Docket #0754 Date Filed: 8/23/2019

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 Avenue, 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 the 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 NON-PARTY N. SCOTT GILLIS' 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)**

1600438190826000000000002

The Receiver hereby submits the following Opposition to Non-Party N. Scott Gillis' ("Gillis") Joinder in Motions to Intervene and for Limited Relief from Receivership Order to Permit Payment of Legal Fees and Expense (Dkt. No. 751.) Specifically, Gillis 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"). Gillis's Motion should be denied for the following reasons.

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

Second, to the extent Gillis 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 MacRitchtie'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, Gillis, 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 Gillis's future **Loss**.

Third, as the Receiver noted in his Responses to MacRitchie's and Rice's Motions (Dkt. Nos. 745 and 750), individual insureds, such as Gillis, 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. Gillis's failure to do so also warrants the denial of his application.

Fourth, because Gillis 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 Gillis's application on these grounds. (*See* Dkt. Nos. 745 and 750.) Some of these incorporated grounds are as follows:

Gillis'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 Gillis, MacRitchie, Rice or other individual insureds.

Likewise, there is no equitable basis for prioritizing coverage for Gillis' 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, Gillis' 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 Gillis' Joinder in MacRitchie's and Rice's Motions.

Dated this 23st day of August, 2019.

Respectfully submitted,

LAW OFFICES OF STANLEY H. SHURE

By: */s/ Stanley H. Shure*

LAW OFFICES OF STANLEY H. SHURE
Stanley H. Shure (Admitted *Pro Hac Vice*)
Email: sshure@shurelaw.com

SCHWABE, WILLIAMSON & WYATT, P.C.
Email: tgreenfield@schwabe.com
Telephone: 503.222.9981
Facsimile: 503.796.2900
Attorneys for the Receiver for Defendants Aequitas Management, LLC, Aequitas Holdings, LLC, Aequitas Commercial Finance, LLC, Aequitas Capital Management, Inc., and Aequitas Investment Management