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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.  
JESENK, BRIAN A. OLIVER; and N.  
SCOTT GILLIS,

Defendants.

No. 3:16-cv-00438-JR

RECEIVERSHIP ENTITY'S OPPOSITION  
TO NON-PARTY OLAF JANKE'S  
JOINDER IN MOTIONS TO INTERVENE  
AND FOR LIMITED RELIEF FROM  
STAY TO PERMIT PAYMENT OF  
DEFENSE COSTS BY STARR  
INDEMNITY & LIABILITY COMPANY

(Request for Oral Argument)



The Receiver hereby submits the following Opposition to Non-Party Olaf Janke's ("Janke") Joinder in Motions to Intervene and for Limited Relief from Receivership Order to Permit Payment of Legal Fees and Expenses (Dkt. No. 748.) Specifically, Janke seeks to join in the Motions of Non-parties Andrew MacRitchie (Dkt. No. 745) and Brian Rice (Dkt. No. 732) to Intervene and For Limited Relief from Stay to Permit Payment of Defense Costs by Starr Indemnity & Liability Company (the "Motions"). Janke's Motion should be denied for the following reasons.

*First*, contrary to Janke's counsel's assertion that he met and conferred with the Receiver's counsel to discuss and attempt to resolve the issues raised in Janke's joinder, no such discussion took place.

*Second*, the relief that Janke seeks requires an independent evidentiary showing by him that he is entitled to the reimbursement of incurred Defense Costs under the Starr policy. Janke makes no such showing. Among other things, Janke (unlike MacRitchie and Rice) has failed to submit any evidence showing that Starr is willing to pay Defense Costs that he seeks and, if so, the extent to which Starr is willing to do so. Janke has also failed to submit evidence showing that (a) he has incurred Defense Costs, (b) the amount of the Defense Costs, (c) when Janke incurred such Defense Costs, and (d) whether such Defense Costs were incurred in connection with a Claim under the policy. Janke has not (and cannot) satisfy his evidentiary burden simply by joining MacRitchie's and Rice's Motions.

*Third*, to the extent Janke seeks an Order allowing Starr to advance future Defense Costs, his request must be denied based on the plain language of the policy. As explained in greater detail in the Receiver's Oppositions to MacRitchie's and Rice's Motions and incorporated herein by this reference (Dkt. 745 at 14-15; Dkt. 750 at 12-15), the first Priority-of-Payments provision in Section XIII.C.1 of the underlying Catlin Specialty Insurance Company's ("Catlin") policy (to which Starr's policy follows form) provides: "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**.” 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). In other words, Janke, like MacRitchie and Rice, is asking this Court to rewrite the policy language by striking the term “incurred,” which 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 Janke’s future **Loss**.

**Fourth**, as the Receiver noted in his Responses to MacRitchie’s and Rice’s Motions (Dkt. Nos. 745 and 750), individual insureds, such as Janke, MacRitchie, and Rice, should have sought relief in the Receiver’s coverage action (Case No. 3:19-cv-00817-JR) or the Insurers’ declaratory relief action (Case No. 3:19-cv-00810-JR), both of which are now consolidated before this Court. Janke’s failure to do so also warrants the denial of his application.

**Fifth**, because Janke purports to assert all of the same reasons for relief that Messrs. MacRitchie and Rice have asserted in their respective Motions, the Receiver hereby incorporates by reference its Responses to said Motions as if set forth fully herein, and the Court should deny Janke’s application on these grounds. (*See* Dkt. Nos. 745 and 750.) Some of these incorporated grounds are as follows:

Janke’s request must be denied because, among other things, it ignores the plain language in Catlin’s policy (to which Starr’s policy follows form). 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). This narrowly worded Priority-of-Payment provision, which is incorporated up into the Starr excess policy, is not relevant and has 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 of liability* in the Starr policy available to Janke, MacRitchie, Rice or other individual insureds.

Likewise, there is no equitable basis for prioritizing coverage for Janke’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, the circumstances have dramatically changed since the Receivership Entity entered into a \$30 million settlement on February 8, 2019, resulting in the exhaustion of the remaining policy limits. 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).

Finally, Jesenik’s reliance on the Stipulation and Order Granting Further Relief from Receivership Order to Permit Limited Payment on Defense Costs by Star (Dkt. No. 660) 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. 660 at 7.) Moreover, Janke’s reliance on

Judge Papak's October 23, 2017 Opinion and Order (Dkt. No. 551) is also unavailing. 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**.

For the foregoing reasons, this Court should deny Janke's Joinder in MacRitchie's and Rice's Motions.

Dated this 23st day of August, 2019.

Respectfully submitted,

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By: /s/ Stanley H. Shure

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