Troy D. Greenfield, OSB #892534
Email: tgreenfield@schwabe.com
Alex I. Poust, OSB #925155
Email: apoust@schwabe.com
Lawrence R. Ream (Admitted *Pro Hac Vice)*
Email: lream@schwabe.com
Schwabe, Williamson & Wyatt, P.C.
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981
Facsimile: 503.796.2900

Stanley H. Shure (Admitted *Pro Hac Vice*)
Email: sshure@shurelaw.com
Law Offices of Stanley H. Shure
2355 Westwood Blvd. #374
Los Angeles, CA 90064
Telephone: 310.984.6945
Facsimile: 310. 984.6945

ATTORNEYS FOR RECEIVER FOR DEFENDANTS AEQUITAS MANAGEMENT, LLC; AEQUITAS HOLDINGS, LLC; AEQUITAS COMMERCIAL FINANCE, LLC; AEQUITAS CAPITAL MANAGEMENT, INC.; AEQUITAS INVESTMENT MANAGEMENT, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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.

No. 3:16-cv-00438-JR

RECEIVERSHIP ENTITY'S OPPOSITION TO ANDREW MACRITCHIE'S MOTION TO INTERVENE AND FOR LIMITED RELIEF FROM RECEIVERSHIP ORDER TO PERMIT PAYMENT OF LEGAL FEES AND EXPENSES

Request for Oral Argument

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Non-party Andrew MacRitchie's ("MacRitchie") Motion to Intervene and For Limited Relief from Receivership Order to Permit Payment of Legal Fees and Expenses (the "Motion") (Dkt. 721) asks this Court to allow Starr Indemnity & Liability Company ("Starr") to pay his Defense Costs incurred in connection with their defense of the action entitled *Securities And Exchange Commission v. Aequitas Management, LLC, et.al.*, (the "*SEC* Action"). (Dkt. 1). As discussed below, MacRitchie's Motion should be denied for a number of different reasons, some of which are articulated below.

First, MacRitchie, in his factually and legally misleading Motion, seeks to "jump ahead" of the Receivership Entity – to fund his defense of a DOJ Investigation regarding his culpability as a member of Aequitas's management personnel in defrauding Aequitas' Investors – as to the exact same Starr policy proceeds that the Receivership Entity is seeking recovery of in the insurance coverage action currently pending before your honor in that certain action entitled *Ronald F. Greenspan, in his capacity as Court-Appointed Receiver for the Receivership Entity v. Catlin Specialty Insurance Company, et. al*, Oregon District Court Case No. 3:19-cv-00817-JR ("Receivership Coverage Action). Essentially, MacRitchie in his Motion is trying to obtain a "quick" ruling from this court that he is entitled to policy proceeds (which this court previously ruled is property of the Receivership Entity's estate (Dkt. 551) before the Receivership has the opportunity to adjudicate its right to obtain those same policy proceeds in the Receivership Coverage Action, which overlap with certain coverage defenses raised by Starr in connection with the Insurers' Declaratory Relief.[1]

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[1] The Insurers' Declaratory Relief Action refers to that certain lawsuit entitled *Forge Underwriting Limited et al. v. Ronald F. Greenspan, in his capacity as Court-Appointed Receiver for the Receivership Entity, et al.*, Oregon District Court Case No. 3:19-cv-00810-JR, in which Starr is one of the named plaintiffs.

One can readily infer that MacRitchie's failure to mention in his Motion the existence of the Receivership Entity's competing claim for the same Starr policy proceeds was not an inadvertent oversight.[2]

Second, one also imagines that MacRitchie, when faced with evidence of the Receivership Entity's competing claim in this Response, may then advance arguments in his reply for the "first" time asserting "new" coverage defenses challenging the merits of Receivership Entity's competing claim and seeking – in this summary proceeding – a ruling on the merits regarding that claim's validity. This raises at the very least "fairness" let alone due process issues.

Third, there is an absence of any actual evidence, such as relevant insurance policies and a copy of the April 23, 2019 letter the Department of Justice sent to MacRitchie ("DOJ Letter"), from which one could determine whether the DOJ Letter received by MacRitchie actually qualifies as a "Claim" under the Starr Policy. The May 17, 2019 "reservation of rights" letter from Bailey Cavalieri, Starr's counsel, for example, is devoid of any analysis whatsoever regarding whether the DOJ Letter – which refers to MacRitchie as being a "subject," not a "target" of the DOJ Investigation regarding Aequitas - qualifies as a "Claim".[3]

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[2] For example, Robert Knuts, one of MacRitchie's counsel had a detailed discussion with the Receiver's coverage counsel about the Receiver's competing claim and how, if it was determined to be covered, it would as a practical matter defeat coverage for MacRitchie's claim. The discussions with Knuts also included an explanation from the Receivership's counsel about the harm the Receivership Estate would sustain if MacRitchie were able to obtain a ruling in his favor before the Receivership Entity's competing claim was adjudicated.

[3] The definition of "Claim" as it applies to investigations is a narrowly drafted one, triggered by, *inter alia*, an Insured's receipt of a formal orders of investigation, a "Wells Notice", a subpoena or a "target" letter. The DOJ Letter, based upon the "hearsay" description of it contained in Starr's May 17, 2019 reservation of rights letter, does not appear to qualify as a "Claim".

Fourth, MacRitchie is seeking in his Motion to recover attorney's fees incurred prior to the DOJ Letter/DOJ Investigation for which Starr says it will pay, with no evidence from any carrier – let alone Starr --- this is covered Loss.

Finally, the Receivership Entity, in opposing the Motion, is not seeking to prevent MacRitchie from having his "day in court" or doing so on a relatively expedited basis. The Receivership Entity, however, wants to do so in an orderly and comprehensive manner involving all the competing claims seeking coverage under the Starr 2014/2015 policy[4], Starr and the other insurers, and Catlin and Forge (which issued 2014/2015 polices based upon the potential that one or both of those policies could be determined not to be exhausted and still have a continuing obligation to pay defense costs).

The Receivership Entity, in conjunction with the insurers in the Insurers Declaratory Relief Action, are proposing that the Insurers' Declaratory Relief Action and the Receiver's Coverage Action be consolidated, an early scheduling conference be set with the court, and, in conjunction therewith, an expedited briefing schedule set so that the Receivership Entity's claim for coverage under the Starr policy, Starr's coverage defenses, and the competing claims of individual insureds for the same Starr proceeds can all be expeditiously heard and a determination(s) made whether the Receivership Entity or the individual insureds are entitled to receive the remaining $4.6 million of limits of liability left in the Starr 2014/2015 Policy.

The Receivership Entity now turns to a discussion of the relevant background facts.

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[4] The competing claims for the Starr policy proceeds include not only this Motion, but a recently filed motion to intervene and lift the receivership stay brought by Brian Rice (Dkt. 732). The Receivership Entity is also informed and believes, based upon emails received from counsel for Robert Jesenik and Scott Gillis, that they intend to bring motions to lift the receivership stay and also seek the remaining proceeds of the Starr Policy. Other individuals, such as counsel for Olaf Janke, have asserted they are also considering bringing motions to lift the stay.

II.
RELEVANT BACKGROUND FACTS

A. MacRitchie's Counsel Knew About the Receiver's Competing Coverage Claim When He Brought His Motion

Stan Shure has had extensive in-depth conversations with Roberts Knuts, counsel for Andrew MacRitchie, involving the Receivership Entity's coverage position as it pertains to the Starr 2014/2015 policy and, in particular, how it would adversely impact MacRitchie's competing claim for coverage under the same Starr policy. During the initial conversation, Shure told Knuts: (i) about the existence of the Receivership Coverage Action and the assertions made therein that Starr, *inter alia*, breached its 2014/2015 policy by refusing to pay the limits of liability of that policy to the Receivership Entity (ii) that the Receivership Entity had entered into a $30 million settlement with the Investors of the Investor Claims against the Receivership Entity in early February 2019 and that the settlement was referenced in the Receivership Coverage Action; (iii) about the Receivership Entity's position that its settlement with the Investors is a Loss covered by the Starr Policy; (iv) that such Loss exhausted the entire remaining Starr policy proceeds; (v) that such Loss was not subject to any "Priority of Payment" provision argument by MacRitchie because, at the time it was incurred, there was no covered Loss sustained by MacRitchie that would have priority over the Receivership Entity's Loss; and (vi) therefore there was no policy proceeds remaining in the Starr 2014/2015 policy for any Loss MacRitchie was seeking from Starr in connection with the DOJ Investigation. Shure also mentioned the existence of Judge Papak's prior ruling addressing priority-of-payment provisions and that the D&O policy proceeds were property of the Receivership estate and could be found in the "docket" of the SEC Civil Action, and how a review of the various pleading involving that ruling showed how extensively the issues were litigated. Shure also discussed the harm that the Receivership Estate would sustain if individual insureds, such as MacRitchie, were allowed to access and deplete Starr's limits of liability for its 2014/2015 policy before the Receivership could have its coverage position in connection therewith were adjudicated. Finally, Shure also

mentioned that, based upon the Receivership's position as articulated in the Receivership Coverage Action regarding the Catlin and Forge policies, those policies would have an obligation to continue to provide defense costs to insured persons, such as MacRitchie.

Shure's second conversation with MacRitchie followed a formal request by Knuts to have a meet and confer in connection with a motion MacRitchie was contemplating to intervene and lift the stay associated with the receivership order to access the Starr 2014/2015 policy proceeds to pay legal fees incurred by MacRitchie in connection with the DOJ's investigation of MacRitchie. When Shure pressed Knuts about the particulars of MacRitchie's position regarding the Receivership Entity's competing coverage claim regarding the 2014/2015 Starr policy proceeds, Knuts answered each time that "he disagreed" albeit without any explanation regarding the bases of the disagreement.

B. <u>The Receivership Incurred $30 Million in Loss Since The Last Stipulation</u>

The instant Motion is predicated upon MacRitchie's assertion that, because other individual insureds affiliated with Aequitas management previously accessed "D&O" policy proceeds from the policies making up the 2014/2015 coverage tower (Catlin, Forge and Starr), he should also be allowed to access the remaining policy proceeds (limits of liability), contained in the 2014/2015 Starr policy. The Motion, however, completely ignores that, since the fall of 2018, which is the last time any individual insureds accessed 2014/2015 policy-year policy proceeds, the Receivership Entity entered into a $30 million settlement as of February 8, 2019 with the former Aequitas Investors settling the Investor Claims against the Receivership. (*See* Shure Decl., Exhibit 1). The Motion also ignores that Starr, is obligated under its policy to pay Loss, defined to include a "settlement", sustained by its Insureds, subject to its policy limits, and that the subject $30 million settlement is more than enough to fully exhaust Starr's remaining limits, estimated to be approximately in the $4.65 million range, upon the Receivership establishing coverage under the 2014/2015 Starr policy.

The Receivership Entity, based upon conversations between its counsel and counsel for Starr, believes Starr is looking to have an orderly, expedited, and coordinated process for adjudicating the competing claims for the remaining $4.65 million of its 2014/2015 limits of liability. It is the Receivership Entity's understanding that Starr – and perhaps other 2014/2015 insurers such as Forge – will file papers in response to the Motion to this effect.

Separately, the May 17, 2019 reservation of rights letter issued to MacRitchie from Starr's counsel, which is Exhibit 1 to the Declaration of Samuel C. Kaufman in support of the Motion (Dkt # 722), raises a fundamental question about the validity of MacRitchie's assertion that coverage is triggered for him. The April 23, 2019 letter from the DOJ to MacRitchie, as described by Starr at pages 1 and 2 of Exhibit 1, refers to MacRitchie as a "subject" of a DOJ investigation. Starr, in Exhibit 1, fails to undertake any analysis whatsoever whether the April 23, 2019 letter from the DOJ qualifies as a "Claim" under the Starr policy.

This is a ***very*** substantial coverage question based upon definition of "Claim" as it applies to investigations. Nor can this issue be addressed by the Receivership Entity in this Response, as neither the subject April 23, 2019 letter from the DOJ to MacRitchie nor any other material the DOJ may have provided in connection with its April 23, 2019 correspondence has been provided in connection with this Motion.

C. The Court in Connection With Oliver & Gillis And Jesenik's Motions for Relief from Stay Made Certain Rulings Germane to the Current Dispute

Judge Papak's October 23, 2017 Opinion and Order (Dkt. 551) addressed motions brought by the Individual Defendants in the SEC Civil Action to access the policy proceeds contained in the Forge 2014/2015 policy, and it contains at least two rulings highly germane to the instant Motion. First, Judge Papak ruled in his opinion that the D&O policy proceeds are property of the estate (*Id*. at 8.) Second, Judge Papak also correctly ruled that the priority-of-payment provision in the Catlin policy, which applied to the Forge policy, applies only to simultaneously incurred Loss, and that because the Receivership Entity had not yet incurred

Loss, such as a settlement, the priority-of-payment provisions did not apply. (*Id.* at 8-9.) As is described in more detail below, because the $30 million settlement between the Investors and the Receivership Entity qualifies as a Loss and exhausts the remaining $4.6 million Starr limits, and there was no competing Side A Loss, all of Starr's remaining limits are payable solely to the Receivership Entity.

D. The Earliest Loss That MacRitchie is Even Arguably Entitled to Recover Payment for from Starr Could Not Have Occurred Until Sometime After MacRitchie's Receipt of the April 27, 2019 DOJ Letter

The Motion contains a lengthy discussion about legal fees that MacRitchie incurred during the period from February 2016 through March 2019. (Dkt. 721 at 6.). The covered defense costs that Starr indicated in its May 17, 2019 reservation of rights letter that it is willing to pay MacRitchie are limited ***only*** to those legal fees MacRitchie incurs in connection with the DOJ Investigation, which, in turn, was triggered by the April 23, 2019 DOJ letter to MacRitchie. (Dkt. 722, Exh. 1, at 1-2.) Accordingly, the earliest covered legal fees that may be payable by Starr to MacRitchie are those that may have been incurred upon receipt of the April 23, 2019 DOJ Letter, and then only in connection with the DOJ Investigation.

The proposed order MacRitchie submitted in connection with the Motion, however, inappropriately seeks recovery of legal fees (defense costs) incurred significantly beyond those incurred in connection with the DOJ Investigation, stating:

> "IT IS NOW ORDERED that, notwithstanding the Receivership Order, to the extent applicable, the Insurer shall be and is hereby authorized to make payments under the Policy to or for the benefit of Andrew MacRitchie for past and future covered Defense Costs incurred in connection with both the ***SEC Action***[5] and the DOJ Investigation, ***the Litigation and/or other claims***."

(Dkt. # 723, p. 3) (Emphasis added.).

[5] MacRitchie defines "SEC Action" as relating "to both the investigation conducted by the SEC and the subsequent action brought by the SEC . . . ." (Dkt. 723, p. 2)

The only arguably permissible recovery MacRitchie is seeking in the Motion are those for the "DOJ Investigation". The relief MacRitchie actually seeks in the Motion, however, includes legal fees he is not entitled to. This request raises significant adverse inferences as to MacRitchie's honesty as it pertains to these particular matters as well as the Motion in general.

E. The Receivership Coverage Action Seeks Recovery From Starr of The Policy Proceeds of its 2014/2015 Policy

The Receivership Coverage Action seeks recovery from Starr under its 2014/2015 policy for the Loss the Receivership Entity incurred as a consequence of it having entered into the February 8, 2019 settlement with the Investors to settle the Investors' Claims. See Receivership Coverage Action, Second Cause of Action, and pgs. 47-49 therein.[6]

F. The Receivership & The Insurers Are Trying to Put Together a Program to Expeditiously Determine Coverage Under The Starr And Other 2014/2015 Policies And The Individual Insureds Competing Claims

As reflected in the attached declaration of Jason Gauss the Receivership, the Insurers and the individual insureds have been communicating with each other and are attempting to come up a procedure for an orderly and expeditious determination of the competing coverage claims at issue here. Currently, it is contemplated that such a procedure would occur in connection with the two pending coverage actions, which would be consolidated. The parties are also trying to come up with an expedited and streamlined process for determining the validity of these claims and which claim(s) are entitled to access the remaining $4.65 million in remaining limits under the Starr policy.

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[6] Starr's primary coverage defense to the Receivership's claim for coverage under its 2014/2015 policy is its "warranty letter" defense. This defense is asserted in the Insurers' Declaratory Relief Complaint as the Fourth Claim for Relief.

III.
MACRITCHIE'S MOTION SHOULD BE DENIED

A. The Basic Premises Underlying MacRitchie's Motion Does Not Exist

The Motion, as previously referenced, is predicated upon MacRitchie's assertion that, because other individual insureds affiliated with Aequitas management previously accessed "D&O" policy proceeds from the policies making up the 2014/2015 coverage tower (Catlin, Forge and Starr), he should also be allowed to access the remaining policy proceeds (limits of liability), contained in the 2014/2015 Starr policy. The Motion ignored the Receivership's subsequent $30 million settlement and its impact. As discussed hereinbelow the $30 million settlement exhausted the Starr 2014/2015 policy limits before MacRitchie at the earliest incurred any potentially covered legal fees after his receipt of the April 23, 2019 DOJ Letter. Simply put there are no available limits of liability left in the Starr 2014/2015 policy for MacRitchie to access upon the Receivership establishing coverage under the subject Starr policy for the $30 million settlement. Substantial doubts about the validity of MacRitchie's claim for coverage exist that require the Motion be denied until the MacRitchie's, the other individual insureds and Receivership's competing claims are all adjudicated and the priority of those claims to the remaining 2014/2015 Starr policy proceeds determined.

B. MacRitchie Should Have Brought His Motion in Connection With the Two Coverage Actions

MacRitchie also had ample opportunity to bring this Motion in the two coverage actions and thereby obtain a hering whereby all interested parties would have a chance to present their competing coverage claims. For example, pursuant to Federal Rule of Civil Procedure 19, a person must be joined in a proceeding as a party if:

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> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FRCP 19(a)(1).

By filing a motion to lift the stay in the SEC Civil Action, MacRitchie is effectively attempting to make an end-run around the declaratory judgment action initiated by the insurers. In fact, Mr. MacRitchie is both a necessary and a named party in the declaratory judgment action. His attempt to avoid litigating his entitlement to these proceeds in the declaratory judgment action is therefore blatant. There was also nothing preventing MacRitchie from seeking to lift the receivership stay while at the same time joining in the Receivership's Coverage Action, which directly put at issue the Receivership's competing claim seeking recovery of the same 2014/2015 Starr limits of liability.

Because the Receiver asserts rights to the remaining limits of the Starr 2014-15 policy, any request by Mr. MacRitchie implicates the subject matter of the insurance coverage proceedings.[7] FRCP 19(B). In addition, the court cannot accord complete relief in the declaratory judgment action without Mr. MacRitchie because, upon exhaustion of the policies by payment of the Receiver's loss, Mr. MacRitchie may file claims against either the Receiver or the insurers asserting that he is entitled to a portion of the proceeds paid to the Receiver. *See*

[7] The Receiver has not yet filed his response to the declaratory judgment action. However, the Receiver's position regarding the policies may be seen in his breach of contract action brought against the insurers, Case No. 3:19-cv-00817-JR.

Known Litigation Holdings LLC v. Navigators Ins Co, 934 F. Supp. 2d 409, 422 (D. Conn. 2013) (concluding parties are necessary if they may have claims to same loss payment).

C. The Receivership Has a Facially Meritorious Claim for Coverage Under the Starr 2014/2015 Policy That Deserves to Be Adjudicated in Conjunction With MacRitchie And The Other Individual Insureds Competing Claims

The Receivership's claim for coverage under the Starr 2014/2015 policy is a legally valid one that should be fully adjudicated and not ignored to the Receivership's detriment, while the claims for coverage by MacRitchie and others are given preference. A discussion showing that the Receivership's claim for coverage under the Starr 2014/2015 policy has merit follows.

1. *The Settlement Term Sheet Entered Between the Receivership & Investors is a Valid Settlement and Therefore a Loss*

All the essential terms needed for a binding settlement agreement under Oregon law are present in the February 8, 2019 Settlement[8] between the Receivership Entity and the Investors, entitled Settlement Term Sheet ("STS"). Irrespective, the Receivership Entity expects that, in an effort to defeat the Receivership Entity's claims for coverage, Starr, the other insurers, and certain of the individual insureds, including MacRitchie, will assert that the STS is not a binding agreement because it contains references to the preparation of required implementation documents and court approval of them[9] that are material and render the STS unenforceable. The key determination regarding the enforceability of the STS is whether the parties to the STS agreement objectively considered it to be binding. *Logan v. D.W. Sivers Co.*, 343 Or. 339, 349 (2007) (letter-of-intent as to purchase and sale of property as a whole was ***not*** a binding

[8] A February 8, 2019 date is used for the Settlement, as that is the latest date provided for any of signatures.

[9] This involves the preparation of the separate Settlement Agreements with each Investor Group and the referenced court approval of same.

obligation where the parties ***expressly stated*** therein it was not binding, though certain distinct promises contained therein, such as a promise not to solicit or accept other offers for a sixty (60) day period, ***were binding***).

Further, where the essential terms of a settlement agreement were agreed to in a "term sheet" – absent an express communication that a party was not providing its intent to be bound intent – the agreed upon terms are effective immediately, even where extensive subsequent written implementation documentation needs to be drafted. *See Hughes v. Mear*, 189 Or. App. 258, 264-267 (2003); *Dumitrash v. Recontrust Co.*, 2013 U.S. Dist. LEXIS 107252, at *10-*11 (D. Or. July 31, 2013); *In re Marriage of Baldwin*, Ore. App. 203, 207 (2007); *Taylor v. Kaiser Foundation Health Plan*, 2012 U.S. Dist. LEXIS 184796, at *16-*19 (D. Or. Nov. 7, 2012).

Finally, one expects that either Starr, the other insurers, MacRitchie or individual insureds will assert that the condition regarding the approval of the various Investor Settlement Agreements by the court in the SEC Civil Action means the agreement is not enforceable.[10] This issue has not been addressed by Oregon courts. Case law outside of Oregon addressing this issue, however, has found that such settlement agreements were binding ***when they were signed***, irrespective of any subsequent court approval that was contemplated. *Crowley Mar. Corp. v. Fed. Ins. Co.*, No. C 08-00830 SI, 2008 WL 5071118 (N.D. Cal. Dec. 1, 2008), *aff'd*, 373 Fed. Appx. 782 (9th Cir. 2010); *Vigilant Ins. Co. v. Bear Stearns Companies, Inc.*, 10 N.Y.3d 170, 177, 884 N.E.2d 1044 (2008).

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[10] Additionally, fulfilling this condition only goes to the issue of the timing of the payment to the Investors, not the obligation to pay the $30,000,000.

2. *The Receivership's Promise to Pay the Investors $30,000,000 is a Legal Obligation to Pay*

As articulated in the STS, the Receivership Entity promised to pay the Investors $30,000,000 in exchange for Investors providing releases, pursuant to the specific terms articulated in the STS by the parties. The Receivership's promise to pay $30 million to the Investors unequivocally constitutes a "legal obligation to pay" under Oregon law.

Under Oregon law, an insured has a "legal obligation to pay" for purposes of triggering an insurer's obligation to pay on the insured behalf in a liability policy (such as the D&O policies here) the amounts stated in a settlement between its insured and claimants, even where the insured has assigned its rights to collect from the insurer to the claimants the settlement amount, in exchange for a covenant not to execute from the claimants. *Brownstone Homes Condominium Association v. Brownstone Forest Heights, LLC*, 358 Or. 223, 244-246 (2015). Additionally, in reaching its decision, the Oregon Supreme Court also specifically stated that the phrase "legally obligated to pay" as is commonly used in liability policies is, under Oregon law, ambiguous and construed against the insured. *Brownstone, supra*.

As reflected by the Oregon Supreme Court's ruling in *Brownstone*, an insured, pursuant to the terms of a liability policy, has a legal obligation to pay the amount of a settlement even in circumstances where the insured will never have to pay any of the amounts owed out of its own pocket. In contrast, the Receivership Entity here under the STS is obligated to pay $30,000,000 to the Investors, and that promise to pay the Investors qualifies as a legal obligation to pay as that phrase is used in the Insuring Agreement C.

With the last signature of the STS occurring on February 8, 2019, the Receivership Entity had incurred a $30,000,000 **Loss**, as of that date, that triggered its insurers' respective obligations to pay the $30,000,000 up to its policy limits, albeit subject to other possible

coverage defenses. Accordingly, absent the application of some bar to coverage, such as the application of an exclusion, each of the Aequitas insurers (Catlin, Forge, Starr and Underwriters) are "legally obligated to pay" their available limits of liability toward the $30,000,000 the Receivership Entity owes the Investors.

D. Catlin's Priority-of-Payments Provision is Very Narrowly Drafted And Under Oregon Law Does Not Transform The Policy Proceeds Into MacRitchie's or The Other Individual Defendants' Property.

One expects that MacRitchie in his reply may attempt to unreasonably misinterpret the priority-of-payments provision of the Catlin primary policy – which is incorporated up into the Starr excess policy – asserting it provides that all ***potential*** Loss under the 2014-2015 policies (which includes Defense Costs) are solely the property of Insured Persons, to the exclusion of the Receivership Entity. Catlin's Priority-Of-Payments provision says no such thing.

When interpreting insurance provisions under Oregon law, absent a writing to the insurer(s) from the Named Insured (here, Aequitas Holding) stating that all Loss should be first paid to Insured Persons under Coverage A, Insured Persons have priority over Loss under Coverage C, *if, and only if*, their incurred **Loss** under Coverage A exceeds the remaining Limits of Liability. *Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Ore. 464, 469-70 (1992) (if provision is not ambiguous, then policy is interpreted in accordance with that unambiguous meaning). Since Aequitas Holdings never wrote any of the 2014-2015 policy-year insurers telling them to pay Loss under Coverage A first, any priority-of-payments rights MacRitchie and the other individual insured may have are limited in scope to the situation where the ***then*** available Limits of Liability are insufficient to pay all incurred Loss. It is only in such situations that, under the priority-of-payments provisions, incurred Loss under Coverage A is paid first, before any other Loss is paid.[11]

[11] One expects that any cases upon which MacRitchie may cite to in his reply contain priority-of-payments provisions with different, much more broadly written priority-of-payments provisions, that require an insurer to pay individual insureds ahead of corporate entities.

On its face, Catlin's priority-of-payments provision is implicated *if, and only if*, **Loss** is incurred that exceeds the remaining Limits of Liability. *See* Catlin Policy, Section XIII.C.1 ("If **Loss** is incurred that exceeds the remaining Limits of Liability for this Policy, the Insurer shall pay **Loss** under **Insuring Agreement A** before paying any other **Loss**."). The term "incurred," which is not defined in the Policy, commonly means "to become liable or subject to." *White v. Jubitz Corp.*, 345 Or. App. 62 (2008) (quoting Webster's Third New Int'l Dictionary 1146 (unabridged ed. 2002)), *aff'd* 2009 Or. LEXIS 500 (Or. Oct. 15, 2009).

Accordingly, it is only after the combined **Loss** of all insureds (here, **Insured Persons** and **Insured Organizations**, such as Aequitas Holding and its subsidiaries) are liable for **Loss** in excess of a policy's then-existing limits of liability that the priority-of-payments provision even come into play. Here, the priority-of-payment provisions from the Catlin policy incorporated up into the Starr excess are not relevant and have no application because the entire remaining Starr 2014/2015 policy limits of liability were exhausted when the Receivership Entity settled with the Investors for $30 million on February 8, 2019, leaving no remaining limits in the Starr policy available to MacRitchie.

MacRitchie, at the earliest, first incurred covered Loss only upon the receipt of the April 23, 2019 letter from the DOJ. The Receivership Entity, by contrast, incurred covered Loss in the amount of $30,000,000 more than two months earlier on February 8, 2019, in an amount that overwhelmingly exhausts the approximately $4.65 million in limits of liability remaining in the Starr policy. As of April 23, 2019, and thereafter, there were no limits of liability available to MacRitchie.

E. Starr Has Significant Problems With its Primary Coverage Defense the "Warranty Letter"

Starr's primary coverage defense under its 2014/2015 policy, based upon a review of the Insurers Declaratory Relief Action appears to be its assertion that its Warranty Letter Defense applies to and bars coverage for the Loss sustained by the Receivership. Before one even gets to

the merits of its Warranty Letter Defenses, Starr must first establish that it complied with the provisions of ORS 742.013 which requires that in seeking to preclude coverage based upon a misrepresentation or omission made in an application the application must be attached to or indorsed upon the policy. *Brook v. State Farm Mutual*, 195 Or. App. 519, 526-528 (2004) (The term "indorsed upon" means the insurer must reproduce on the policy itself the information contained in the application.)

ORS 742.013 appears to apply to the Starr policies, including its 2014/2015 Policy. The Starr policies the Receivership have in its possession do not have the July 2, 2014 "Warranty Letter" attached to them. Additionally, there are substantial questions about the authenticity and accuracy of the Starr policies attached as exhibits to the Insurers Declaratory Relief Action Complaint. For example, though the Insurers Declaratory Relief Action Complaint alleges that Exhibits C and F are true and correct copies of the respective 2014/2015 and 2015/2016 Starr policies both exhibits contain transmittal cover letters from a Starr underwriter, dated many months after the initial effective date for each policy, and sending electronic copies of those policies to Aequitas' broker, Woodruff Sawyer. Simply put, "transmittal cover letters" are not part of a policy irrespective of what may be alleged.

Additionally, substantial questions exist about the admissibility of the Warranty Letter Defense under ORS 742.016(1) unless Starr can establish that the Warranty Letter was attached to its policies. Questions also about Starr's compliance with ORS 742.046(1) regarding the delivery of policies to the Insured within a reasonable period of time.[12]

[12] There are also a plethora of other legal questions that exist about the Warranty Letter. These questions include but are not limited to the meaning of the words used in the Warranty Letter, what constitute a violation of the Warranty Letter, whether an objective, subjective or mixed standard applies in determining if a violation has occurred and what evidence is germane and can be used by Starr in applying the Warranty Letter.

In summary, substantial questions exist about Starr's ability to successfully prosecute its Warranty Letter Defense and defeat the Receivership's claims for coverage under the 2014/2015 Starr policy.

IV.
CONCLUSION

The Receivership has a meritorious claim for coverage under the Starr 2014/2015 policy that will, as a practical matter, defeat MacRitchie's attempt to access the Starr limits of liability if the Receivership is given the opportunity to fully litigate its claim. This Motion should therefore be denied so that MacRitchie, any other individual insureds seeking to access the Starr 2014/2015 policy limits and the Receivership's claims can all be fully and fairly adjudicated and the priority of those claims properly determined.

Dated this 9th day of August, 2019.

Respectfully submitted,

LAW OFFICES OF STANLEY H. SHURE

s/Stanley H. Shure

Stanley H. Shure (Admitted *Pro Hac Vice*)
Email: sshure@shurelaw.com
Attorneys for the Receiver for Defendants Aequitas Management, LLC, Aequitas Holdings, LLC, Aequitas Commercial Finance, LLC, Aequitas Capital Management, Inc., and Aequitas Investment Management