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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 CORRECTED OPPOSITION TO 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; DECLARATIONS OF STANLEY H. SHURE AND JASON GAUSS

(Request for Oral Argument)

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CASES

I. <u>INTRODUCTION AND SUMMARY OF ARGUMENT</u>

Non-party Brian Rice's ("Rice") Motion to Intervene and for Limited Relief from Stay to Permit Payment of Defense Costs by Starr Indemnity & Liability Company (the "Motion") (Dkt. 732) asks this Court to allow Starr Indemnity & Liability Company ("Starr") to pay his Defense Costs incurred in connection with an April 23, 2019 letter from the United States Attorney's Office (Dkt. 734-1, "DOJ Letter") informing Mr. Rice "of a federal criminal investigation concerning fraud that occurred at Aequitas Commercial Finance and related entities." ("DOJ Investigation")

As discussed herein, Rice's Motion should be denied for the following reasons:

First, Rice claims that because he has allegedly incurred **Loss** in the form of **Defense Costs** that he has and will pay in the future in connection with the DOJ Investigation, the remaining $4.65 million in limits of liability of Starr's 2014 policy are payable solely to him and other similarly situated individual insureds. Rice takes this position despite the undisputed fact that the Receivership Entity already sustained **Loss** (in the form of its February 8, 2019 $30 million settlement of the Investor Claims) months before the DOJ Letter was sent to Rice. (Dkt. 732 at p. 4.) Rice's position is premised almost exclusively upon his interpretation of the "Priority-of-Payments" provision of the underlying Catlin Specialty Insurance Company's ("Catlin") policy (Catlin Policy § XIII),[1] which is incorporated up into the 2014 Starr policy. According to Rice, this provision mandates that payment of all **Loss** be made to individual insureds under **Insuring Agreement A**, irrespective of the presence of any **Loss** sustained by the Receivership Entity.[2] (*Id*.)

Rice's interpretation of the Priority-of-Payments provision is both unreasonable and disingenuous. Rice's Motion references only the *first* paragraph of the Priority-of-Payments

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[1] A copy of Catlin's 2014 policy is attached as an exhibit to the Declaration of Angelo J. Calfo in support of Rice's Motion. (Dkt. 734-4, "Catlin Policy"). Words that are in bold are defined terms found in the various 2014/2015 and 2015/2016 policies, including Catlin's, where they are also set in bold type.

[2] The Catlin 2014 policy provides for payment of **Loss** under three (3) different Insuring Agreements. Insuring Agreement A applies to **Loss** sustained by **Insured Persons** (individual insureds) that is not indemnified by an **Insured Organization(s)**, such as the Receivership Entity here. Insuring Agreement B applies to **Loss** sustained by **Insured Persons** that is indemnified by an **Insured Organization(s)**. Insuring Agreement C applies solely to **Loss** sustained by an **Insured Organization(s)**. (*See infra* at pp. 8-9.)

provision, conveniently ignoring the *second* paragraph of the Priority-of-Payments provision. This was not an inadvertent oversight on Rice's part. The *second* (omitted) paragraph of the Priority-of-Payments provision unambiguously states that **Loss** is payable *only* under Insuring Agreement A *if* the **Named Organization** (here, Aequitas Holdings, LLC) informed the insurer in writing to pay only Insuring Agreement A **Loss** and *not* to pay **Loss** incurred by the **Insured Organization(s)** under Insuring Agreements B and C. Under Rice's interpretation of the *first* paragraph of the Priority-of-Payment provision, however, payment of Insuring Agreement A **Loss** is automatically mandated whenever **Loss** payable under Insuring Agreement B and/or C exists. Rice's interpretation renders the unambiguous language of the *second* paragraph of the Priority-of-Payment provision without force or effect. Thus, Rice's interpretation is unreasonable and cannot be adopted under Oregon law. *See Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or. 464, 473 (1992) (interpretation that creates a meaningless redundancy is unreasonable and will not be adopted.) Rice's silence on the second Priority-of-Payments provision – which undercuts his argument – is quite telling.

Second, even if this Court were constrained to consider only the *first* Priority-of-Payments provision in the Catlin policy in isolation (and it is not), Rice's interpretation of the provision fails because it ignores the plain language in Catlin's policy. On its face, the first Priority-of-Payments provision is applicable only "[i]f **Loss** is *incurred* that exceeds the *remaining Limit of Liability* for this Policy . . . ." Catlin Policy § XIII.C.1 (emphasis added). Yet, Rice concedes for purposes of this Motion that (a) the Receiver incurred **Loss** of $30 million when it entered into a settlement agreement to settle the Investors' Claims ("Investor Settlement"), (b) the Receiver incurred this **Loss** *before* Rice received the April 23, 2019 DOJ Letter (let alone before Rice incurred any allegedly covered **Loss**), (c) the maximum Limit of Liability under the Starr policy is $5 million; and (d) the combined **Loss** incurred by the Receiver and Rice exceed Starr's limit of liability, thus triggering the Priority of Payment provision. (*See* Shure Decl. ¶ 4.) These concessions are fatal to his Motion. By conceding that the Investor Settlement triggered the Priority-of-Payments provision, there is no reason (and Rice offers none) why the Investor Settlement did not, *by itself*, completely exhaust Starr's remaining limits of liability when the Receiver had entered into the settlement on February 8, 2019. Put another way, if the Receiver's $30 million **Loss** for the Investor Settlement counts now, it has counted since February 8, 2019. Since the Receiver's **Loss** was incurred prior to Rice's alleged **Loss**, and the Receiver's **Loss** was large enough by itself to exhaust Starr's remaining limits of liability, it necessarily follows that the first Priority-of-Payments provision is inapplicable. By its terms, the Priority-of-Payments provision is not triggered where (as here) there are no *remaining limits of liability* under the Starr policy.

Third, to the extent Rice argues that Starr is obligated to pay for both his past and *future* defense costs, Rice's argument also ignores the plain language of the Priority-of-Payments provision. This provision is triggered only if, *inter alia*, "**Loss** is *incurred* . . . ." Catlin Policy § XIII.C.1 (emphasis added). Thus, the plain language of the policy refers to **Loss** in the past tense by using the term "incurred." *Casey v. Rotenberg (In re Kenny G. Enters., LLC*, 512 B.R. 628, 634 (C.D. Cal. 2014). There is no obligation under the policy, therefore, to pay for Rice's future **Loss**.

Fourth, there is no equitable basis for prioritizing coverage for Rice's liability for defense costs over the settlement of the Investors' Claims. While Judge Papak previously granted the motions of the individual defendants Robert Jesenik, Brian Oliver, and N. Scott Gillis for relief from the Receivership Order to permit a different insurer (Forge Underwriting) to pay the individual defendants' defense costs (*see* October 23, 2017 Opinion and Order, Dkt. 551), the Receivership Entity had not yet incurred a **Loss** in connection with the Investors' Claims at the time of Judge Papak's ruling. Thus, there were no competing claims for the insurance proceeds almost two years ago. Now that the Receivership Entity has incurred **Loss** by entering into Investor Settlement, Starr is obligated under **Insuring Agreement C** of the Catlin Policy to pay the Receivership Entity's **Loss**. Catlin Policy § I.C ("The **Insurer** shall pay on behalf of an **Insured Organization** all **Loss** which the **Insured Organization** becomes legally obligated to pay resulting from a **Claim** . . . first made against such Insured Organization during the Policy Period

. . . for a Wrongful Act.”). In other words, Rice is not similarly situated to the individual defendants who previously moved for relief. Since there is an express contractual provision covering the Receivership Entity’s **Loss,** there is no basis for equitable relief. *See, e.g., U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 99-100 (2013) (“[I]f the agreement governs, the agreement governs . . . [and] [t]he agreement itself becomes the measure of the parties’ equities”); *Arnett v. Bank of Am.*, 874 F. Supp. 2d 1021, 1035 (D. Or. 2012) (dismissing unjust-enrichment claim because a valid contract covered the services at issue and the defendant admitted to being a party to contract).

Fifth, even if this Court were to find that the Investor Settlement has not exhausted the Starr 2014/15 Policy, Rice has also failed to meet his burden to prove that he has incurred covered **Loss**. For example, the April 23, 2019 DOJ Letter simply notifies Rice that he is a “subject of a federal criminal investigation concerning fraud that occurred at Aequitas Commercial Finance and related entities.” (*See* Dkt. 734-1). Rice has not cited to any provision in the Catlin policy, however, that identifies such a letter as a **Claim**. Indeed, Section III.F.5 of the policy mentions only such steps as a “Wells Notice, subpoena or ‘target’ letter . . ., formal order of investigation or other formal investigative document . . . .” And the Catlin policy contains a “**Delete Informal Investigations Coverage Endorsement**,” which provides in relevant part that “it is hereby understood and agreed that Section II. **COVERAGE EXTENSIONS**, A. **Informal Investigations Coverage**, of the Policy is deleted in its entirety.” (Dkt. 734-4 at p. 35 of 42.) Moreover, Rice has not established the reasonableness and necessity of the alleged defense costs he has incurred. Because it is Rice’s burden to prove he has incurred covered loss, and he has failed to do so, the Court should deny the Motion on this basis as well.[3]

[3] Rice also argues that equity dictates that his defense-cost payments be prioritized over future defense-costs payments to the individual defendants. (Motion at 15.) The Receiver takes no position at this time on this specific argument. As for Rice’s decision to file his Motion in the instant SEC Enforcement Action, as opposed to the Receiver’s coverage action (Case No. 3:19-cv-00817-JR), the Receiver hereby incorporates by reference his arguments against MacRitchie’s decision to file his Motion to Intervene in the SEC Enforcement Action. (*See* Dkt. 745 at pp. 9-10.) Rice should have filed his Motion in the Receiver’s coverage action.

Finally, in opposing Rice's Motion, the Receivership Entity is not seeking to prevent him from having his "day in court" or doing so on a relatively expedited basis. However, the Receivership Entity wants to proceed in an orderly and comprehensive manner involving all the competing claims seeking coverage under the Starr 2014/2015 policy,[4] as well as the other insurers (Catlin and Forge) that issued 2014/2015 polices.[5]

The Receivership Entity, in conjunction with the insurers in the Insurers' Declaratory Relief Action, have proposed that the Insurers' Declaratory Relief Action and the Receivership Entity'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 regarding whether the Receivership Entity or the individual insureds are entitled to receive the remaining $4.65 million of limits of liability left in the Starr 2014/2015 Policy. (*See* Declaration of Jason Gauss ¶¶ 2-6.)

II. <u>THE RECEIVERSHIP ENTITY NOW TURNS TO A DISCUSSION OF THE RELEVANT BACKGROUND FACTS RELEVANT BACKGROUND FACTS</u>

A. The Receivership Entity Incurred $30 Million in Loss since the Last Stipulation

Rice's Motion is predicated in part on his 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

[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 Andrew MacRitchie. (Dkt. No. 745.) Olaf Janke has filed a joinder to both the MacRitchie and Rice Motions. (Dkt. No. 748.) The Receivership Entity is also informed and believes that individual defendants Robert Jesenik and N. Scott Gillis intend to bring additional motions to lift the receivership stay and also seek the remaining proceeds of the Starr Policy.

[5] The Receivership Entity has asserted in its related coverage action, Case No. 3:19-cv-00817-JR, that Catlin's and Forge's 2014-2015 policies might not be exhausted and that those insurers may still have continuing obligations to pay defense costs.

allowed to access the remaining policy proceeds (limits of liability), contained in the 2014/2015 Starr policy. However, Rice's Motion completely ignores that, since the fall of 2018 (Dkt. No. 660), 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 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. (*See* Dkt. No. 744 (Starr's Statement Regarding MacRitchie Motion for Limited Relief.)

Separately, the June 24, 2019 reservation of rights letter issued to Rice from Starr's counsel, which is an exhibit to the Declaration of Angelo J. Calfo (*see* Dkt. No. 734-3) in support of the Motion, raises a fundamental question about the validity of Rice's assertion that coverage is triggered for him. The April 23, 2019 letter from the U.S. Attorney's Office to Rice (Dkt. No. 734-2) refers to Rice as a "subject" of a DOJ investigation. However, Starr 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 the definition of "Claim," as it applies to investigations and is one that counsel for Rice agreed would, if required, be adjudicated along with a number of other issues in connection with expedited hearings anticipated in connection with the consolidation of the two coverage actions and the competing claims for the

Starr 2014/2015 policy limits between the Receivership Entity, on the one hand, and Rice, MacRitchie, Janke and other individual insureds, on the other hand.[6]

B. The Court, in Connection with the Motions of Jesenik, Oliver, and Gillis for Relief from Stay, Made Certain Rulings Germane to the Rice's Motion

Judge Papak's October 23, 2017 Opinion (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 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-Payments provision did not apply. (*Id*. at 8-9.) As described 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.

C. 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.[7]

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[6] For example, with respect to whether April 23, 2019 DOJ Letter qualifies as a "Claim" an insured, such as Rice, has the burden of establishing that a "Claim" as defined in the policy exists. The Receivership Entity does not have the benefit at this time of any articulation by Rice of its position regarding how the April 23, 2019 DOJ Letter qualifies as a Claim.

[7] Starr's primary coverage defense to the Receivership Entity's claim for coverage under its 2014/2015 policy is its "warranty letter" defense. This defense is asserted in the related Insurers' Declaratory Relief Complaint (Case 3:19-cv-00810-JR) as the Fourth Claim for Relief.

D. The Receivership Entity & the Insurers Are Trying to Put Together an Orderly Procedure 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 Entity, along with 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.

III. <u>RELEVANT POLICY PROVISIONS</u>

Catlin's 2014/2015 Private Equity Management Liability Insurance policy, the terms of which are incorporated up into the Starr 2014/2015 second-level excess policy, contains various terms and conditions that are relevant to Rice's Motion.

Specifically, the "Named Insured" in the Catlin 2014/2015 Policy is Aequitas Holdings, LLC. The Catlin policy also provides coverage under three (3) different Insuring Agreements. They are Insuring Agreements A, B, and C set forth below.

I. Insuring Agreements

A. **Insured Person Liability**

> The **Insurer** shall pay on behalf of any **Insured Person** all **Loss** for which the **Insured Organization** has not indemnified such **Insured Person**, resulting from a **Claim** . . . first made against such **Insured Person** during the **Policy Period** . . . for a **Wrongful Act**.

B. **Insured Organization Reimbursement**

> The **Insurer** shall pay on behalf of an **Insured Organization** all **Loss** for which the **Insured Organization** is permitted or required to indemnify any **Insured Person**, resulting from a **Claim** . . . first made against such **Insured Person** during the **Policy Period** . . . for a **Wrongful Act**.

C. **Insured Organization Liability**

> The **Insurer** shall pay on behalf of an **Insured Organization** all **Loss** which the **Insured Organization** becomes legally obligated to pay resulting from a **Claim** . . . first made against such **Insured Organization** during the **Policy Period** . . . for a **Wrongful Act**.

As reflected by a review of the three (3) Insuring Agreement, there is nothing within the language in Insuring Agreements A, B, or C that gives any priority to paying **Loss** incurred under one Insuring Agreement as compared to another.

Certain definitions contained in the Catlin are also germane to the matters put at issue in this motion.

F. "Claim" means any:

. . .

> 5. civil, criminal, administrative, or regulatory investigation of an **Insured** by any natural person or entity or any local, state, federal or foreign investigating authority commenced upon such **Insured's** receipt of a formal order of investigatory, or once such **Insured** is identified by name in a Wells Notice, subpoena or "target" letter (within the meaning of Title 9, 11.151 of the United States Attorney's Manual), formal order of investigation or other formal investigative document as a person or entity against whom or which a proceeding described in paragraphs 2., 3. or 4. above may be commenced . . . .

As reflected in the quoted portion of the "Claim" definition, an "investigation" that qualifies as a Claim exists only: (i) if investigation of an Insured commenced upon an Insured's receipt of a formal order of investigation; or (ii) once an Insured is identified by name in a "Wells Notice", subpoena or "target" letter, in a formal order of investigation or other formal investigation document as a person or entity against whom a proceeding may be commenced. Here, the April 23, 2019 DOJ Letter received by Rice does not fall within any of the enumerated items that qualifies as a Claim.

Other relevant defined terms include the various **Insured**-related definitions. They provide:

X. "**Insured**" means any:

1. **Insured Organization**; or

2. **Insured Person**.

Y. "**Insured Organization**" means the **Named Insured** . . . .

Z. "**Insured Person**" means any:

1. **Executive**;

2. **Employee** . . . .

The Catlin policy also specially defines **Loss**. It provides:

DD. "**Loss**" means **Defense Costs**, compensatory and other damages, settlements, judgments . . . .

In Section XIII.C of the Catlin policy, entitled "General Conditions", the following "Priority of Payments" provision is set forth:

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**.

2. If **Loss** is incurred other than under **Insuring Agreement** A., the **Named Insured** shall have the right to direct the **Insurer** to delay payment of such Loss until such time as the **Named Insured** specifies. Any such direction by the **Named Insured** to delay or make payment of **Loss** shall be by written notice to the **Insurer**. The **Insurer's** liability under this Policy shall not be increased, and the **Insurer** shall not be liable for any interest, as a result of any such delayed **Loss** payment. Any such delayed **Loss** payment shall be available to the **Insurer** to pay **Loss** covered under **Insuring Agreement** A. Any **Loss** payment under **Insuring Agreement** A. by the **Insurer** out of funds withheld pursuant to this provision shall terminate the **Insurer's** liability to make a delayed **Loss** payment under any other **Insuring Agreement** by the amount of such payment.

Finally, the Catlin policy, per Endorsement 1, deletes the Informal Investigation coverage provided as one of the supplemental coverage in the Catlin policy. That endorsement provides:

Endorsement

Delete Informal Investigations Coverage Endorsement

This Endorsement Changes The Policy. Please Read It Carefully.

> In consideration of the payment of the premium for this Policy, it is hereby understood and agreed that Section II. **COVERAGE EXTENSIONS**, A. **Informal Investigations Coverage**, of the Policy is deleted in its entirety.
>
> All other terms, conditions and exclusions remain unchanged.

IV. <u>OREGON'S PRINCIPLES OF POLICY INTERPRETATION</u>

Oregon law governs with respect to the interpretation of the insurance policy. *Kabatoff v. Safeco Ins. Co. of Am.*, 627 F.2d 207, 209 (9th Cir. 1980). The interpretation of an insurance policy, like every other contract, is a question of law. *Timberline Equip. v. St. Paul Fire & Marine Ins. Co.*, 281 Or. 639, 643 (1978).

The Oregon Supreme Court has explained that "the primary and governing rule of the construction of insurance contracts is to ascertain the intention of the parties." *Hoffman, supra,* 313 Or. at 469. Courts must determine the intention of the parties based on the terms and conditions of the insurance policy. *Id*. Courts begin with the wording of the policy, "applying any definitions that are supplied by the policy itself and otherwise presuming that words have their plain, ordinary meanings." *Tualatin Valley Hous. Partners v. Truck Ins. Exch.*, 208 Or. App. 155, 159-60 (2006); *see also Botts v. Hartford Acc. & Indem. Co*., 284 Or. 95, 101 (1978) ("The insurance company may, of course, insert in its policy any definitions of [policy terms] it chooses but, in the absence of doing so, it must accept the common understanding of the terms by the ordinary member of the purchasing public.").

If the policy does not define the terms in dispute, the court must decide if the term at issue has a plain, unambiguous meaning. *Hoffman, supra*, 313 Or. at 470. If a term has only one plausible interpretation, then the term is interpreted in accordance with that unambiguous meaning. *Andres v. Am. Standard Ins. Co.*, 205 Or. App. 419, 423 (2006). If the disputed terms are susceptible to more than one plausible interpretation, however, then the Court examines the terms in the particular context in which that term is used in the policy and the broader context of the policy as a whole. *Hoffman, supra*, 313 Or. at 470. In doing so, it is important to note that a proposed interpretation of a term that may be plausible in isolation is not reasonable, if it would render another term redundant or meaningless. *N. Pac. Ins. Co. v. Hamilton*, 332 Or. 20, 25 fn. 3 (2001). Indeed, courts presume that contracting parties intend that each word in a contract carries independent significance. *Hunters Ridge Condo. Assn. v. Sherwood Crossing, LLC*, 285 Or. App. 416 (2017). If the Court's consideration of the policy's context fails to resolve the ambiguity, then the Court will construe the term against the insurer, who drafted the policy. *Hoffman*, *supra*, 313 Or. at 470.

V. RICE'S MOTION SHOULD BE DENIED

A. Rice's Interpretation of the Priority-of-Payments Provision Ignores, Among Other Things, the Plain Language of the Policy and Judge Papak's October 23, 2017 Opinion and Order.

Although one would not know it from reading Rice's brief (*see, e.g.*, Motion at 9), there are actually *two* Priority-of-Payments provision paragraphs in Catlin's primary policy. We turn now to an interpretation of these two paragraphs.

1. Interpretation of the Two Priority-of-Payments Provisions

Again, the two "priority-of-payment" paragraphs at issue here provide as follows:

> 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**.
>
> 2. If **Loss** is incurred other than under **Insuring Agreement** A., the **Named Insured** shall have the right to direct the **Insurer** to delay payment of such Loss until such time as the **Named Insured** specifies. Any such direction by the **Named Insured** to delay or make payment of **Loss** shall be by written notice to the **Insurer**. The **Insurer's** liability under this Policy shall not be increased, and the **Insurer** shall not be liable for any interest, as a result of any such delayed **Loss** payment. Any such delayed **Loss** payment shall be available to the **Insurer** to pay **Loss** covered under **Insuring Agreement** A. Any **Loss** payment under **Insuring Agreement** A. by the **Insurer** out of funds withheld pursuant to this provision shall terminate the **Insurer's** liability to make a delayed **Loss** payment under any other **Insuring Agreement** by the amount of such payment.

(Catlin Policy, Section XIII, C.1 & 2.)

Under Oregon law, if a policy provision, such as the "priority-of-payment" provision here, is not ambiguous, the policy is then interpreted in accordance with its unambiguous meaning. *Hoffman, supra,* 313 Ore. at 469-70. Here the subject "priority-of-payment" provisions are precisely drafted so that they apply only in the specific circumstances delineated therein.

As reflected by the language used in the Priority-of-Payments provisions, they were drafted to address only situations involving the order in which **Loss** should be paid in circumstances where the combined **Loss** incurred by both an **Insured Organization** under Insuring Agreements B and/or C and an **Insured Persons** (individual insureds) under Insuring Agreement A exceed a policy's *remaining limits of liability*.

By its express terms, the first Priority-of-Payments paragraph is implicated *if, and only if*, **Loss** is incurred that exceeds the *remaining Limits of Liability*. 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). The term "priority" means "the quality or state of being prior; precedence in date or position of publication; superiority in rank, position, or privilege; or legal precedence in exercise of rights over the same subject matter. *Scannell v. JP Morgan Chase Bank, N.A. (In re Scannell),* 505 B.R. 523, 527 n.7 (Bankr. Az. 2014) Accordingly, it is only after there are competing claims for payment of **Loss –** one group of claims involving **Loss** incurred under Insuring Agreements B and/or C and the other group of claims involving **Loss** incurred under Insuring Agreement A – which results in combined **Loss** for all Insureds (here, **Insured Persons** and **Insured Organizations**, such as Aequitas Holdings and its subsidiaries) that is in excess of the policy's then-existing limits of liability that the Priority-of-Payments provision first comes into play. If these conditions are met, then and only then, the first Priority-of-Payments paragraph provides that **Loss** incurred by the **Insured Persons** is paid first, and once paid, the remaining balance of limits is then paid to **Insured Organization's Loss**.

The second Priority-of-Payments paragraph comes into play where there is **Loss** under Insuring Agreements B and/or C, and the **Named Insured** (Aequitas Holdings) elected to delay payment of such **Loss** so that only **Loss** under Insuring Agreement A, without consideration of the Insuring Agreements B and C **Loss**, is paid. To make this election, however, the **Named Insured** must provide *written notice to the Insurer*. Absent such prior written notice from the **Named Insured** stating that all **Loss** should be first paid to **Insured Persons** under Coverage A, the **Individual Insureds** do not have an unfettered right to payment of all policy proceeds. Here, no such written notice was ever made in connection with Rice (or any of the individual insureds), and Rice does not argue (let alone provide evidence) to the contrary.

Under the plain unambiguous language of the second Priority-of-Payments paragraph, neither Rice, nor any other **Insured Person**, has an unfettered right to recover all policy proceeds.[8] Nor does any such right to unfettered recovery of all policy limits of liability for **Insured Persons** exist under Insuring Agreement A pursuant to the first Priority-of-Payments paragraph.

The Priority-of-Payments provisions, by their terms, are not drafted to address (and have no bearing upon) situations where only **Insured Persons** have incurred **Loss** or where only an **Insured Organization(s)** has incurred **Loss**. As Judge Papak correctly stated in his October 23, 2017 Opinion & Order (Dkt. No. 551 at pp. 8-9), the Priority-of-Payments provisions had no bearing upon the insurer's obligation to pay covered **Loss** incurred by the **Insured Persons** where the Receivership Entity – though Claims were pending against it – had yet to *incur* **Loss**. Conversely, Judge Papak's interpretations applies equally to those situations where an **Insured Organization(s)** has incurred **Loss** and there is no competing **Loss** incurred by **Insured Persons**. In such circumstances, the "Priority-of-Payments" provision is inapplicable and the insurer is

[8] Indeed, Rice essentially takes the position that he is entitled to all policy proceeds, which would effectively make the subject management liability policies' promises to pay an **Insured Organization'**s **Loss** under Insurance Coverage C illusory. The **Individual Insured**'s position, if adopted, would also transform the subject policies into standalone "Side A" policies which, by their terms, cover only directors and officers and do not provide "entity" coverage for an **Insured Organization**, a type of policy the Aequitas Entities did not purchase.

contractually obligated to pay all of the **Insured Organization(s)'** incurred **Loss,** subject to any coverage defenses that may apply**,** up through and including its remaining limits of liability.

In sum, the following principles can be adduced by reviewing the plain language of the Priority-of-Payments provisions and Judge Papak's interpretation of these terms:

- The first Priority-of-Payments paragraph is not triggered unless an **Insured Person** is competing with an **Insured Organization** over policy limits (*i.e.*, it is inapplicable if two or more **Insured Persons** are competing over policy proceeds, or where *only* an **Insured Person** is seeking payment and the **Insured Organization** has not yet incurred a **Loss**, as Judge Papak concluded in Dkt. No. 551.)
- The first Priority-of-Payments paragraph is inapplicable unless there are *remaining limits of liability* and the combined claims of an **Insured Person**'s incurred **Loss** and an **Insured Organization**'s incurred **Loss** exceed the remaining policy limits. Thus, if two or more insureds have **Loss** that does not exceed the remaining limits of liability, the Priority-of-Payment provision does not apply. Likewise, if there are no remaining policy limits, the provision does not apply because there is nothing that can be paid.
- The second Priority-of-Payments paragraph gives the **Insured Organization** the right (but not the obligation) to direct payments that it would normally receive from the insurer solely to the **Insured Persons**, under Insuring Agreement A, but only if it was provided by prior written instruction to this effect to the Insurer. This is the sole situation articulated in the Catlin policy whereby payments are made exclusively to **Insured Persons** under Insuring Agreement A, whereas, here, **Loss** is also owed to the **Insured Organization(s)**.[9] The Priority-of-Payments provisions

[9] Further, Rice's interpretation of the first Priority-of-Payment paragraph to the effect that all **Loss** is payable to **Insured Persons** in the face of a competing claims for coverage by the Receivership Entity under Insuring Agreement C (Motion at p. 4) would render illusory the second paragraph of the Priority-

are triggered, if at all, only where *Loss* has already been incurred (i.e., **Loss** that is anticipated in the future or hypothetical does not qualify.)

Here, the narrowly drafted Priority-of-Payment provisions incorporated up into the Starr excess policy are not triggered and therefore are inapplicable 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. In other words, as of February 8, 2019, the *remaining limits of liability* in the Starr policy should have been paid as **Loss** by Starr to the Receivership Entity, leaving no *remaining limits of liability* in the Starr policy available to Rice or other individual insureds.

2. Rice's Misconstrues the Priority-of-Payments Provisions

Rice cannot avoid this result by claiming that a new calculation of the policy's remaining limits of liability must be performed now that he has allegedly incurred a **Loss**. Again, since Rice concedes that the Receiver's $30 million **Loss** must be included when calculating whether there are any remaining limits of liability under Starr's $5 million policy, there is no reason (and Rice offers none) why the Receiver's **Loss** did not, *by itself*, completely exhaust Starr's remaining limits of liability when the Receiver entered into the settlement with the Investors on February 8, 2019. In other words, if the Receiver's **Loss** counts now, it has counted since February 8, 2019. Because the Receiver's **Loss** was incurred prior to Rice's alleged **Loss**, and the Receiver's **Loss** was large enough by itself to exhaust Starr's remaining limits of liability, it necessarily follows that the first Priority-of-Payments paragraph is inapplicable. *The Priority-of-Payments provisions are not triggered where, as here, there are no payments that could possibly be made.* While Rice may

of-Payment. Again, the second paragraph involves the situation where the **Named Insured** (**Insured Organization**) with **Loss** payable under Insuring Agreement B or C, specifically designates that payments be made only to the **Insured Persons** under Insuring Agreement A. Simply put, there would be no need for a policy term providing for a writing from the **Insured Organization** to the Insurer to pay only under Insuring Agreement A under the second paragraph of the Priority-of-Payment if all **Loss** was already payable under the terms of the policy to Insured Persons under Insuring Agreement A, where **Loss** also existed payable under Insuring Agreements B or C.

wish that a new assessment of remaining limits of liability is performed each and every time another insured incurs a new **Loss**, there is no basis in the policy (or common sense) to perform such a calculation after an insured (here, the Receivership Entity) has already incurred a **Loss** sufficient to exhaust the remaining limits of liability.

Moreover, Rice's argument on page 5 of his brief that the first paragraph of the Priority-of-Payments provision is silent about the chronology of incurred **Loss**, and that the Receiver is improperly adding language to the Priority-of-Payments provision, is meritless. Even if the Court were to focus solely on the first Priority-of-Payments paragraph, the policy refers to **Loss** in the past tense by using the term "incurred." *Casey, supra*, 512 B.R. at 634. Moreover, the policy expressly provides that the Priority-of-Payments provisions are not implicated unless and until the parties have competing claims that will exceed the *remaining limits of liability*.

For example, the parties and this Court cannot determine if there are any remaining limits of liability available to pay Rice or other **Insured Persons** under Insuring Agreement A unless they determine the amount of previously incurred **Loss** that existed prior to an individual insured's claim, a calculation that is required to determine the amount of remaining limits of liability available under the policy. Determining how much of the policy limits are remaining necessarily requires consideration of what has already been incurred. *See, e.g., People v. Tolbert*, 216 Mich. App. 353, 358 (1996) (defining "remaining as "that which is left over"); Merriam-Webster.com (defining "remaining" as "left over after a part has been destroyed, taken, used, or lost"). In other words, these required calculations necessarily contains a backward-looking element to determine the amount of remaining limits of liability. Finally, it is important to note that the Receiver's interpretation is also consistent with Insuring Agreement C, which provides, in pertinent part, that the "**Insurer** shall pay on behalf of an **Insured Organization** all **Loss** which the **Insured Organization** becomes legally obligated to pay resulting from a **Claim** . . . first made against such **Insured Organization** during the **Policy Period** . . . for a **Wrongful Act**."

3. *The Case Law upon which Rice Relies in Support of His Priority-of-Payments Argument is Unavailing.*

Not surprisingly, none of the cases Rice cites in support of his Motion contain a narrow priority-of-payments provision like the ones found in the Catlin policy. In *MF Global Holdings Ltd.*, 469 B.R. 177, 185 (Bankr. S.D.N.Y. 2012), for example, the Specialty D&O policy at issue contained the following priority-of-payments language:

> If the Insurer is obligated to pay Loss, including Defense Costs, under more than one INSURING AGREEMENT, whether in connection with a single Claim or multiple Claims, the Insurer will first pay any Loss payable under INSURING AGREEMENT (A) and, if the Insurer concludes that the amount of all Loss, including Defense Costs, is likely to exceed the Insurer's Limit of Liability, the Insurer shall be entitled to withhold some or all of any Loss payable under INSURING AGREEMENT (B)(l) or (B)(2) to ensure that as much of the Limit of Liability as possible is available for the payment of Loss under INSURING AGREEMENT (A).

The MF Global Holdings court interpreted this language as requiring that “the coverage potentially afforded to the Individual Insureds under Insuring Agreement A must be paid prior to the payment of any loss on behalf of the Debtors under Insuring Agreements B(1) or (B)(2).” *Id.*; *see also id.* at 193 (noting that the priority-of-payment “clarify[ies] that the coverage potential afforded to the Individual Insureds for non-indemnifiable losses must be paid prior to any payments made for matters implicating coverage potentially provided to the Debtors . . . .” *Id*. at 193.

Thus, unlike the present action, the priority-of-payments provision in *MF Global Holdings* dictated that the insurer must pay insured persons first whenever loss was incurred under more than one insuring agreement. Moreover, while the D&O policy in *MF Global Holding* gave the insurer discretion to withhold some or all of any Loss payable to the Debtor in order to pay Insured Persons if the insurer concluded the amount of Loss was likely to exceed the remaining limits of liability (*id*. at 185), no such contractual right is given to the Insurer or Insured Persons in the

Catlin Policy. To impose such a provision here would effectively rewrite the Priority-of-Payments provision, something that cannot occur under Oregon law. *Usinger*, *supra*, 280 Or. 751, 755 (1977) (court may not rewrite policies). Additionally, the language quoted above, by its express terms, presupposes that there are remaining limits of liability. The *MF Global Holding* decision does not remotely suggest that an insurer must pay an individual insured when there are no remaining limits of liability from which it could pay **Loss**.

SEC v. Morriss, 2012 U.S. Dist. LEXIS 64465 (E.D. Mo. May 8, 2012) is equally unavailing. As in *MF Global Holdings* (but unlike in Catlin's policy here), the priority-of-payments provision in *Morriss* "requires [the insurer] to first pay claims arising under Insurance Clause 1; other claims are payable only to the extent of the remaining limit of liability." *Id*. at *4. By contrast, Catlin's first Priority-of-Payments paragraph is implicated *if, and only if*, **Loss** is incurred that exceeds the *remaining Limits of Liability*.

A number of other cases upon which Rice relies do not even contain priority-of-payments provisions. *See, e.g., In re Petters Co.*, 419 B.R. 369 (Bankr. D. Minn. Aug. 31, 2009) (granting insurance companies' motion for relief from automatic stay and authorized them to make payments under the policies up to $7.5 million; no priority-of-payments provision discussion in case); *In re Cybermedica, Inc.*, 280 B.R. 12, 16-17 (Bankr. D. Mass. 2002) (court granted former director's motion to use policy proceeds to pay defense costs but case is silent about any priority-of-payments provision or issues related thereto); *In re Tierone Corp.*, 2012 Bankr. LEXIS 4608 (Bankr. D. Neb. Oct. 2, 2012) (court found that directors and officers were entitled to policy proceeds before any interest of the estate came into play; no priority-of-payments provision discussed in case); *Nat'l Century Fin. Enters. v. Gulf Ins. Co. (In re Nat'l Century Fin. Enters.)*, 2005 Bankr. LEXIS 1052, at *15 (Bankr. S.D. Ohio Jan. 10, 2005) ("[The policy] does not contain a 'priority of payments' section, listing who should take first or most in the event where claims to proceeds exceed the aggregate amount that can be paid under the Policy.")

Finally, the Receiver notes that it does not quibble with the general proposition (cited by Rice) that D&O policies are concerned with, *inter alia*, protecting directors and officers. But where there is specific policy language controlling the situation (such as here), there is no basis for resorting to general propositions in an effort to rewrite the policy so a new and different contract, one distinct from the bargain actually struck, is made. Here, the policy unambiguously states that the Priority-of-Payments provision upon which Rice relies is inapplicable where (as here) there are no remaining policy limits.

B. Rice's Argument that Starr is Obligated to Pay for Future Defense Costs Is Contrary to the Plain Language in the Priority-of-Payments Provisions

Rice also argues that Starr is obligated to pay not only for defense costs incurred after his receipt of the April 23, 2019 letter from the U.S. Attorney's office, but also for *future* defense costs. Rice appears to argue that the Policy's definition of **Defense Costs** – which includes "reasonable and necessary fees and expenses incurred in the defense or appeal of a Claim" – requires that the insurer reimburse an insured for fees that he or she will have to pay but that have not yet been incurred. (Motion at p. 10.) Even assuming Rice's interpretation of the term **Defense Costs** is correct, however, the specific provision Rice is attempting to invoke for relief – the Priority of Payments provisions – use the term "incurred." Thus, the plain language of the policy refers to **Loss** in the past tense by using the term "incurred." *Casey, supra,* 512 B.R. at 634. In other words, Rice is asking this Court to rewrite the policy language by striking the term "incurred," to require payment of future "unincurred" **Loss**, which is something it cannot do. *Usinger v. Campbell*, 280 Or. 751, 755 (1977) (court may not rewrite policies). There is no obligation under the policy therefore to pay for Rice's future **Loss**.

C. There is No Basis for Equitable Relief Where, as here, there is Governing Policy Language

As noted above, there is no equitable basis for prioritizing coverage for Rice's liability for defense costs over the Receivership Entity's settlement of the Investors' Claims. At the time Judge

Papak granted the individual defendants' motions to lift the stay and permit Forge Underwriting to pay their defense costs (Dkt. No. 551), the Receivership Entity had not yet incurred a **Loss** in connection with the Investor Claims. There were no competing claims by the Receivership Entity for insurance proceeds thereafter until about 18 months later when the February 8, 2019 settlement was executed. Now that the Receivership Entity has incurred **Loss** by entering into the $30 million settlement, however, Starr is obligated under **Insuring Agreement C** of the Catlin Policy to pay the Receivership Entity's **Loss**. (Catlin Policy, Section I.C ("The **Insurer** shall pay on behalf of an **Insured Organization** all **Loss** which the **Insured Organization** becomes legally obligated to pay resulting from a **Claim** . . . first made against such Insured Organization during the Policy Period . . . for a Wrongful Act.") In other words, Rice is not similarly situated to the individual defendants who previously moved for and obtained relief

Since there is an express contract provision covering this subject matter, there is no basis for equitable relief. *See, e.g., U.S. Airways, Inc., supra*, 569 U.S. at 99-100 ("[I]f the agreement governs, the agreement governs . . . [and] [t]he agreement itself becomes the measure of the parties' equities"); *Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 448-49 (1935) (courts cannot modify or disregard terms of a valid and enforceable contract, even when sitting in equity); *Lexington Ins. Co. v. General Acc. Ins. Co. of Am.*, 338 F.3d 42, 50 (1st Cir. 2003) (refusing to apply doctrine of equitable contribution to override explicit, unambiguous language in insurance policy). This is true under Oregon law as well. *See, e.g., Arnett v. Bank of Am., N.A.*, 874 F. Supp. 2d 1021, 1035 (D. Or. 2012) (dismissing unjust-enrichment claim "because a valid contract – the mortgage – covers the services at issue" and the defendant "expressly admitted being party to the contract"); *U.S. ex rel. Doughty v. Or. Health & Scis. Univ.*, 2017 U.S. Dist. LEXIS 55083, at *14-*15 (D. Or. Apr. 11, 2017) (no unjust enrichment claim where express contract defines parties' rights) (citations omitted); *Prestige Homes Real Estate Co. v. Hanson*, 151 Or. App. 756, 762 (1997) ("[T]here cannot be a valid legally enforceable contract and an implied contract covering the same services."). In fact, Oregon law has even extended the bar to instances "where the parties have entered into an actual agreement, *whether express or implied*." *DCIPA, LLC v. Lucile Slater Packard Children's Hosp. at Stanford*, 868 F. Supp. 2d 1042, 1061 (D. Or. 2011) (emphasis added). Accordingly, Rice's request for equitable relief must be denied.

D. Rice Has Failed to Satisfy His Burden of Establishing that He Has Incurred Covered Loss.

Finally, Rice has also failed to establish that he has incurred covered **Loss**. Rice notes that he has received an April 23, 2019 letter from the U.S. Attorney's Office notifying him that he is a "subject of a federal criminal investigation concerning fraud that occurred at Aequitas Commercial Finance and related entities." (*See* Dkt. 734-1). Yet, Rice has not cited to any provision in the Catlin policy that identifies such a letter as a **Claim**. Indeed, Section III.F.5 of the policy mentions only such steps as a "Wells Notice, subpoena or 'target' letter . . ., formal order of investigation or other formal investigative document . . . ." Moreover, as noted above, the Catlin policy contains a "**Delete Informal Investigations Coverage Endorsement**," which provides in relevant part that "it is hereby understood and agreed that Section II. **COVERAGE EXTENSIONS**, A. **Informal Investigations Coverage**, of the Policy is deleted in its entirety." (Dkt. 734-4 at p. 35 of 42.) Rice has also not established the reasonableness and necessity of the alleged defense costs he has incurred.

On pages 8-9 of his Motion, Rice argues that neither the Receiver nor the Individual Defendants can or should reasonably dispute that the "claims made by the United States Attorney's Office" against him are covered Claims under the Starr policy. In support of this argument, Rice cites to the Stipulation and Order Granting Further Relief from Receivership Order to Permit Limited Payment on Defense Costs by Star (Dkt. No. 659.) However, nowhere in that stipulation is there a discussion that a letter notifying an individual that he or she is a "subject" of an investigation constitutes a Claim under the Policy. Indeed, such a discussion would have been unnecessary since the policy is clear that a civil lawsuit (in which Jesenik, Oliver, and Gillis were named as defendants) qualifies as a **Claim**. Moreover, Rice's reliance on this stipulation is highly improper because it was entered into in connection with a mediation, and the Court's Order states on its face that, given "the privileged nature of such a proceeding, any and all statements made in the Parties' Stipulation, including the Recitals and Stipulation, may not be used for any evidentiary purposes whatsoever by any third parties . . . ." (Dkt. No. 659 at 7.)

Rice's reliance on Judge Papak's October 23, 2017 Opinion and Order (Dkt. No. 551) for the general proposition that "the individual defendants [have a] legitimate expectation that their insurers will cover their attorneys' fees and costs reasonably incurred in the course of defending this action" is also unavailing. Again, at the time Judge Papak issued his Opinion and Order, the Receivership Entity had not yet incurred any **Loss**, and there was no issue over whether there were sufficient remaining limits of liability to pay the individual defendants for their incurred **Loss**. Nor was there any dispute over whether the *SEC Enforcement Action* constituted a **Claim** under the policy. Accordingly, this Court should deny Rice's Motion.

VI. CONCLUSION

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

Dated this 22st day of August, 2019.

Respectfully submitted,

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