:

> LPHC [the entity] purchased the policy for the benefit of its directors and officers, one of whom was represented by GT [the law firm Greenberg Traurig]. The policy expressly states that purpose and provides that coverage of the defense costs of directors and officers has priority over coverage of loss sustained by LPHC. Even assuming LPHC has an interest in the proceeds owing to the pendency of the civil action commenced by the Securities and Exchange Commission against it, that action is stayed. Absent relief from the automatic stay, GT would be substantially and irreparably harmed as payment of fees and expenses for work it performed in reliance upon Coverage A would be exceedingly problematic.

Id. at *3.

5.4. Equity also dictates that Mr. Rice's defense-cost payments be prioritized over future defense-cost payments to the individual defendants.

The $5 million Catlin and Forge Policies have been exhausted by the payment of Defense Costs incurred by the Individual Defendants. Dkt. 660 at 3. This means that defendants Jesenik, Oliver, and Gillis (and, apparently, Janke) have collectively spent more than $10 million in Defense Costs. These Individual Defendants have benefited financially, personally, and legally from that $10+ million insofar as all "have reached tentative settlements with the SEC of the SEC Enforcement Action." *Id*. at 4. In light of these benefits, and the fact of the tentative settlements, it is only fair that Mr. Rice's Defense Costs take priority over whatever additional Defense Costs the Individual Defendants might incur. Mr. Rice, like the Individual Defendants, is an Insured under the Catlin, Forge, and Starr Policies, yet he has enjoyed no benefits of those Policies to date.

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6. Conclusion

The Priority of Payments provision commands that Mr. Rice's defenses costs be paid before the Receiver's Loss (the Investor Settlement). The Court should permit Mr. Rice to intervene in this action, and then find that the Starr Policy, according to its plain meaning and purpose to protect directors and officers like Mr. Rice, requires that Starr must pay Mr. Rice's reasonable and necessary Defense Costs before making any payment towards the Investor Settlement.

Dated: August 7, 2019

s/ Dwain M. Clifford
Dwain M. Clifford, OSB 025074
Franklin D. Cordell (*pro hac vice* pending)
Greg D. Pendleton (*pro hac vice* pending)

Attorneys for Intervenor Brian Rice

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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: August 7, 2019

s/ Dwain M. Clifford
Dwain M. Clifford, OSB 025074
Attorneys for Intervenor Brian Rice