UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	Case No. 4:12-cv-80-CEJ
BURTON DOUGLAS MORRISS, *et al.*	)	
Defendants, and	)	
MORRISS HOLDINGS, LLC,	)	
Relief Defendant.	)	

MOTION FOR ENTRY OF AN ORDER CONFIRMING THAT INSUREDS ARE ENTITLED TO ADVANCEMENT OF DEFENSE EXPENSES UNDER INSURANCE POLICY NOTWITHSTANDING ASSET FREEZE ORDER

Defendant Burton Douglas Morriss ("Morriss") respectfully requests that this Court enter an order confirming that Federal Insurance Company ("Federal") may advance defense costs on behalf of Morris as an insured under an insurance policy purchased by Acartha Group LLC ("Acartha"). Federal has indicated that it is prepared to advance Morriss's defense costs, subject to confirmation by this Court that advancement does not violate this Court's Order that created the Receivership.

Therefore, for the reasons set forth in the accompanying Memorandum in support of this motion, Morriss respectfully requests that the Court enter an order providing that notwithstanding the Court's orders of January 17, 2012, January 27, 2012, or any other similar order which the Court may enter, Federal is authorized to make payments under the Policy up to the Policy's Limit of Liability to or for the benefit of any Insured Persons or for the benefit of an Organization for defense costs incurred in connection with this litigation or any related Claim.

Respectfully Submitted,

ASHCROFT HANAWAY, LLC

By: /s/ Catherine L. Hanaway________

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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UNITED STATES DISTRICT COURT
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SECURITIES & EXCHANGE COMMISSION	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No. 4:12-cv-80-CEJ**
BURTON DOUGLAS MORRISS, *et al.*	)	
Defendants, and	)	
	)	
MORRISS HOLDINGS, LLC,	)	
Relief Defendant	)	

ORDER

This cause comes before the Court upon a Motion by Defendant Burton Douglas Morriss for Confirmation that Defendant Morriss is Entitled to Advancement of Defense Expenses Under Insurance Policy Notwithstanding Order Appointing Receiver or Asset Freeze Order. The Court finds that good cause exists for this motion. Accordingly,

IT IS ORDERED AND ADJUDGED that the Motion is granted. The Court holds that notwithstanding the Court's orders of January 17, 2012, January 27, 2012, or any other similar order which the Court may enter, Federal Insurance Company is authorized to make payments under the Venture Capital Asset Protection Policy No. 8207-6676 (the "Policy") up to the Policy's Limit of Liability to or for the benefit of Defendant Morriss (or any Insured Persons) or for the benefit of an Organization for defense costs incurred in connection with this litigation or any related Claim.

DONE AND ORDERED in Chambers in ______________________, Missouri, this ____ day of February, 2012.

____
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

SECURITIES & EXCHANGE COMMISSION	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No. 4:12-cv-80-CEJ**
BURTON DOUGLAS MORRISS, *et al.*	)	
Defendants, and	)	
	)	
MORRISS HOLDINGS, LLC,	)	
Relief Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION FOR CONFIRMATION THAT DEFENDANT MORRISS IS ENTITLED TO ADVANCEMENT OF DEFENSE EXPENSES UNDER INSURANCE POLICY NOTWITHSTANDING ORDER APPOINTING RECEIVER OR ASSET FREEZE ORDER

I. INTRODUCTION

Defendant Burton Douglas Morriss ("Morriss") respectfully requests that this Court enter an order confirming that Federal Insurance Company ("Federal") may advance defense costs on behalf of Morris as an insured under an insurance policy purchased by Acartha Group LLC ("Acartha"). Federal has indicated that it is prepared to advance Morriss's defense costs, subject to confirmation by this Court that advancement does not violate this Court's Order that created the Receivership. Morriss, who is in personal bankruptcy, faces severe prejudice if he is not able to use insurance proceeds to begin making payments to his defense counsel and to retain an expert to prepare the accounting that this Court has ordered Morriss to produce.

Morriss is a beneficiary of a Director and Officers (D&O) insurance policy that unequivocally provides coverage for his defense of this matter. The policy was purchased long before the SEC filed this case. Now, the Receiver refuses to give her assent to Federal to release funds for Mr. Morriss's defense. The Receiver is attempting to unilaterally rewrite an existing insurance policy. Federal has informed the Receiver that its policy does, in fact, provide coverage for Mr. Morriss's defense costs and has asked the

Receiver to relent to no avail. Counsel for Mr. Morris sought to reach agreement with the Receiver to propose a joint stipulation allowing Federal to advance defense costs, and the Receiver rejected the proposal.

Nearly everyone pays at least verbal homage to the axiom that someone who stands accused in court is innocent until proven guilty; however, in this situation, the Receiver obviously believes otherwise. The Receiver apparently reasons that because the SEC has made accusations against Mr. Morriss, she has the right to deprive him of insurance coverage to which even the insurance carrier believes he is entitled. The Receiver would dispossess Mr. Morriss of any ability to retain counsel, to hire an accountant or to mount even a scant defense.

If the Receiver is able to set aside coverage in this situation, D&O policies from coast to coast will not be worth the paper on which they are printed. If, when receivers or trustees are appointed, as they frequently are in times of economic stress, receivers are given omnipotent power to ignore the clear terms of D&O policies, no officer or director would be safe from litigation peril. If the Receiver's interpretation of her power prevails, any company facing financial hardships would encounter extreme difficulty in finding people willing to face the hazards of management with the prospect that a receiver might later yank their D&O coverage out from under them. The Receiver has taken an extreme position. Fortunately, courts have uniformly affirmed the crucial role of D&O coverage in the economy and have rejected efforts by receivers to deprive directors and officers accused of malfeasance of the D&O coverage purchased on their behalf when that coverage is most needed.

II. BACKGROUND

A. The Insurance Policy

Federal issued Venture Capital Asset Protection Policy No. 8207-6676 to Acartha for the Policy Period of December 1, 2010 to December 1, 2011 (the "Policy," a copy of which is attached as Exhibit A).[1] The Policy has a $3,000,000 Aggregate Limit of Liability. Policy, Declarations, Item 3. Payment of

[1] Capitalized terms used herein not otherwise defined are used as defined in the Policy. *See* Policy, § 32 ("Definitions").

defense costs depletes the aggregate limit of liability. Policy, Declarations ("The limit of liability to pay damages or settlements will be reduced and may be exhausted by 'defense costs.'") (emphasis removed); § 11 ("Defense Costs are part of, and not in addition to, the Limits of Liability set forth in Item 3 of the Declarations, and the payment by the Company of Defense Costs shall reduce and may exhaust such Limits of Liability."). A $100,000 Deductible Amount applies to Loss incurred by Acartha, but no Deductible Amount applies to Loss incurred by individual Insured Persons. Policy, Declarations, Item 4, as amended by Endorsement 1.

1. The Insuring Clauses provide coverage to Morriss

The Policy has, as is relevant here, three insuring clauses. Insuring Clause 1 provides that Federal "shall pay, on behalf of each Insured Person, Loss for which the Insured Person is not indemnified by the Organization and which the Insured Person becomes legally obligated to pay on account of any Claim first made against such Insured Person, individually or otherwise, during the Policy Period . . . for a Wrongful Act[.]" Policy, § 1. Insuring Clause 2 provides that Federal "shall pay, on behalf of the Organization, Loss for which the Organization grants indemnification to each Insured Person, as permitted or required by law, which the Insured Person becomes legally obligated to pay on account of any Claim first made against such Insured Person, individually or otherwise, during the Policy Period . . . for a Wrongful Act[.]" Policy, § 2. Insuring Clause 5, as added by Endorsement 1, provides that Federal "shall pay, on behalf of an Organization, Loss for which the Organization becomes legally obligated to pay on account of any Claim first made against such Organization during the Policy Period . . . for a Wrongful Act[.]" Policy, Endorsement 1. Morris is an "Insured Person" under the Policy, which defines the term to include any natural person "who was, now is, or shall be a director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governors or equivalent executive in an Organization[.]" Policy, § 32.

2. <u>The Policy requires Federal to provide current advancement of Morriss's defense costs</u>

As is common with D&O insurance, the Policy is not a "duty to defend" policy. Under the Policy, Insureds, like Morriss, must defend themselves. Policy, §14. Yet, section 32 of the Policy, as amended by Endorsement 10, defines Loss to include defense costs. The Policy provides that Federal "shall advance Defense Costs as provided under Section 15 of this Policy on a current basis." Policy, § 14. Thus, in contrast to insurance policies that provide indemnification for costs of defense after resolution of the underlying claim and final coverage determinations, under the Policy, Federal must advance covered Defense Costs before final resolution of the underlying claims.

3. <u>The Policy requires Federal to make payment on behalf of Insured Persons before payment on behalf of Acartha</u>

The Policy contains a priority-of-payments provision, which provides in relevant part:

(1) In the event of Loss for which payment is due under Insuring Clause 1 and Loss for which payment is due under any other Insuring Clause in the Policy, the Company shall, upon written request of any Insured Person:

i. first pay all Loss for which coverage is provided by Insuring Clause 1; and

ii. then, and only to the extent of the remaining Limit of Liability available, if any, after payment under i. above, pay such other Loss for which coverage is provided under any other Insuring Clause under this Policy.

(2) Except as otherwise provided in this Endorsement, [Federal] may pay Loss as it becomes due without regard to the potential for other future payment obligations under this Policy.

Policy, Endorsement 11. Accordingly, Federal is required to advance defense costs on behalf of an individual even if Acartha is seeking coverage at the same time or believes it may be subject to another Claim at some later date.

B. <u>Pre-Receivership Activity</u>

On September 15, 2011 the SEC issued an Order Directing Private Investigation and Designating Officers to Take Testimony against Acartha and certain related entities, which commenced an investigation into Acartha (the "SEC Investigation"). As part of the SEC Investigation, the SEC subsequently issued

subpoenas seeking testimony from Morriss, Dixon Brown, Christopher Aliprandi, David Truetzel, John Wehrle, and Robert Wetzel.

Acartha tendered the SEC Order to Federal and requested coverage for defense of itself and two of the individuals in connection with the SEC Investigation. Federal replied by correspondence dated November 23, 2011 accepting the SEC Investigation as a Claim as to Acartha, Morriss, and Brown and agreed to begin advancing to Acartha an allocated portion of defense costs, in excess of the deductible, incurred on their behalf.

On November 29, 2011, Ron Nixon, as Co-Trustee of the Bailey Quin Daniel 1991 Trust, and others filed suit against Morriss, Acartha, and a related entity in Missouri state court (the "Nixon litigation"). Acartha tendered the Nixon litigation to Federal and requested coverage in connection with the defense of itself and Morriss. Federal replied by correspondence dated December 20, 2011 accepting the Nixon litigation as a Related Claim and agreed to begin advancing to Acartha an allocated portion of defense costs in excess of the deductible incurred on the defendants' behalf.

C. **The SEC Litigation and the Receivership Order**

The SEC initiated this litigation against Acartha and Morriss by Complaint dated January 17, 2012. On January 17, 2012, this Court granted the SEC's ex parte motion and, by Order Appointing Receiver, appointed Claire M. Schenk to be the Receiver and directed her to take possession of and hold all property of Acartha. Doc. 16. The Order Appointing Receiver provides that "[d]uring the period of this receivership, all persons . . . are enjoined . . . from in any way disturbing the assets or proceeds of the receivership," and that "[t]itle to all property, . . . all contracts, [and] rights of action . . . of the Investment Entities and their principals . . . is vested by operation of law in the Receiver." Order Appointing Receiver, ¶¶ 15, 17.

On January 17, 2012, this Court entered an Asset Freeze Order (Doc. 17) which, among other things, restrained Acartha's directors, officers, agents, "and those persons in active concert or participation with any one or more of them . . . from, directly or indirectly, transferring, . . . receiving, . . . liquidating or

other otherwise disposing of, or withdrawing any assets or property . . . owned by, controlled by, or in the possession of" Acartha, and which further provides that "[a]ny financial . . . institution or other person or entity . . . holding any such funds or other assets, in the name, for the benefit or under the control of [Acartha], directly or indirectly, held jointly or singly, . . . shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition . . . or other disposal of any such funds or other assets." Asset Freeze Order, pp. 2-3.

Federal provided its current coverage position with respect to the SEC action by letter dated February 13, 2012 (copy attached as Exhibit B). As more fully described in the Letter, subject to a reservation of rights and the satisfaction of other Policy conditions, Federal has agreed to advance defense costs under the Policy, including consenting to representation of Morriss in connection with the SEC's civil complaint by Catherine Hanaway of The Ashcroft Law Firm, LLC d/b/a Ashcroft Hanaway and agreeing to advance on a current basis allocated defense costs incurred by counsel on behalf of Morriss.

Morriss has incurred and continues to incur defense fees and costs in connection with this litigation. If Morriss is not able to access insurance proceeds, he faces immediate, extreme prejudice, including but not limited to the possibility that his counsel will seek to withdraw and leave him unrepresented.[2] Even if Morriss's counsel were to continue representation in this extremely complicated matter without payment, conducting the defense will require paying third-party vendors and other professionals to perform tasks such as document analysis, storage, and production. Until Morriss knows whether he will be able to arrange for payment to such vendors, work on his defense cannot meaningfully progress—which not only works to prejudice Morriss, but also delays the Receiver's (and the SEC's) ability to receive discovery responses from Morriss. Without the assurance of access to insurance proceeds, Morriss has not been able to retain an accountant to review the records necessary to compile the Court-ordered accounting.

[2] Mr. Morriss' has filed for personal bankruptcy, Case No. 12-40164-659. In an abundance of caution and an effort to be fully transparent with this Court and the bankruptcy court, counsel for Mr. Morriss will file a retention application with the bankruptcy court disclosing the proposed source of counsel's retainer and the advancement of defense costs by Federal on Mr. Morriss' behalf.

III. ARGUMENT

The insurance policy is a contract and should be interpreted as a contract would be interpreted. *Med. Protective Co. v. Bubenik*, 594 F.3d 1047, 1051 (8th Cir. 2010) (applying Missouri law) ("If the language of the [insurance] contract is clear and unambiguous, it must be enforced as written."); *Flomerfelt v. Cardiello*, 997 A.2d 991, 996 (N.J. 2010) ("An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.").[3]

The Policy contains plain and unambiguous provisions on the payment of defense costs. When an Insured Person, such as Morriss, tenders covered defense costs to Federal, Federal shall advance payment of those defense costs "on a current basis." Policy, §14. If other Insured Persons or Acartha itself seeks advancement of covered defense costs, they also have a right to have Federal advance proceeds of the Policy. Federal must make payments immediately, regardless of the potential for future claims against the Policy proceeds. Policy, Endorsement 11 (Federal "may pay Loss as it becomes due without regard to the potential for other future payment obligations under this Policy").

A. Receivership Case Law

While cases analyzing advancement of D&O policy proceeds in the context of a non-bankruptcy receivership are limited, courts that have examined such cases have concluded that D&O insurance proceeds are not subject to a receiver's control. Bankruptcy receiver cases are far more numerous and come to the same conclusion.

A federal district court faced with nearly identical circumstances in connection with a receivership over the assets of Stanford International Bank and related entities allowed advancement of defense expenses on behalf of insured individuals notwithstanding the receiver's opposition. *See S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-298, 2009 U.S. Dist. Lexis 124377, at **19-21 (N.D. Tex. Oct. 9, 2009) (copy attached as Exhibit C). In the Stanford receivership, as here, the district court appointed a receiver over the

[3] Acartha and Federal contemplated that New Jersey law would apply to the Policy. *See, e.g.*, Policy, Declarations, Item 1 (Policy issued to New Jersey address); Policy, Endorsement 12 ("New Jersey Amendatory Endorsement"). However, neither the parties nor the Court need address choice-of-law issues at this time because New Jersey and Missouri law both provide that courts must enforce unambiguous insurance policies as written.

entities' property and entered an asset freeze order that, while drafted with broad terms, did not specifically address whether Stanford officers who were accused of malfeasance by the SEC would be covered by an existing D&O liability insurance. The court-appointed Receiver argued robustly that the Stanford officer should not have access to the coverage. As is the case here, the relevant insurance program provided for both individual coverage and entity coverage. However, unlike this case, the Stanford policies did *not* contain a priority of payments provision directing the insurer to pay covered amounts on behalf of the individuals before the entities.

Even without a priority of payments provision, the Court held that its receivership and asset freeze Order did not prohibit the insurer from "disbursing policy proceeds to fund directors' and officers' defense costs in accordance with the D&O policies' terms and conditions." *Id.* at *22. (The court did not decide whether the policy proceeds were part of the receivership estate, holding that even if they were, they would be made available to the directors and officers. *Id.* at **11-12.) The receiver had argued that "allowing defense costs would deplete policy limits," and therefore "decrease the coverage dollars eventually available for distribution to Stanford investors." *Id.* at *19. The court rejected this argument, explaining that "at this point the possibility that the D&O proceeds might one day be paid into the receivership does not justify denying directors' and officers' claims." *Id.* at *20. The court found that any claim the receiver had to insurance proceeds "is presently hypothetical," noting that the receiver had not sought reimbursement of specific defense expenses, and that serious coverage issues would have to be resolved if the receiver did seek coverage under the policy. *Id.* at **20-21.

The *Stanford* court stressed that while the receivership's claim was speculative, the directors' and officers' claims to the policy proceeds were both real and imminent. The Court also addressed the immense harm that would be visited on accused officers and directors if their access to a D&O policy were cut off:

> The Court finds it in the interest of fairness to allow directors and officers to access insurance proceeds to which they are entitled for several reasons. First, although the Court is sensitive to concerns about preserving coverage dollars for aggrieved investors, the receivership's claim to the policy proceeds is presently speculative. Second, the directors

> and officers, many of whom deny any knowledge of fraudulent activities, relied on the existence of coverage. They expected that D&O proceeds would afford them a defense were they to be accused of wrongdoing in the course of duty. The potential harm to them if denied coverage is not speculative but real and immediate: they may be unable to defend themselves in civil actions in which they do not have a right to court-appointed counsel.

Id. at *21. It was not lost on the Court that the fundamental purpose of D&O coverage was at issue. The court therefore concluded that it would permit payment of defense costs out of the policy proceeds – even in the absence of a priority of payments provision – regardless of whether or not those proceeds were part of the receivership estate.

The reasons the *Stanford* court gave for permitting advancement of defense costs apply to Morriss's need for the Policy proceeds. The Receiver's claims to coverage are largely speculative—while a Claim against Acartha exists, the Receiver has not requested coverage in connection with ongoing Defense Costs that may exist, and it is unclear what amounts, if any, the Receiver seeks under the Policy in connection with Acartha's past defense costs and indemnification obligations. More importantly, Morriss relied on the existence of coverage to be able to defend himself against accusations of wrongdoing. Morriss faces "real and immediate" harm if he does not receive coverage for his defense costs. Thus, the Court should permit Federal to advance defense costs for the same reasons that the *Stanford* court permitted advancement. Indeed, the case for advancement is even stronger here because the Stanford policies did not contain a priority of payments provision favoring individual insureds over the entities as is present in the Federal policy covering Morriss.

In another receivership case, the court had to decide "whether the proceeds of a liability insurance policy that covers two groups of coinsureds—one group in receivership, and one not—may be distributed to the insureds that are not in receivership without violating receivership law." *Executive Risk Indemnity, Inc. v. Integral Equity, L.P.*, No. 3:03-cv-269, 2004 WL 438936, at *13 (N.D. Tex. Mar. 10, 2004) (not reported in F. Supp. 2d). The Court concluded that the policy proceeds were not property subject to its receivership orders. The Court first noted the dearth of case law on the issue in the receivership context, and therefore looked to "precedent on a closely related issue—the treatment of liability insurance proceeds

in the context of bankruptcy." *Id.* Looking to Fifth Circuit precedent, the Court reasoned that the proceeds from the policy were only owed in connection with successful claims by third parties or with the costs of defending against such claims. *Id.* at *14. The receivership itself had no claim on the proceeds to seek to repay creditors directly. *Id.* Therefore, the Court held, "payment by [the insurance company] of the Defense Expenses and any subsequent additional Loss from a settlement or judgment in the [underlying] action will not violate the Receivership Order or applicable law." *Id.* Thus, the Court found that payment of liability insurance policy proceeds to parties not in receivership would not violate a receivership order.[4]

B. <u>Bankruptcy Case Law</u>

The *Integral Equity* court relied on the closely analogous context of bankruptcy and looked to Fifth Circuit precedent on that issue. This Court can likewise look to applicable bankruptcy precedent. A frequent issue in bankruptcy cases is whether policy proceeds under a D&O Policy are available to insured persons where the named insured entity is in bankruptcy. Whenever a bankruptcy petition is filed, the bankruptcy code provides for an automatic stay, which bars "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" 11 U.S.C. § 362. In general, under the Code's broad definition of a debtor's estate, insurance policies that name the debtor are considered to be property of the estate. *See generally National Union Fire Insurance Company of Pittsburgh, Pa. v. Titan Energy, Inc. (In re Titan Energy, Inc.*), 837 F.2d 325, 329 (8th Cir. 1988). However, the issue here is not who owns the Policy, but rather who is entitled to the Policy's proceeds.

It is a basic tenet of bankruptcy law that the bankruptcy estate is limited to the rights held by the debtor at the time of filing. *See generally Moody v. Amoco Oil Co*., 734 F.2d 1200, 1213 (7th Cir. 1984) ("[S]ection 541(a) provides that a debtor's estate consists of 'all legal or equitable interests of the debtor in property as of the commencement of a case.' Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less. Section 541 'is not intended to

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[4] In *McAninch v. Wintermute*, the Eighth Circuit addressed whether a former bank director was entitled to coverage under the D&O policy obtained by the now-defunct bank. 491 F.3d 759 (8th Cir. 2007). Although the FDIC had been appointed receiver of the bank, nothing in the court's opinion indicates that this was a relevant consideration to addressing whether there was coverage for the director.

expand the debtor's rights against others more than they exist at the commencement of the case.'") (quoting legislative history); *see also N.S. Garrott & Sons v. Union Planters National Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 467 (8th Cir. 1985) ("The estate succeeds to only such title and rights in the property as the debtor had at the time the petition was filed.").

In this case, whatever rights Acartha – and thus a Receiver or Trustee – would have in the Policy are limited by the Priority of Payments provision. Under this provision, the insurer is required to "first pay" covered losses under Insuring Clause 1, and then, "and only to the extent of the remaining Limit of Liability available, if any," it may pay any other covered losses. Thus, any right to policy proceeds that Acartha or the Receiver might have is subordinate to the coverage for Morriss and other insured persons under Insuring Clause 1.

In similar cases, the federal courts have uniformly held that where there is a Priority of Payments (or "Order of Payments") provision, the advancement of defense costs (or other policy proceeds) to an insured person does not violate any bankruptcy stay. A bankruptcy court recently addressed a nearly identical situation. *In re Downey Financial Corp.*, 428 B.R. 595 (Bankr. D. Del. 2010). As the court observed, the bankruptcy code "is not intended to expand the debtor's rights against others beyond what rights existed at the commencement of the case." *Id.* at 607 (citations omitted). The D&O policy at issue in *Downey Financial* contained a Priority of Payment clause similar to the one in the Federal policy here. The Court therefore held that to the extent the bankruptcy trustee had any interest in the policy, it was subordinate to the coverage provided to the individual insureds. The court explained:

> To the extent the Trustee has *any* interest in the Policy, his interest is limited to Coverages B(i) and B(ii). However, Clause 22 clearly provides that Coverages B(i) and B(ii)—entity and indemnification coverages, respectively—are, under all circumstances, junior to Coverage A, which provides direct coverage to the Insureds. Indeed, Clause 22 explicitly states that the Policy's priority scheme is not affected by a bankruptcy filing. This is significant because were the Court to hold that the Policy proceeds are property of the estate and, thus, subject to the automatic stay, the trustee would have "greater rights in the [Policy proceeds] than the debtor had before filing for bankruptcy." Prior to bankruptcy, there was no means by which the Debtor's interests in Coverages B(i) or B(ii) could become superior to, or even equal to, the Insureds' interest in Coverage A. Were the Court to hold that the Policy proceeds are property of the estate, however, there *would* be a means by which the trustee's interests in Coverages B(i) and B(ii) could become at least equal to the Insureds'

> interest in Coverage A. Specifically, the trustee's interests in Coverages B(i) and B(ii) would become at least equal to the Insureds' interest in Coverage A if the Court ruled that the Policy proceeds were property of the estate and refused to grant stay relief.

Id. at 608 (emphasis in original) (footnotes and citations omitted). The Court therefore held that the policy proceeds were not property of the estate. *Id.*[5] The situation in *Downey Financial* is on all fours with the facts in this case. As the court in *Downey Financial* recognized, the individual insureds had priority over the policy's proceeds, regardless of any corporate bankruptcy, under the clear terms of the policy itself. Therefore, they could not properly be considered to be assets of the estate subject to the automatic stay.

A bankruptcy court in Florida reached the same conclusion in *In re Laminate Kingdom, LLC*, 2008 WL 1766637 (Bankr. S.D. Fla. Mar. 13, 2008) (not reported in B.R.). As that court noted, "[i]n determining a property interest in an insurance policy, courts are guided by the language and scope of the policy at issue," and that "[t]ypically, the proceeds of a directors and officers liability insurance policy are not considered property of a bankruptcy estate." *Id.* at *2. Like the Policy at issue here, the policy in *Laminate Kingdom* insured both the entity and its officers and directors, but – again, like the Policy in this case – there was a clear Priority of Payments provision. The court acknowledged that the policy did provide entity coverage, but found that interest insufficient to render the policy proceeds part of the bankruptcy estate:

> Having noted that distinction, the Court believes the depletion of proceeds to pay the Costs of Defense does not diminish the protection afforded the estate's assets under the terms of the Policy. The Policy's "Priority of Payments Endorsement" specifically requires that the proceeds be used *first* to pay non-indemnifiable loss for which coverage is provided under Coverage A of this Policy, which coverage includes the Costs of Defense. Then, only after such payments are made, and only if proceeds remain after payment of such Costs of Defense, will the Trustee or the estate be paid any proceeds. Thus, under the language of the Policy itself, the estate has only a contingent, residual interest in the Policy's proceeds; and, payment of the proceeds in accordance with the "Priority of Payments Endorsement" does not diminish the protection the Policy affords the estate, as such protection is only available after the Costs of Defense are paid.

[5] The court further held that even if the policy proceeds were considered to be property of the estate, there was sufficient cause to lift the stay under the circumstances. *Id.* at 608-09.

Id. at *3 (emphasis in original). The court therefore held that the policy proceeds were not part of the estate and not subject to an automatic stay. Even if the policy *were* to be considered estate property, the court found there was cause to grant relief from the stay, because the very essence of D&O insurance policies was at stake:

> In the present case, "cause" exists for granting relief from the stay to permit Carolina to advance the Defense Costs to Laminate's Directors and Officers under the Policy. As stated by the New York Bankruptcy Court: "D & O policies are obtained for the protection of individual directors and officers .... in essence and at its core, a D & O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection." *In re First Central Financial Corp*., 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999).

Id. at *4. "Indeed," the court added, "the Bankruptcy Court of New York cautioned that 'bankruptcy courts should be wary of impairing the contractual rights of directors and officers even in cases where the policies provide entity coverage.'" *Id.* (citation omitted).[6]

The court quoted approvingly from prior bankruptcy cases in which the courts acknowledged the trustee's concern that the estates have access to the policy proceeds as well. *Id.* In one of those cases, the court explained:

> . . . The Trustee's real concern is that payment of defense costs may affect his rights as a plaintiff seeking to recover from the D & O Policy rather than as a potential defendant seeking to be protected by the D & O Policy. In this way, Trustee is no different than any third party plaintiff suing defendants covered by a wasting policy. No one has suggested that such a plaintiff would be entitled to an order limiting the covered defendants' rights to reimbursement of their defense costs.
>
> The bottom line is that the Trustee seeks to protect the amount he may receive in his suit against the directors and officers while limiting coverage for the defense costs of the directors and officers. This is not what the directors and officers bargained for. In bringing the action against the directors and officers, the Trustee knew that the proceeds could be depleted by legal fees and he took that chance. The law does not support the Trustee's request to regulate defense costs.

In re Allied Digital Technologies, Corp., 306 B.R. 505, 513 (Bankr. D. Del. 2004).

[6] Any attempt to deprive Mr. Morriss of his chosen counsel might also implicate the Sixth Amendment's right to counsel. *See United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (accounting firm employees' Sixth Amendment rights were violated where government conduct caused employer to restrict advancement of legal fees to employees, and indictment had to be dismissed, even though state actor conduct occurred pre-indictment).

In these and other cases, the courts have refused to deprive corporate officers and directors of insurance benefits to which they are contractually entitled. This is especially true in those cases where, as here, there is a clear "Priority of Payments" provision in the policy. A contrary rule would undermine the very purpose of D&O coverage, which is to protect an entity's officers and directors, even (or perhaps especially) when the entity is in financial trouble:

> D & O policies are obtained for the protection of individual directors and officers. . . . In essence and at its core, a D & O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection.

In re First Cent. Financial Corp., 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). *See also Miller v. McDonald (In re World Health Alternatives, Inc.)*, 369 B.R. 805, 811 (Bankr. D. Del. 2007) (trustee failed to demonstrate likelihood of success on merits in establishing that policy proceeds were included in property of estate where, among other things, policy included a "Priority of Payments" provision); *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 1008240 (Bankr. S.D.N.Y. May 17, 2002) (unreported order and transcript of April 11, 2002 hearing) (recognizing that by operation of the priority of payments provision the debtors' right to entity and indemnification coverage is expressly subordinated to the directors' and officers' right to direct liability coverage) (copy attached as Exhibit D); *In re Lernout & Hauspie Speech Prods., N.V.*, Case Nos. 00-4397 through 00-4399 (JHW), pp. 44, 47 (Bankr. D. Del. May 8, 2001) (transcript of May 8, 2001 hearing) (finding that under the priority of payments provision the directors and officers have first priority to payment of policy proceeds under the direct liability coverage) (copy attached as Exhibit E); *cf. Duchow's Boat Ctr. v. Interstate Fire & Cas. Ins. Co. (In re SportStuff, Inc.)*, 430 B.R. 170, 178 (B.A.P. 8th Cir. 2010) (holding that court approval of settlement between insurer and bankrupt entity that purported to cut off other insureds' independent rights to a defense under the policy was an abuse of discretion)

Even when the applicable policy does not contain a priority of payments provision, courts routinely find that cause exists to permit advancement. "Courts faced with similar situations have commonly granted relief from stay to allow directors and officers to receive payment for their defense costs." *In re Beach First Nat. Bancshares, Inc.*, 451 B.R. 406, 410 (Bankr. D.S.C. 2011); *see also Groshong v. Sapp (In re*

Mila, Inc.), 423 B.R. 537, 545 (B.A.P. 9th Cir. 2010) (affirming bankruptcy court's grant of relief from stay because "defense losses were clear, immediate, and ongoing, while Trustee could only show hypothetical or speculative indemnification claims"); *In re Pasquinelli Homebuilding, LLC*, --- B.R. ----, 2012 WL 147949, at *4 (Bankr. N.D. Ill. Jan. 17, 2012) ("In the context of liability insurance proceeds, courts commonly grant such relief to allow payment of defense costs[.]"); *In re Taylor Bean & Whitaker Mortg. Corp.*, No. 3:09-bk-07047, 2011 WL 6014089 (Bankr. M.D. Fla. Oct. 11, 2011) (copy attached as Exhibit F) ("The Court is not obligated to postpone payments contractually owed to the former directors and officers based on mere hypothetical claims that may never be asserted and the possibility that coverage determinations may be reversed at some point in the future."); *In re Allied Digital Techs. Corp.*, 306 B.R. at 513 ("It is not uncommon for courts to grant stay relief to allow payment of defense costs or settlement costs to directors and officers, especially when there is no evidence that direct coverage of the debtor will be necessary.").

In contrast to all of this authority, Morriss is unaware of any case in which a court has held in similar circumstances that individuals entitled to coverage under a directors' and officers' policy were not entitled to receive payments to fund immediate expenses of defense. In her communications with Morriss regarding this issue, the Receiver has cited no such case in spite of being asked to do so. Accordingly, the court should permit Federal to advance defense costs on behalf of Insureds, including Morriss.

IV. CONCLUSION

The Court should enforce Morriss's rights under the unambiguous language of the Federal Policy lest Morriss suffer immediate and severe prejudice. Regardless of whether the Court's orders cover the Policy proceeds in the first instance, ample cause exists to permit Federal to make payments on behalf of Morriss (and any other Insured Person against whom a Claim may be asserted). Accordingly, Morriss respectfully requests that the Court enter an order providing that notwithstanding the Court's orders of January 17, 2012, January 27, 2012, or any other similar order which the Court may enter, Federal is authorized to make payments under the Policy up to the Policy's Limit of Liability to or for the benefit of

any Insured Persons or for the benefit of an Organization for defense costs incurred in connection with this litigation or any related Claim.

Respectfully Submitted,

ASHCROFT HANAWAY, LLC

By: /s/ Catherine L. Hanaway________

Catherine L. Hanaway, # 41208MO
Lisa Ottolini, # 39870MO
222 S. Central Avenue, Suite 110
St. Louis, MO 63105
Phone: (314) 863-7001
Fax: (314) 863-7008
chanaway@ashcroftlawfirm.com
lottolini@ashcroftlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Stephen B. Higgins
Brian A. Lamping
THOMPSON COBURN, LLP
One US Bank Plaza
St. Louis, MO 63101
314-552-6047
314-552-7047 (fax)

Brian T. James
Robert K. Levenson
Adam L. Schwartz
Securities and Exchange Commission
801 Brickell Avenue Suite 1800
Miami, FL 33131
305-982-6300
305-536-4146 (fax)

Vicki L. Little
David S. Corwin
Sher Corwin LLC
190 Carondelet Plaza
Suite 1100
St. Louis, Missouri 63105
314-721-5200
314-721-5201 (fax)

/s/ Catherine L. Hanaway_________________
Catherine L. Hanaway, # 41208MO
Attorney for Defendant Burton Douglas Morriss

PREMIUM BILL

Insured: Acartha Group LLC

Date: 12/08/2010

Producer: CRUMP INSURANCE SERVICES
565 MARIOTT DRIVE #820
NASHVILLE, TN 37214-0000

Company: Federal Insurance Company

THIS BILLING IS TO BE ATTACHED TO AND FORM A PART OF THE POLICY REFERENCED BELOW.

Policy Number: 8207-6676

Policy Period: December 1, 2010 to December 1, 2011

NOTE: PLEASE RETURN THIS BILL WITH REMITTANCE AND NOTE HEREON ANY CHANGES. BILL WILL BE RECEIPTED AND RETURNED TO YOU PROMPTLY UPON REQUEST.

PLEASE REMIT TO PRODUCER INDICATED ABOVE. PLEASE REFER TO 8207-6676

Product	Effective Date	Premium
FIVCAP03	12/01/10	$58,850.00
Surcharge: Property-Liability Insurance Guaranty Association Recoupment - New Jersey	12/01/10	$529.65

* For Kentucky policies, amount displayed includes tax and collection fees.

TOTAL POLICY PREMIUM	$59,379.65
TOTAL INSTALLMENT PREMIUM DUE	$59,379.65

Form 26-10-0426 (Ed. 2/98)

Exhibit A

POLICYHOLDER DISCLOSURE NOTICE OF TERRORISM INSURANCE COVERAGE

(for policies with no terrorism exclusion or sublimit)
Insuring Company: Federal Insurance Company

You are hereby notified that, under the Terrorism Risk Insurance Act (the "Act"), effective December 26, 2007, this policy makes available to you insurance for losses arising out of certain acts of terrorism. Terrorism is defined as any act certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism; to be a violent act or an act that is dangerous to human life, property or infrastructure; to have resulted in damage within the United States, or outside the United States in the case of an air carrier or vessel or the premises of a United States Mission; and to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

You should know that the insurance provided by your policy for losses caused by acts of terrorism is partially reimbursed by the United States under the formula set forth in the Act. Under this formula, the United States pays 85% of covered terrorism losses that exceed the statutorily established deductible to be paid by the insurance company providing the coverage.

However, if aggregate insured losses attributable to terrorist acts certified under the Act exceed $100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds $100 billion.

If aggregate insured losses attributable to terrorist acts certified under the Act exceed $100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds $100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

The portion of your policy's annual premium that is attributable to insurance for such acts of terrorism is: $ **-0-.**

If you have any questions about this notice, please contact your agent or broker.

IMPORTANT NOTICE TO POLICYHOLDERS

Insuring Company: Federal Insurance Company

All of the members of the Chubb Group of Insurance companies doing business in the United States (hereinafter "Chubb") distribute their products through licensed insurance brokers and agents ("producers"). Detailed information regarding the types of compensation paid by Chubb to producers on US insurance transactions is available under the Producer Compensation link located at the bottom of the page at www.chubb.com, or by calling 1-866-588-9478. Additional information may be available from your producer.

Thank you for choosing Chubb.

December 8, 2010

Acartha Group LLC
2 Tower Center, 20th Floor
East Brunswick , NJ 08816

Re: Financial Strength
Insuring Company: Federal Insurance Company

Dear Acartha Group LLC,

Chubb continues to deliver strong financial performance. Our financial strength, as reflected in our published reports and our ratings, should give you peace of mind that Chubb will be there for you when you need us most.

- Chubb's financial results during calendar year 2008 stand out in the industry.
- Chubb's balance sheet is backed with investments that we believe emphasize quality, safety, and liquidity, with total invested assets of $38.7 billion as of December 31, 2008.
- With 127 years in the business, Chubb is here for the long term, which is why we vigorously guard our financial strength and take what we believe is a prudent approach to assuming risk - on both the asset and liability sides of our balance sheet.
- Chubb is one of the most highly rated property and casualty companies in the industry, which is a reflection of our overall quality, strong financial condition, and strong capital position.
  - Chubb's financial strength rating is "A++" from A.M. Best Company, "AA" from Fitch, "Aa2" from Moody's, and "AA" from Standard & Poor's – the leading independent evaluators of the insurance industry.
  - Chubb's senior unsecured corporate debt rating from Standard & Poor's was upgraded from "A" to "A+" on December 15, 2008. Standard & Poor's also reaffirmed all of Chubb's ratings with a "stable" outlook.
  - A.M. Best, Fitch, and Moody's recently affirmed all of Chubb's ratings with a "stable" outlook. (For reference, A.M. Best reaffirmed us on 12/23/08, Fitch on 2/13/09, and Moody's on 2/4/09.)
  - For more than 50 years, Chubb has remained part of an elite group of insurers that have maintained A.M. Best's highest ratings.
- Chubb was named to Standard & Poor's list of S&P 500 Dividend Aristocrats, one of 52 companies in the S&P 500 index that have increased dividends every year for at least 25 consecutive years.
- Chubb's investment portfolio has held up extremely well. Chubb takes what we believe is a conservative approach to selecting and managing our assets. Furthermore, Chubb does not have any direct exposure to the subprime mortgage-backed securities market, and we stopped doing new credit derivative business in 2003 and put existing business in runoff.

Rarely has Chubb's business philosophy – to underwrite conservatively and invest judiciously – been more important than it is today. By adhering to this philosophy, we now have the capacity and flexibility to respond to opportunities, especially when you engage us in fully understanding your business risks.

We want you to know that Chubb is well-positioned to continue serving your needs with our underwriting expertise; broad underwriting appetite across all property, casualty, and specialty lines; and claim services. If you have any questions, feel free to call your agent or broker or your local Chubb underwriter. As always, we appreciate the trust you place in us as your insurance partner.

Notice to our Producers

Policy Surcharge To Recoup New Jersey Property–Liability Insurance Guaranty Association Assessments

Insuring Company: Federal Insurance Company

The New Jersey Property–Liability Insurance Guaranty Association ('PLIGA") is empowered to assess its member insurers in order to provide sufficient funds for PLIGA to pay claims against insurers that have been judicially declared insolvent. Insurers are currently required to recoup such assessments through a policy surcharge on premiums for policies providing the kinds of insurance to which PLIGA'S obligations apply. Policies issued or renewed on or after May 1, 1997 are subject to this surcharge which will be separately identified on the premium bills as "PLIGA Surcharge".

If the premium is paid by installment the full surcharge must be paid with the first premium installment. **PLEASE NOTE** that by law, this surcharge is not considered premium for the purpose of commissions. Also, this surcharge shall not apply to assessments made by PLIGA pursuant to the Fair Automobile Insurance Reform Act of 1990.

If you have any questions, or require additional information please contact your local Chubb underwriter.

Very truly yours,

CHUBB & SON

A division of Federal Insurance Company

Manager

Dear Policyholder:

Insuring Company: Federal Insurance Company

Pursuant to New Jersey law, the amount due for this policy includes a surcharge to pay claims made by New Jersey claimants against insolvent insurance companies which were doing business in the state. This surcharge is called the "New Jersey Property –Liability Insurance Guaranty Association Surcharge" and is identified as a separate item in your premium bill as the "PLIGA" Surcharge".

If you have any questions or require additional information about the surcharge, please contact your agent or broker.

Very truly yours,

CHUBB & SON

A division of Federal Insurance Company

Manager

Chubb Group of Insurance Companies
15 Mountain View Road
Warren, New Jersey 07059

VENTURE CAPITAL ASSET PROTECTION POLICY

DECLARATIONS

Policy Number: 8207-6676

FEDERAL INSURANCE COMPANY

A stock insurance company, incorporated under the laws of Indiana, herein called the Company

Capital Center, 251 North Illinois, Suite 1100
Indianapolis, IN 46204-1927

THIS POLICY PROVIDES CLAIMS MADE COVERAGE, WHICH APPLIES ONLY TO "CLAIMS" FIRST MADE DURING THE "POLICY PERIOD," OR ANY APPLICABLE EXTENDED REPORTING PERIOD. THE LIMIT OF LIABILITY TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY "DEFENSE COSTS," AND "DEFENSE COSTS" WILL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT. IN NO EVENT WILL THE COMPANY BE LIABLE FOR "DEFENSE COSTS" OR THE AMOUNT OF ANY JUDGMENT OR SETTLEMENT IN EXCESS OF THE APPLICABLE LIMIT OF LIABILITY. READ THE ENTIRE POLICY CAREFULLY.

Item 1. **Parent Organization:** Acartha Group LLC
Principal Address: 2 Tower Center, 20th Floor
East Brunswick, NJ 08816

Item 2. **Private Fund**:
Acartha Technology Partners, LP
Clearbrook Acquisition, LLC
Evergrid Acquisition, LLC
Evergrid/MIC VII C, LLC
Integrien Acquisition, LLC
MIC VII, LLC
Tervela Acquisition II, LLC
Tervela Acquisition LLC

Item 3. Limits of Liability (inclusive of **Defense Costs**):

(A) Each **Loss** Limit of Liability $ 3,000,000.00

(B) Aggregate Limit of Liability Each **Policy Period** $ 3,000,000.00

Item 4. Deductible Amount for each **Loss**:
Insuring Clause 1 $ 0.00 Management Liability, all **Insured Persons**
Insuring Clause 2 $ 100,000.00 Management Indemnification
Insuring Clause 3 $ 0.00 Professional Liability
Insuring Clause 4 $ 0.00 Outside Directorship Liability

Item 5. Extended Reporting Period:

(A) Additional Premium: $123,750.00 of Annualized Premium for the Expiring **Policy Period**
(B) Additional Period: 1 year

Item 6. Pending or Prior Date: December 1, 2006

Item 7. **Policy Period**: From 12:01 A.M. on December 1, 2010
To 12:01 A.M. on December 1, 2011
Local time at the address shown in Item 1.

Chubb Group of Insurance Companies
15 Mountain View Road
Warren, New Jersey 07059

VENTURE CAPITAL ASSET PROTECTION POLICY

Item 8. Endorsement(s) Effective at Inception:

14-02-10836	17-02-4816
14-02-10903	17-02-4821
14-02-11534	17-02-4829
14-02-12510	17-02-4961
14-02-12973	17-02-6475
14-02-12980	17-02-6724
14-02-9228	17-02-6726

In witness whereof, the Company issuing this Policy has caused this Policy to be signed by its authorized officers, but it shall not be valid unless also signed by a duly authorized representative of the Company.

FEDERAL INSURANCE COMPANY

W. Andrew Macan

Secretary

John J. Degnan

President

12/08/2010

Date

Authorized Representative

VENTURE CAPITAL ASSET PROTECTION POLICY

THE LIMIT OF LIABILITY TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY "DEFENSE COSTS," AND "DEFENSE COSTS" WILL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT. IN NO EVENT WILL THE COMPANY BE LIABLE FOR "DEFENSE COSTS" OR THE AMOUNT OF ANY JUDGMENT OR SETTLEMENT IN EXCESS OF THE APPLICABLE LIMIT OF LIABILITY.

In consideration of payment of the premium and subject to the Declarations, limitations, conditions, provisions and other terms of this Policy, the Company and the **Insured** agree as follows:

Insuring Clause 1
Management Liability Coverage

1. The Company shall pay, on behalf of each **Insured Person**, **Loss** for which the **Insured Person** is not indemnified by the **Organization** and which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against such **Insured Person**, individually or otherwise, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in Section 16 of this Policy.

Insuring Clause 2
Management Indemnification Coverage

2. The Company shall pay, on behalf of the **Organization**, **Loss** for which the **Organization** grants indemnification to each **Insured Person**, as permitted or required by law, which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against such **Insured Person**, individually or otherwise, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in Section 16 of this Policy.

Insuring Clause 3
Professional Liability Coverage

3. The Company shall pay, on behalf of any **Insured**, **Loss** arising solely from **Private Equity Venture Investing** for which the **Insured** becomes legally obligated to pay on account of any **Claim** first made against such **Insured** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in Section 16 of this Policy.

Insuring Clause 4
Outside Directorship Liability Coverage

4. The Company shall pay, on behalf of an **Insured Person**, **Loss** for which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against such **Insured Person**, individually or otherwise, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** resulting from his or her **Outside Capacity**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in Section 16 of this Policy.

Outside Directorship Liability Run-off Extension

5. If an **Insured Person** ceases serving in an **Outside Capacity**, coverage provided under Insuring Clause 4 of this Policy shall continue until the termination of this Policy, but only with respect to **Wrongful Acts** occurring prior to the time the **Insured Person** ceased serving in such **Outside Capacity**.

Spouses, Estates and Legal Representatives

6. Subject to the limitations, conditions, provisions and other terms of this Policy, coverage shall extend to **Claims** for the **Wrongful Acts** of an **Insured Person** made against:

   a. the estates, heirs, legal representatives or assigns of such **Insured Person** who is deceased or against the legal representatives or assigns of an **Insured Person** who is incompetent, insolvent or bankrupt, and

   b. the lawful spouse or **Domestic Partner** of such **Insured Person** solely by reason of such spouse or **Domestic Partner's** status as a spouse or **Domestic Partner**, or such spouse or **Domestic Partner's** ownership interest in property which the claimant seeks as recovery for an alleged **Wrongful Act** of such **Insured Person**.

   All terms and conditions of this Policy, including without limitation the Deductible Amount, applicable to **Loss** incurred by the **Insured Person**, shall also apply to loss incurred by the estates, heirs, legal representatives, assigns, spouses and **Domestic Partners** of such **Insured Person**. The coverage provided under this Section 6 shall not apply with respect to any loss arising from an act or omission by an **Insured Person's** estate, heirs, legal representatives, assigns, spouse or **Domestic Partner**.

Extended Reporting Period

7. If the Company or the **Parent Organization** terminates or does not renew this Policy, other than termination by the Company for non-payment of premium, then the **Parent Organization** and the **Insured Persons** shall have the right, upon payment of the additional premium set forth in Item 5(A) of the Declarations, to an extension of the coverage granted by this Policy for **Claims** first made during the period set forth in Item 5(B) of the Declarations (the "Extended Reporting Period") following the effective date of termination or non-renewal, but only to the extent such **Claims** are for **Wrongful Acts** occurring before the effective date of termination or non-renewal. The offer of renewal terms and conditions or premiums different from those in effect prior to renewal shall not constitute refusal to renew. The right to purchase an extension of coverage as described under this Section 7 shall lapse unless written notice of election to purchase the extension, together with payment of the additional premium due, is received by the Company within thirty (30) days after the effective date of termination or non-renewal. Any **Claim** made during the Extended Reporting Period shall be deemed to have been made during the immediately preceding **Policy Period**. The entire additional premium for the Extended Reporting Period shall be deemed fully earned at the inception of such Extended Reporting Period.

Exclusions Applicable to All Insuring Clauses

8. The Company shall not be liable for **Loss** on account of any **Claim** made against any **Insured**:

   a. based upon, arising from, or in consequence of any circumstance if written notice of such circumstance has been given, under any policy of which this Policy is a renewal or replacement, and if such prior policy affords coverage (or would afford such coverage except for the exhaustion of its limits of liability) for such **Loss**, in whole or in part, as a result of such notice;

b. based upon, arising from, or in consequence of any demand, suit or other proceeding pending against, or order, decree or judgment entered for or against any **Insured** on or prior to the Pending or Prior Date set forth in Item 6 of the Declarations, or the same or substantially the same fact, circumstance or situation underlying or alleged therein;

c. brought or maintained by or on behalf of any **Insured** in any capacity except:

   i. a **Claim** that is a derivative action brought or maintained on behalf of an **Organization** by one or more persons who are not **Insured Persons** and who bring and maintain the **Claim** without the solicitation, assistance or participation of any **Insured Person**;

   ii. a **Claim** brought or maintained by a director, officer, general partner or managing member of an **Organization** for the actual or alleged wrongful employment termination of a director, officer, general partner or managing member of such **Organization**;

   iii. a **Claim** brought or maintained by an **Insured Person** for contribution or indemnity, if the **Claim** directly results from another **Claim** covered under this Policy; or

   iv. a **Claim** brought or maintained by all natural persons who were, now are, or shall be duly appointed to an **Advisory Board**, while acting in their capacity as a member or limited partner of a **Private Fund**.

d. for an actual or alleged violation of the responsibilities, obligations or duties imposed by the Employee Retirement Income Security Act of 1974, as amended, or similar provisions of any federal, state or local statutory law or common law anywhere in the world, as respects any pension, profit sharing, health and welfare or other employee benefit plan or trust established or maintained for the purpose of providing benefits to employees of an **Organization**;

e. for bodily injury, mental anguish or emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof. However, this Exclusion shall not apply to any **Claim** for mental anguish or emotional distress brought by an employee of an **Outside Entity** against an **Insured Person** in an **Outside Capacity**;

f. for defamation, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, assault or battery;

g. based upon, arising from, or in consequence of:

   i. any actual, alleged, or threatened exposure to, or generation, storage, transportation, discharge, emission, release, seepage, migration, dispersal, escape, treatment, removal or disposal of any **Pollutants**; or

   ii. any regulation, order, direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**; or

      (a) any action taken in contemplation or anticipation of any such regulation, order, direction or request; or

      (b) any voluntary decision to do so,

including but not limited to any **Claim** for financial loss to the **Organization**, its security holders or its creditors based upon, arising from or in consequence of any matter described in i. or ii. above;

h. based upon, arising from, or in consequence of:

i. the committing in fact of any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such **Insured**, or

ii. such **Insured** having gained in fact any profit, remuneration or advantage to which such **Insured** was not legally entitled,

as evidenced by:

(a) any written statement or written document by any **Insured**, or

(b) any judgement or ruling in any judicial, administrative or alternative dispute resolution proceeding;

i. based upon, arising from, or in consequence of any **Claim** against a limited partner or member, acting in the capacity as a general partner or managing member of a **Private Fund**. However, this Exclusion shall not apply to an **Insured Person** otherwise covered under this Policy;

j. based upon, arising from, or in consequence of the liability of a party, other than an **Insured**, assumed by such **Insured** pursuant to a contract, except liability for **Loss** that the **Insured** would have had in the absence of such contract;

k. based upon, arising from or in consequence of any intentional breach of contract, if a judgment or other final adjudication adverse to such **Insured** establishes any intentional breach of contract;

l. for an accounting of profits made from the purchase or sale by such **Insured** of securities of the **Organization** within the meaning of Section 16 (b) of the Securities Exchange Act of 1934, as amended, or similar provisions of any federal, state or local statutory law or common law; or

m. made against an organization that is a **Subsidiary** or against an **Insured Person** of such **Subsidiary** for any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted at any time when the organization was not a **Subsidiary**.

Exclusions Applicable to Insuring Clause 4 Only

9. The Company shall not be liable for **Loss** on account of any **Claim** made against any **Insured Person** in his or her **Outside Capacity**:

a. based upon, arising from, or in consequence of any **Wrongful Act** which occurred prior to the date set forth in Item 6, Pending or Prior Date, of the Declarations, or any **Wrongful Act** occurring subsequent to that date which, together with a **Wrongful Act** occurring prior to such date, constitute **Interrelated Wrongful Acts**;

b. based upon, arising from, or in consequence of any **Wrongful Act** occurring after the date such **Insured Person** ceases to be a director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governor, **Advisory Board** member or equivalent executive position of an **Organization**;

c. for any **Claim** brought or maintained by or on behalf of any **Outside Entity** or affiliate of the **Outside Entity**, or one or more directors, officers, trustees, governors, board observers or equivalent executives of any **Outside Entity**, except:

   i. a **Claim** that is brought or maintained by or on behalf of a **Portfolio Company**, or its directors, officers, trustees, governors, board observers or equivalent executives, without the solicitation, aid, assistance, or participation of any **Insured**;

   ii. a **Claim** that is a derivative action brought or maintained on behalf of an **Outside Entity** by one or more persons who are not:

      (a) **Insured Persons**; or

      (b) directors, officers, trustees, governors, board observers or equivalent executives of the **Outside Entity**,

   and who bring and maintain such **Claim** without the solicitation, assistance or participation of any such person; or

   iii. a **Claim** brought or maintained by:

      (a) an **Insured Person**; or

      (b) a director, officer, trustee, governor, board observer or equivalent executive of the **Outside Entity**,

   for contribution or indemnification, if such **Claim** results from another **Claim** covered under this Policy; or

d. based upon, arising from, or in consequence of:

   i. any litigation, arbitration, **Claim**, demand, cause of action, equitable, legal or quasi-legal proceeding, decree or judgment (collectively referred to as litigation) against the **Outside Entity** occurring prior to, or pending as of the date the **Insured Person** first serves in his or her **Outside Capacity**, of which the **Outside Entity** or the director, officer, trustee, governor, board observer or equivalent executive of the **Outside Entity** received notice or otherwise had knowledge as of such date;

   ii. any subsequent litigation arising from, or based on the same or substantially the same matters alleged in the prior or pending litigation in i. above; or

   iii. any **Wrongful Act** of the **Outside Entity**, or the director, officer, trustee, governor, board observer, or equivalent executive of the **Outside Entity**, which gave rise to such prior or pending litigation included in i. above.

Severability of Exclusions

10. With respect to the Exclusions herein, in order to determine if coverage is available:

    a. no fact pertaining to or knowledge possessed by any **Insured Person** shall be imputed to any other **Insured Person** for the purpose of applying Exclusion 8.h. and 8.l.

    b. only facts pertaining to or knowledge possessed by any past, present or future chief financial officer, in-house general counsel, president, chief executive officer, chairperson, general partner or managing member of any **Organization** shall be imputed to any **Organization**.

Limit of Liability Deductible

11. The Company's maximum liability for all **Loss** on account of each **Claim** covered under one or more of the Insuring Clauses shall be the Limit of Liability set forth in Item 3(A) of the Declarations. The Company's maximum aggregate liability for all **Loss** on account of all **Claims** first made during the **Policy Period**, whether covered under one or more Insuring Clauses, shall be the Aggregate Limit of Liability for each **Policy Period** set forth in Item 3(B) of the Declarations.

    Defense Costs are part of, and not in addition to, the Limits of Liability set forth in Item 3 of the Declarations, and the payment by the Company of **Defense Costs** shall reduce and may exhaust such Limits of Liability.

    The Company's liability under the Insuring Clauses shall apply only to that part of each covered **Loss** which is excess of the applicable Deductible Amount set forth in Item 4 of the Declarations. Such Deductible Amount shall be borne by the **Insureds** uninsured and at their own risk.

    If different parts of a single **Claim** are subject to different Deductible Amounts, then the applicable Deductible Amount shall be applied separately to each part of such **Claim**, but the sum of such Deductible Amounts shall not exceed the largest applicable Deductible Amount.

    All **Related Claims** shall be treated as a single **Claim** first made on the date the earliest of such **Related Claims** was first made, or on the date the earliest of such **Related Claims** is treated as having been made in accordance with Section 16 of this Policy, regardless of whether such date is before or during the **Policy Period**.

    The Limit of Liability available during the Extended Reporting Period (if exercised) shall be the remaining portion, if any, of the Company's maximum aggregate liability for all **Loss** on account of all **Claims** made during the immediately preceding **Policy Period**.

Non-Accumulation of Limits

12. If any **Loss** arising from any **Claim** made against any **Insured**, in the **Insured's** capacity as a director, officer, trustee, board observer or equivalent executive of a **Portfolio Company**, is insured under any other valid policy(ies) issued by a parent, subsidiary or affiliate of the Company, then payment under such policy(ies) on account of a **Claim** also covered under this Policy shall reduce, by the amount of the payment, the Company's Limit of Liability under this Policy with respect to such **Claim.**

Presumptive Indemnification

13. If the **Organization**:

    a. fails or refuses, other than for reason of **Financial Impairment**, to indemnify the **Insured Person** for **Loss**; and

    b. is permitted or required to indemnify the **Insured Person** for such **Loss** pursuant to the fullest extent permitted by law,

    then, notwithstanding any other conditions, provisions or terms of this Policy to the contrary, any payment by the Company of such **Loss** shall be subject to:

    i. the applicable Insuring Clause Deductible Amount set forth in Item 4 of the Declarations; and

    ii. all of the Exclusions in this Policy.

Defense and Settlement

14. It shall be the duty of the **Insured** and not the duty of the Company to defend any **Claim** made against the **Insured**.

    The Company may make any investigation it deems necessary and may, with the written consent of the **Parent Organization**, on behalf of the **Insured**, make any settlement of a **Claim** it deems expedient.

    The **Insured** agrees not to settle or offer to settle any **Claim**, incur any **Defense Costs** or otherwise assume any contractual obligation or admit any liability with respect to any **Claim** without the Company's prior written consent. The Company shall in no event be liable for any element of **Loss** incurred, for any obligation assumed, or for any admission made, by any **Insured** without the Company's prior written consent. Provided the **Insured** complies with the obligations set forth in the next two paragraphs, the Company shall not unreasonably withhold any such consent.

    With respect to any **Claim** that appears reasonably likely to be covered in whole or in part under this Policy, the Company shall have the right and shall be given the opportunity to effectively associate with, and to be consulted in advance by, the **Insured** regarding the investigation, defense and settlement of such **Claim**, including but not limited to selecting appropriate defense counsel and negotiating any settlement.

    The **Insured** agrees to provide the Company with all information, assistance and cooperation which the Company reasonably requests and agrees that in the event of a **Claim** the **Insured** shall do nothing that may prejudice the Company's position or its potential or actual rights of recovery.

    The Company shall advance **Defense Costs** as provided under Section 15 of this Policy on a current basis. Any advancement of **Defense Costs** shall be repaid to the Company by the **Insured**, severally according to their respective interests, if and to the extent it is determined that such **Defense Costs** are not insured under this Policy.

Allocation

15. If both **Loss** covered by this Policy and loss not covered by this Policy are incurred, either because a **Claim** against the **Insured** includes both covered and uncovered matters or covered and uncovered parties, then the **Insured** and the Company shall allocate such amount between covered **Loss** and uncovered loss based upon the relative legal and financial exposures of the parties to covered and non-covered matters and, in the event of a settlement in such **Claim**, also based upon the relative benefits to the parties from such settlement. The Company shall not be liable under this Policy for the portion of such amount allocated to non-covered loss.

    If the **Insured** and the Company agree on an allocation of **Defense Costs**, the Company shall advance on a current basis **Defense Costs** allocated to covered **Loss**. If the **Insured** and the Company cannot agree on an allocation:

    a. no presumption as to allocation shall exist in any arbitration, suit or other proceeding;

    b. the Company shall advance on a current basis **Defense Costs** which the Company believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined; and

    c. the Company, if requested by the **Insured**, shall submit the dispute to binding arbitration. The rules of the American Arbitration Association shall apply except with respect to the selection of the arbitration panel, which shall consist of one arbitrator selected by the **Insured**, one arbitrator selected by the Company, and a third independent arbitrator selected by the first two arbitrators.

    Any negotiated, arbitrated or judicially determined allocation of **Defense Costs** on account of a **Claim** shall be applied retroactively to all **Defense Costs** on account of such **Claim**, notwithstanding any prior advancement to the contrary. Any allocation or advancement of **Defense Costs** on account of a **Claim** shall not apply to or create any presumption with respect to the allocation of other **Loss** on account of such **Claim**.

    As a condition of any payment of **Defense Costs** the Company may, at its sole option, require a written undertaking on terms and conditions satisfactory to the Company guaranteeing the repayment of any **Defense Costs** paid to or on behalf of any **Insured** if it is finally determined that **Loss** incurred by such **Insured** would not be covered.

Reporting and Notice

16. The **Insured** shall, as a condition precedent to exercising any right to coverage under this Policy, give to the Company written notice of any **Claim** as soon as practicable, but in no event more than sixty (60) days after the earliest of the following dates:

    a. the date on which any **Organization's** chief financial officer, in-house general counsel, president, chief executive officer, chairperson, general partner or managing member first becomes aware that the **Claim** has been made; or

    b. if this Policy is not renewed by the Company, the termination date of the **Policy Period** or, if exercised, the Extended Reporting Period.

If, during the **Policy Period** an **Insured**:

i. becomes aware of circumstances which could give rise to a **Claim** and gives written notice of such circumstances to the Company; or

ii. receives a written request to toll or waive a statute of limitations applicable to **Wrongful Acts** occurring before or during the **Policy Period** and gives written notice of such request and of such alleged **Wrongful Acts** to the Company,

then any **Claim** subsequently arising from the circumstances referred to in i. above or from the **Wrongful Acts** referred to in ii. above, shall be deemed to have been first made during the **Policy Period** in which the written notice described in i. or ii. above was first given by an **Insured** to the Company, provided any such subsequent **Claim** is reported to the Company as set forth under this Section 16. With respect to any such subsequent **Claim**, no coverage under this Policy shall apply to loss incurred prior to the date such subsequent **Claim** is actually made.

The **Insured** shall, as a condition precedent to exercising any right to coverage under this Policy, give to the Company such information and cooperation as the Company may reasonably require, and shall include in any notice under this Section 16 a description of the **Claim**, circumstances, the nature of any alleged **Wrongful Acts**, the nature of the alleged or potential damage, the names of all actual or potential claimants, the names of all actual or potential defendants, and the manner in which such **Insured** first became aware of the **Claim** or circumstances.

Notice

17. Notice to the Company under this Policy shall be given in writing addressed to:

a. for notice of **Claim** or circumstances that could give rise to a **Claim**:

Claims Department, Attention D&O/E&O Claim Manager
Chubb Group of Insurance Companies
15 Mountain View Road
Warren, N.J. 07059

b. for all other notices:

Department of Financial Institutions
Chubb Group of Insurance Companies
15 Mountain View Road
Warren, N.J. 07059

Such notice shall be effective on the date of receipt by the Company at such address.

Other Insurance

18. With respect to coverage provided by Insuring Clause 1, 2 and 3, if any **Loss** under this Policy is insured under any other valid and collectible insurance policy(ies), then this Policy shall cover such **Loss**, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such **Loss** is in excess of the applicable retention (or deductible) and limit of liability under such other insurance, whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other

insurance is written only as specific excess insurance over the Limits of Liability provided in this Policy. Any payment by **Insureds** of a retention or deductible under such other insurance shall deplete, by the amount of such payment, the applicable Deductible Amount under this Policy.

With respect to coverage provided by Insuring Clause 4, this Policy shall be specifically excess of any indemnity (other than the indemnity provided by the **Organization**) and insurance available to such **Insured Person** by reason of serving in an **Outside Capacity**, including any indemnity or insurance available from or provided by the **Outside Entity.**

Acquisition or Creation of Another Organization

19. If before or during the **Policy Period** the **Organization**:

    a. acquires securities or voting rights in another organization or creates another organization, which as a result of such acquisition or creation becomes a **Subsidiary** or **Investment Holding Company**; or

    b. acquires another organization by merger into or consolidation with an **Organization**,

    then such other organization and its **Insured Persons** shall be **Insureds** under this Policy, but only with respect to **Wrongful Acts** or **Interrelated Wrongful Acts** where all or part of such acts occurred after such acquisition or creation unless the Company agrees, after presentation of a complete application and all other appropriate information, to provide coverage by endorsement for **Wrongful Acts** occurring before such acquisition or creation.

    If the fair value of all cash, securities, assumed indebtedness and other consideration paid by the **Organization** for any such acquired organization, new **Subsidiary** or new **Investment Holding Company** exceeds fifteen percent (15%) of the total assets of the **Parent Organization** (as reflected in the most recent audited consolidated financial statements of such organization and the **Parent Organization**, respectively as of the date of such acquisition or creation), then the **Parent Organization** shall give written notice of such acquisition or creation to the Company as soon as practicable, but in no event later than sixty (60) days after the date of such acquisition or creation, together with such information as the Company may require and shall pay any reasonable additional premium required by the Company. If the **Parent Organization** fails to give such notice within the time specified in the preceding sentence, or fails to pay the additional premium required by the Company, then coverage for such acquired or created organization and its **Insured Persons** shall terminate with respect to **Claims** first made more than sixty (60) days after such acquisition or creation.

Acquisition of an Organization By Another Organization

20. If:

    a. the **Parent Organization** or a **Private Fund** merges into or consolidates with another organization;

    b. another organization, person or group of organizations or persons acting in concert acquires securities or voting rights which result in ownership or voting control by the other organization or person of more than 50% of the outstanding securities representing the present right to vote for election of directors or select general partners or managing members of the **Parent Organization** or a **Private Fund**;

c. the **Parent Organization** completely ceases to actively engage in its primary business ("cessation"); or

d. **Financial Impairment** occurs,

then coverage under this Policy shall continue until termination of this Policy but only with respect to **Claims** where all or part of the **Wrongful Acts** or **Interrelated Wrongful Acts** occurred prior to such merger, consolidation, acquisition, cessation or **Financial Impairment**. The **Parent Organization** shall give written notice of such merger, consolidation, acquisition, cessation or **Financial Impairment** to the Company as soon as practicable, together with such information as the Company may require. The full annual Premium for the **Policy Period** shall be deemed fully earned immediately upon the occurrence of any event outlined in a. through d. above.

Cessation of Subsidiaries

21. If an organization ceases to be a **Subsidiary**, then coverage with respect to such **Subsidiary** and its **Insured Persons** shall continue until termination of this Policy, but only with respect to **Wrongful Acts** occurring prior to the date such organization ceased to be a **Subsidiary.**

Creation of Another Private Fund

22. If during the **Policy Period**, an **Organization** sponsors or creates another private investment fund engaged in substantially similar activities as any **Private Fund** scheduled in Item 2 of the Declarations, then such newly sponsored or created private investment fund and its **Insured Persons** shall be **Insureds** under this Policy for a period of sixty (60) days from the date of sponsorship or creation, but only with respect to **Wrongful Acts** or **Interrelated Wrongful Acts** where all or part of such acts occurred after such sponsorship or creation. The **Parent Organization** shall give written notice of such sponsorship or creation to the Company as soon as practicable, but in no event later than sixty (60) days after the date of such sponsorship or creation, together with such information as the Company may require and shall pay any reasonable additional premium required by the Company. If the **Parent Organization** fails to give such notice within the time specified in the preceding sentence, or fails to pay the additional premium required by the Company, then coverage for such sponsored or created private investment fund and its **Insured Persons** shall terminate with respect to **Claims** first made more than sixty (60) days after such acquisition or creation.

Representations and Severability

23. In issuing this Policy, the Company has relied upon the statements, representations and information in the **Application** for this Policy. All of the **Insureds** acknowledge and agree that all such statements, representations and information:

    a. are true and accurate;

    b. were made or provided in order to induce the Company to issue this Policy; and

    c. are material to the Company's acceptance of the risk to which this Policy applies.

    In the event that any of the statements, representations or information in the **Application** are not true and accurate, this Policy shall be void with respect to:

i. any **Insured** who knew as of the effective date of the **Application** the facts that were not truthfully and accurately disclosed (whether or not the **Insured** knew of such untruthful disclosure in the **Application**) or to whom knowledge of such facts is imputed; and

ii. the **Organization** under Insuring Clause 2 to the extent it indemnifies an **Insured Person** who had such actual or imputed knowledge.

For purposes of the preceding paragraph:

(a) the knowledge of any **Insured Person** who is a past, present or future chief financial officer, in-house general counsel, president, chief executive officer, chairperson, general partner or managing member of any **Organization** shall be imputed to such **Organization** and its **Subsidiaries**;

(b) the knowledge of the persons who signed the **Application** for this Policy shall be imputed to all of the **Insureds**; and

(c) except as provided in (a) above, the knowledge of an **Insured Person** who did not sign the **Application** shall not be imputed to any other **Insured**.

Subrogation

24. In the event of any payment under this Policy, the Company shall be subrogated, to the extent of such payment, to all the **Insured's** rights of recovery, and the **Insured** shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable the Company effectively to bring suit in the name of the **Insured**.

Action Against the Company

25. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy. No person or organization shall have any rights under this Policy to join the Company as party to any action against any **Insured** to determine such **Insured's** liability, nor shall the Company be impleaded by such **Insured** or the **Insured's** legal representatives.

Bankruptcy or Insolvency

26. Bankruptcy or insolvency of an **Insured** or the estate of an **Insured Person** shall not relieve the Company of its obligations nor deprive the Company its rights under this Policy.

Authorization Clause

27. By acceptance of this Policy, the **Parent Organization** agrees to act on behalf of all **Insureds** with respect to giving and receiving of notice of **Claim** or termination, the payment of premiums, and the receiving of return premiums that may become due under this Policy, the negotiation, agreement to and acceptance of endorsements, and the giving or receiving of any notice provided for in this Policy, and each **Insured** agrees that the **Parent Organization** shall act on their behalf.

Alteration or Assignment

28. No change in, modification of, or assignment of interest under this Policy shall be effective except when made by a written endorsement to this Policy which is signed by a duly authorized representative of the Company.

Termination of Policy

29. This Policy shall terminate at the earliest of the following times:

    a. ten (10) days after the receipt by the **Parent Organization** of a written notice of termination from the Company, in the event of non-payment of premium, unless the premium is paid within such 10 day period;

    b. upon receipt by the Company of written notice of termination from the **Parent Organization**;

    c. upon expiration of the **Policy Period** as set forth in Item 7 of the Declarations for this Policy;

    d. sixty (60) days after receipt by the **Parent Organization** of the Company's written notice of non-renewal. Such notice shall be in conformance with applicable state laws and regulations; or

    e. at such other time as may be agreed upon by the Company and the **Parent Organization**.

    The Company shall refund the unearned premium computed at the customary short rate if the Policy is terminated by the **Parent Organization**. Under any other circumstances the refund shall be calculated pro rata.

Valuation and Foreign Currency

30. All premiums, limits, deductibles, **Loss** and other amounts under this Policy are expressed and payable in the currency of the United States of America. If judgment is rendered, settlement is denominated or another element of **Loss** under this Policy is stated in a currency other than United States dollars, payment under this Policy shall be made in United States dollars at the rate of exchange published in The Wall Street Journal on the date the final judgment is entered, the amount of the settlement is agreed upon or any part of **Loss** is due.

Coverage Territory

31. Coverage shall extend anywhere in the world.

Definitions

32. When used in this Policy:

    Advisory Board means any board or committee formed pursuant to and identified in the partnership agreement or operating agreement of an **Organization**.

Application means all signed applications, including attachments and materials incorporated therein, submitted by the **Insured** to the Company for this Policy or any Policy issued by the Company of which this Policy is a direct or indirect renewal or replacement. All such applications, attachments and materials are deemed attached to, incorporated into and made a part of this Policy.

Claim means:

a. a written demand for monetary damages;

b. a civil proceeding commenced by the filing or service, whichever is earlier, of a complaint or similar pleading;

c. a criminal proceeding commenced by the return of an indictment; or

d. a formal administrative proceeding commenced by the filing of a notice of charges, formal investigative order or similar document,

against any **Insured** for a **Wrongful Act**, including any appeal therefrom.

A **Claim** shall be deemed to have been made against an **Insured** on the date such **Insured** first received written demand for monetary damages, the date that notice of a judicial or administrative proceeding is served upon such **Insured** in any state, provincial or federal court or administrative agency, or the date such **Insured** first received written notice regarding the filing of a notice of charges, formal investigative order or similar document from a state, provincial or federal regulatory agency.

Controlling Shareholder has the same meaning as the applicable definition or phrase under Section 15 of the Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934, as amended.

Defense Costs means that part of **Loss** consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries or fees of the directors, officers, general partners, managing general partners, managing members, members of a Board of Managers, governors or employees of the **Organization**) incurred in defending or investigating **Claims** and the premium for appeal, attachment or similar bonds.

Domestic Partner means any natural person qualifying as a domestic partner under the provisions of any applicable federal, state or local law or under the provisions of any formal program established by the **Organization**.

Financial Impairment means the status of the **Organization** resulting from:

a. the appointment by any state or federal official, agency or court of any receiver, conservator, liquidator, trustee, rehabilitator or similar official to take control of, supervise, manage or liquidate such **Organization**; or

b. such **Organization** becoming a debtor in possession under the United States bankruptcy law or an equivalent status under the law of any other country.

Insured means the **Organization** and any **Insured Person.**

Insured Capacity means the position or capacity described in the definition of **"Insured Person"** held by any **Insured Person** but shall not include any position or capacity in any organization other than the **Organization**, even if the **Organization** directed or requested the **Insured Person** to serve in such other position or capacity.

Insured Person means any natural person:

a. who was, now is, or shall be a member of any **Advisory Board**, provided such member is indemnified by an **Organization**;

b. who was, now is, or shall be a director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governors or equivalent executive in an **Organization**;

c. with respect to any **Organization** formed outside the United States of America, any equivalent executive position described in a. and b. above, under applicable law in any country other than the United States of America; or

d. who was, now is, or shall be an employee of an **Organization**, but solely for coverage provided by Insuring Clause 3, Professional Liability Coverage.

Interrelated Wrongful Acts means all **Wrongful Acts** based upon, arising from, or in consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events.

Investment Holding Company means any organization which is created or acquired for the sole purpose of acquiring the securities, debentures or voting rights representing the present right to vote for election of directors or to select managing partners or managing members of a **Portfolio Company** and in which a **Private Fund** owns or controls greater than 50% of the outstanding securities or voting rights representing the present right to vote for election of directors or to select general partners or managing members. **Investment Holding Company** shall not include any **Portfolio Company**.

Loss means the amount that any **Insured Person** (for purposes of Insuring Clauses 1, 2 and 4) or the **Organization** (for purposes of Insuring Clause 3) becomes legally obligated to pay on account of any covered **Claim** including, but not limited to, damages, judgments, settlements, pre-judgment and post-judgment interest and **Defense Costs**. **Loss** does not include:

a. any amount not indemnified by the **Organization** for which the **Insured Person** is absolved from payment by reason of any covenant, agreement or court order;

b. any amount incurred by the **Organization** (including its board of directors, any committee of the board of directors, or its general partners or managing members) in connection with the investigation or evaluation of any **Claim** or potential **Claim** by or on behalf of the **Organization**;

c. fines, penalties or taxes imposed by law, including but not limited to punitive or exemplary damages, or the multiple portion of any multiplied damage award;

d. any amount not insurable under the law pursuant to which this Policy is construed;

e. with the exception of **Defense Costs**, the actual principal, interest, or other monies either paid, accrued or due as a result of any loan, lease, extension of credit or equity contribution;

f. any amount allocated to non-covered loss pursuant to Section 15 of this Policy; or

g. any amount incurred by an **Insured** in a proceeding or investigation that is not then a **Claim** even if such:

   i. amount also benefits the defense of a covered **Claim**; or

   ii. proceeding or investigation subsequently gives rise to a **Claim**.

Organization means:

a. the entity general partner or entity managing general partner of each **Private Fund** that is organized as a limited partnership or limited liability partnership;

b. the entity managing member of each **Private Fund** that is organized as a limited liability company;

c. the entity management company identified in the partnership agreement or operating agreement of a **Private Fund**, whether organized as a stock corporation, general partnership, limited liability partnership or limited liability company;

d. any **Subsidiary** of a. through c. above;

e. each **Private Fund**; or

f. any **Investment Holding Company**.

Outside Capacity means service by an **Insured Person** as a director, officer, trustee, governor, board observer, or equivalent executive in an **Outside Entity** at the request or direction of an **Organization**.

Outside Entity means:

a. any non-profit corporation, community chest, fund organization or foundation exempt from federal income tax as any organization described in Section 501(c)(3), Internal Revenue Code of 1986, as amended;

b. a **Portfolio Company** which is not registered or approved, upon notice of issuance, on a national securities exchange, or not authorized or approved for authorization, upon notice of issuance, for quotation in the NASDAQ system;

c. a **Portfolio Company** which, during the **Policy Period**, is registered or approved, upon notice of issuance, on a national securities exchange, or authorized or approved for authorization, upon notice of issuance, for quotation in the NASDAQ system, provided coverage shall only extend to **Wrongful Acts** occurring within thirty (30) days after the date of registration or approval for quotation; or

d. a **Portfolio Company** scheduled by endorsement to this Policy.

Parent Organization means the entity named in Item 1 of the Declarations, as legally constituted at the inception of this Policy.

Policy Period means the period of time specified in Item 7 of the Declarations, subject to prior termination in accordance with Section 29. If the period is less than or greater than one (1) year, then the Limits of Liability specified in Item 3 of the Declarations shall be the Company's maximum liability under this Policy for the entire period.

Pollutants means any substance located anywhere in the world exhibiting any hazardous characteristics as defined by, or identified on a list of hazardous substances issued by, the United States Environmental Protection Agency or any state, county, municipality or locality counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous thermal irritants, contaminants or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials. **Pollutants** shall also mean any other air emission, odor, waste water, oil or oil products, infectious or medical waste, asbestos or asbestos products and any noise.

Portfolio Company means any organization in which one or more **Private Fund** or **Investment Holding Company**, separately or in combination, previously owned or controlled, currently own or control, or propose to own or control, outstanding securities, debentures or voting rights representing the present right to vote for election of directors or to select managing partners or managing members.

Private Equity Venture Investing means:

a. the formation, capitalization, operation or management of a **Private Fund** by an **Insured**;

b. any act performed by an **Insured** for a **Portfolio Company** or proposed **Portfolio Company** of a **Private Fund**, arising from the extending or refusal to extend credit or granting or refusal to grant a loan or any transaction in the nature of a loan;

c. an **Insured's** investment in, formation, capitalization or disposition of, or rendering of management, investment, administrative, economic or financial advice (other than tax or legal services rendered for compensation) to a **Portfolio Company** or proposed **Portfolio Company**; and

d. an **Insured's** purchase or sale of, or offer to purchase or sell, any securities issued by a **Portfolio Company** of which any **Organization** is deemed to be a **Controlling Shareholder**.

Private Fund means any pooled investment vehicle scheduled under Item 2 of the Declarations.

Related Claims means all **Claims** for **Wrongful Acts** and **Interrelated Wrongful Acts**.

Subsidiary means any organization, at or prior to the inception of this Policy, in which more than 50% of the outstanding securities or voting rights representing the present right to vote for election of directors or to select general partners or managing members is owned or controlled, directly or indirectly, in any combination, by one or more **Organizations**. **Subsidiary** shall not include any **Portfolio Company**.

Wrongful Act means:

a. for purposes of Insuring Clauses 1 and 2, any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the **Policy Period**, by an **Insured Person**, individually or otherwise, in an **Insured Capacity**;

b. for purposes of Insuring Clause 3, any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the **Policy Period**, by an **Organization**, an employee of an **Organization** or an **Insured Person** in an **Insured Capacity**; or

c. for purposes of Insuring Clause 4, any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the **Policy Period**, by an **Insured Person** in an **Outside Capacity**.

For the purposes of the definitions, the singular includes the plural and the plural includes the singular, unless otherwise indicated.

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 1

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

ORGANIZATION LIABILITY COVERAGE ENDORSEMENT

In consideration of the premium charged, it is agreed that:

1) This Policy is amended by adding the following Insuring Clause:

Insuring Clause 5
Organization Liability Coverage

The Company shall pay, on behalf of an **Organization**, **Loss** for which the **Organization** becomes legally obligated to pay on account of any **Claim** first made against such **Organization** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act**, but only if such **Claim** is reported to the Company in writing in the manner and within the time provided in Section 16 of this Policy.

2) No coverage shall be available under Insuring Clause 5 Organization Liability Coverage of this Policy for **Loss** on account of any **Claim** brought or maintained by or on behalf of any past, present or prospective employee of any **Organization** against any **Insured** for any **Wrongful Act** in connection with any actual or alleged wrongful dismissal, discharge or termination of employment, breach of any oral or written employment contract or quasi-employment contract, employment related misrepresentation, violation or employment discrimination laws (including harassment), wrongful failure to employ or promote, wrongful discipline, wrongful deprivation of a career opportunity, failure to grant tenure, negligent evaluation, invasion of privacy, employment-related defamation or employment-related wrongful infliction of emotional distress.

3) Solely with respect to coverage afforded by Insuring Clause 5, the Company shall not be liable for **Loss** on account of any **Claim** made against any **Insured** for rendering or failing to render any professional service to a third party, including but not limited to any **Claim** that would otherwise be covered under Insuring Clause 3, Professional Liability Coverage.

(4) Section 18, Other Insurance, is amended by deleting the first paragraph in its entirety and replacing it with the following:

With respect to coverage provided by Insuring Clauses 1, 2, 3 and 5, if any **Loss** under this Policy is insured under any other valid and collectible insurance policy(ies), then this Policy shall cover such **Loss**, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such **Loss** is in excess of the applicable retention (or deductible) and limit of liability under such other insurance, whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as

specific excess insurance over the Limits of Liability provided in this Policy. Any payment by **Insureds** of a retention or deductible under such other insurance shall deplete, by the amount of such payment, the applicable Deductible Amount under this Policy.

5) For the purposes of Insuring Clause 5, the term **Loss**, as defined in Section 32, Definitions, is amended to include the amount that the **Organization** becomes legally obligated to pay on account of any covered **Claim** including, but not limited to, damages, judgments, settlements, pre-judgment and post-judgment interest and **Defense Costs**.

6) Section 32, Definitions, is amended by adding the following subparagraph to the definition of **Wrongful Act**:

   d. for purposes of Insuring Clause 5, any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the **Policy Period**, by an **Organization**;

7) The Declarations are amended by adding the following to Item 4, Deductible Amount for each **Loss**:

   Insuring Clause 5 $$100,000.00 Organization Liability

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 2

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

SECTION 10 SEVERABILITY OF EXCLUSIONS – INSURED PERSONS ENDORSEMENT

It is agreed that Section 10, Severability of Exclusions, is amended by deleting paragraph a. in its entirety and replacing it with the following:

a. no fact pertaining to or knowledge possessed by an **Insured Person** shall be imputed to any other **Insured Person**.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 3

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

DELETION OF INSURING CLAUSE 3, PROFESSIONAL LIABILITY COVERAGE

In consideration of the premium charged, it is agreed that:

1. Insuring Clause 3 Professional Liability Coverage of this Policy is deleted in its entirety. Accordingly, any and all references to Insuring Clause 3 are deleted in their entirety.

2. The Company shall not be liable for **Loss** on account of any **Claim**:

   i. for **Private Equity Venture Investing**, or :

   ii. based upon, arising from, or in consequence of any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted or allegedly committed or attempted, before or during the **Policy Period**, by an **Organization**, an employee of an **Organization** or an **Insured Person** in an **Insured Capacity** in connection with the rendering of or failure to render services to others on behalf of an **Organization**.

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 4

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

AMENDED INSURED VS. INSURED EXCLUSION ENDORSEMENT

In consideration of the premium charged, it is agreed that Section 8., Exclusions Applicable to All Insuring Clauses, is amended by adding to Exclusion c. the following:

v. a **Claim** brought or maintained by any **Insured Person** who has not been an **Insured Person** or been employed by the **Organization** for the four (4) consecutive years immediately preceding the date the **Claim** was made.

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 5

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

AMEND EXCLUSION 8.c ENDORSEMENT

In consideration of the premium charged, it is agreed that Section 8., Exclusions Applicable to All Insuring Clauses, is amended by adding the following to Exclusion c.:

vi. any derivative action by a security holder of an **Organization** on behalf of, or in the name or right of, such **Organization**, if such action is brought and maintained independently of, and without the solicitation, assistance, participation or intervention of, any **Insured** (other than assistance, participation or solicitation for which Section 806 of the Sarbanes-Oxley Act of 2002, or any similar "whistleblower" protection provision afforded to such **Insured** under any applicable federal, state, local or foreign securities law, affords protection to such **Insured Person**); or

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 6

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

AMEND SECTION 16., REPORTING AND NOTICE, ENDORSEMENT

In consideration of the premium charged, it is agreed that Section 16., Reporting and Notice, is deleted and replaced with the following:

16. The **Insured** shall, as a condition precedent to exercising any right to coverage under this Policy, give to the Company written notice of any **Claim** as soon as practicable after the date on which any **Organization's** General Counsel, CEO, GP or Managing Member first becomes aware that the **Claim** has been made, but in no event later than the earliest of the following dates:

    a. if this Policy is not renewed by the Company, sixty (60) days after the termination of the **Policy Period**, if (1) this Policy is not terminated by the Company for nonpayment of premium and (2) the Extended Reporting Period is not purchased;

    b. the effective date of the termination of the of the Policy, if this Policy is terminated by the Company for nonpayment of premium; or

    c. the expiration date of the Extended Reporting Period, if purchased;

    If, during the **Policy Period** an **Insured**:

    i. becomes aware of circumstances which could give rise to a **Claim** and gives written notice of such circumstances to the Company; or

    ii. receives a written request to toll or waive a statute of limitations applicable to **Wrongful Acts** occurring before or during the **Policy Period** and gives written notice of such request and of such alleged **Wrongful Acts** to the Company,

    then any **Claim** subsequently arising from the circumstances referred to in i. above or from the **Wrongful Acts** referred to in ii. above, shall be deemed to have been first made during the **Policy Period** in which the written notice described in i. or ii. above was first given by an **Insured** to the Company, provided any such subsequent **Claim** is reported to the Company as set forth under this Section 16. With respect to any such subsequent **Claim**, no coverage under this Policy shall apply to loss incurred prior to the date such subsequent **Claim** is actually made.

    The **Insured** shall, as a condition precedent to exercising any right to coverage under this Policy, give to the Company such information and cooperation as the Company may reasonably require,

and shall include in any notice under this Section 16 a description of the **Claim**, circumstances, the nature of any alleged **Wrongful Acts**, the nature of the alleged or potential damage, the names of all actual or potential claimants, the names of all actual or potential defendants, and the manner in which such **Insured** first became aware of the **Claim** or circumstances.

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Federal Insurance Company

Endorsement/Rider No. 7

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

COMPLIANCE WITH APPLICABLE TRADE SANCTION LAWS

It is agreed that this insurance does not apply to the extent that trade or economic sanctions or other similar laws or regulations prohibit the coverage provided by this insurance.

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.

Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 8

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

EMPLOYMENT PRACTICES EXCLUSION ENDORSEMENT

It is agreed Section 8., Exclusions Applicable to All Insuring Clauses, is amended by adding the following:

n. based upon, arising from, or in consequence of the actual or alleged wrongful dismissal, discharge or termination of employment, breach of any oral or written employment contract or quasi-employment contract, employment-related misrepresentation, violation of employment discrimination laws (including workplace harassment), wrongful failure to employ or promote, wrongful discipline, wrongful deprivation of a career opportunity, failure to grant tenure, employment-related negligent evaluation, invasion of privacy, employment-related defamation or employment-related wrongful infliction of emotional distress.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 9

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

INSURED VS. INSURED EXCLUSION-BANKRUPTCY TRUSTEE ENDORSEMENT

It is agreed that Section 8., Exclusions Applicable to All Insuring Clauses, is amended by adding to exclusion c. the following:

vii. in the context of a bankruptcy proceeding by or against the **Insured** pursuant to Chapter 7 or Chapter 11 of the *United States Bankruptcy Code*, as amended, a **Claim** brought or maintained by an examiner or trustee of such **Insured**, if any, or any assignee of such examiner or trustee.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 10

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

PUNITIVE DAMAGES MOST FAVORABLE VENUE ENDORSEMENT

It is agreed that Section 32, Definitions, is amended by deleting the definition of **Loss** in its entirety and replacing it with the following:

Loss means the amount that any **Insured Person** (for purposes of Insuring Clauses 1, 2 and 4) or the **Organization** (for purposes of Insuring Clause 3) becomes legally obligated to pay on account of any covered **Claim** including, but not limited to, damages (including punitive or exemplary damages, or the multiple portion of any multiplied damage award to the extent insurable under this Policy), judgments, settlements, pre-judgment and post-judgment interest and **Defense Costs**.

For the purpose of resolving any dispute between the Company and the **Insured** regarding whether the punitive or exemplary damages or the multiplied portion of any multiplied damage award specified above are insurable under this Policy, the law of the jurisdiction most favorable to the insurability of those damages shall control, provided that such jurisdiction is where:

i. those damages were awarded or imposed;
ii. any **Wrongful Act** occurred for which such damages were awarded or imposed;
iii. any **Organization** is incorporated or has its principal place of business; or
iv. the Company is incorporated or has its principal place of business.

Loss does not include:

a. any amount not indemnified by the **Organization** for which the **Insured Person** is absolved from payment by reason of any covenant, agreement or court order;
b. any amount incurred by the **Organization** (including its board of directors, any committee of the board of directors, or its general partners or managing members) in connection with the investigation or evaluation of any **Claim** or potential **Claim** by or on behalf of the **Organization**;
c. fines, penalties or taxes imposed by law (other than punitive or exemplary damages, or the multiple portion of any multiplied damage award as provided above);
d. any amount not insurable under the law pursuant to which this Policy is construed;
e. with the exception of **Defense Costs**, the actual principal, interest, or other monies either paid, accrued or due as a result of any loan, lease, extension of credit or equity contribution;
f. any amount allocated to non-covered loss pursuant to Section 15 of this Policy; or
g. any amount incurred by an **Insured** in a proceeding or investigation that is not then a **Claim** even if such:
    i. amount also benefits the defense of a covered **Claim**; or
    ii. proceeding or investigation subsequently gives rise to a **Claim**.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

ENDORSEMENT/RIDER

Effective date of
this endorsement/rider: December 1, 2010

Company: Federal Insurance Company

Endorsement/rider No. 11

To be attached to and
form a part of Policy No. 8207-6676

Issued to: Acartha Group LLC

PRIORITY OF PAYMENTS ENDORSEMENT

In consideration of the premium charged, it is agreed that the Policy is amended by adding the following provisions:

(1) In the event of **Loss** for which payment is due under Insuring Clause 1 and **Loss** for which payment is due under any other Insuring Clause in the Policy, the Company shall, upon written request of any **Insured Person**:

   i. first pay all **Loss** for which coverage is provided by Insuring Clause 1; and

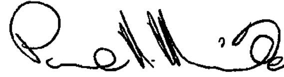
   ii. then, and only to the extent of the remaining Limit of Liability available, if any, after payment under i. above, pay such other **Loss** for which coverage is provided under any other Insuring Clause under this Policy.

(2) Except as otherwise provided in this Endorsement, the Company may pay **Loss** as it becomes due without regard to the potential for other future payment obligations under this Policy.

(3) Nothing in this Endorsement shall be construed to alter or increase the Limits of Liability or Deductible provided under this Policy.

The title and any headings in this endorsement/rider are solely for convenience and form no part of the terms and conditions of coverage.

All other terms, conditions and limitations of this policy shall remain unchanged.



Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 12

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

NEW JERSEY AMENDATORY ENDORSEMENT

It is agreed that

1. The first sentence of Section 7. Extended Reporting Period is amended to read as follows:

   "If the Company or the **Parent Organization** terminates or does not renew this Policy, then the **Parent Organization** and the **Insured Persons** shall have the right, upon payment of the additional premium set forth in Item 5(A) of the Declarations, to an extension of the coverage granted by this Policy for **Claims** first made during the period set forth in Item 5(B) of the Declarations (the Extended Reporting Period"), following the effective date of termination or nonrenewal, but only to the extent such **Claims** are for **Wrongful Acts** occurring before the effective date of termination or nonrenewal."

2. Section 7. Extended Reporting Period is amended further to add the following at the end of such Section:

   "If money is owed to the Company under this Policy, the Extended Reporting Period will not become effective until all amounts due under this Policy are paid and the premium for the Extended Reporting Period is paid when due. Any premium paid for the Extended Reporting Period will be applied first to amounts owed under this Policy."

3. Section 29. Termination of Policy a. is amended to add the following at the end of such paragraph a.:

   "provided that such notice of termination by the Company shall be delivered or mailed by first class mail (if the Company retains a date stamped proof of mailing from the post office showing the addressee) or certified mail to the **Parent Organization** at its last address known to the Company and shall clearly state the effect of nonpayment by the due date;"

4. Section 29. Termination of Policy c. is amended to add the following at the end of such paragraph c.:

   "provided that, non-renewal by the Company is effective if the Company mails or delivers, by first class mail (if the Company retains a date stamped proof of mailing from the post office showing the addressee) or certified mail, between thirty (30) and one hundred and twenty (120) days advance written notice of non-renewal to the **Parent Organization** at its last known address. Such non-renewal will be based on underwriting guidelines that are not arbitrary, capricious or unfairly discriminatory and the notice of non-renewal will state the reason(s) for non-renewal. If the Company does not provide the notice within the time period specified in this paragraph, this Policy will be extended until such notice is provided, with such extension conditioned upon the payment of premium calculated by pro-rating the premium for the expiring **Policy Period**; or"

5. Section 29. Termination of Policy is amended by deleting paragraph d. therefrom.

6. Section 29. Termination of Policy is amended further to add the following at the end of such Section:

   "Any notice of non-renewal by the Company will contain a provision in bold type stating that the **Parent Organization** may file a written complaint on the decision to non-renew with the New Jersey Department of Insurance. The Department's address will be included and the **Parent Organization** will be advised to immediately contact the Insurance Department in the event it wishes to file a complaint.

   The Company has no obligation to send notice of cancellation or non-renewal if the **Parent Organization** has:

   (1) replaced coverage elsewhere; or

   (2) specifically requested termination.

   The Company may increase premium or change the terms and conditions of this Policy upon renewal by delivering or mailing written notice of such changes to the **Parent Organization** between thirty (30) and one hundred and twenty (120) days before the premium due date. Such notice will state the effect of nonpayment of the premium by the due date."

The Policy is deemed to have been amended to the extent necessary to effect the purposes of this Amendatory Endorsement.

The regulatory requirements set forth in this Amendatory Endorsement shall supersede and take precedence over any provisions of the Policy or any endorsement to the Policy, whenever added, that are inconsistent with or contrary to the provisions of this Amendatory Endorsement, unless such Policy or endorsement provisions comply with the applicable insurance laws of the state of New Jersey.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 13

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

AMENDED DISHONEST ACT EXCLUSION-FINAL ADJUDICATION ENDORSEMENT

It is agreed that Section 8, Exclusions Applicable to All Insuring Clauses is amended by deleting exclusion h. in its entirety and replacing it with the following:

h. based upon, arising from, or in consequence of

i. the committing of any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such **Insured**, provided, however, that this Exclusion h.i. shall not apply unless it is established by a judgment or other final adjudication that such **Insured** committed a deliberately fraudulent act or omission or willful violation; or

ii. such **Insured** having gained in fact any profit, remuneration or advantage to which such **Insured** was not legally entitled as evidenced by:

(a) any written statement or written documents by any **Insured**, or

(b) any judgment or ruling in any judicial, administrative or alternative dispute resolution proceeding;

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative

Effective date of
this endorsement: December 1, 2010

Federal Insurance Company

Endorsement No.: 14

To be attached to and form a part of Policy
Number: 8207-6676

Issued to: Acartha Group LLC

**AMENDED REPRESENTATIONS AND SEVERABILITY –
INSURING CLAUSE 1 ENDORSEMENT**

It is agreed that Section 23., Representations and Severability is deleted and replaced by the following:

Representations and Severability

23. In issuing this Policy, the Company has relied upon statements, representations and information in the **Application** for this Policy. All the **Insureds** acknowledge and agree that all such statements, representations and information:

a. are true and accurate;
b. were made or provided in order to induce the Company to issue this Policy; and
c. are material to the Company's acceptance of the risk to which this Policy applies.

In the event that any of the statements, representations or information in the **Application** are not true and accurate, this Policy shall be void with respect to:

i. any **Insured** who knew as of the effective date of the **Application** the facts that were not truthfully and accurately disclosed (whether or not the **Insured** new of such untruthful disclosure in the **Application**) or to whom knowledge of such facts is imputed; and

ii. the **Organization** under Insuring Clause 2 to the extent it indemnifies an **Insured Person** who had such actual or imputed knowledge.

For purposes of the preceding paragraph:

(a) the knowledge of any **Insured Person** who is a past, present or future chief financial officer, in-house general counsel, president, chief executive officer, chairperson, general partner or managing member of any **Organization** shall be imputed to such **Organization** and its **Subsidiaries**;

(b) solely with respect to Insuring Clause 1, the knowledge of the **Insured Person** who signed the **Application** for this Policy shall not be imputed to any other **Insureds**; and

(c) with respect to Insuring Clauses other than Insuring Clause 1, the knowledge of the **Insured Person** who signed the **Application** for this Policy shall be imputed to all of the **Insureds**; and

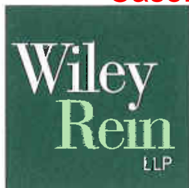
(d) except as provided in (a) above, the knowledge of an **Insured Person** who did not sign the **Application** shall not be imputed to any other

Insured.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 8, 2010

By
Authorized Representative



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February 13, 2012

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BY EMAIL AND CERTIFIED MAIL

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Re:	INSURED:	Acartha Group LLC
	POLICY NO:	8207-6676
	CLAIM NO:	267472
	POLICY TYPE:	Venture Capital Asset Protection 2003
	WRITING COMPANY:	Federal Insurance Company
	SUBJECT:	*SEC v. Morriss et al.* (E.D. Mo.)

Dear Mr. Higgins, Ms. LaRock, and Ms. Hanaway:

Our firm has been retained by Federal Insurance Company ("Federal") in connection with the above-referenced policy and matter. Please direct all communications intended for Federal in connection with this matter to our attention. We write to you based on our understanding that the Receiver has succeeded to all of Acartha Group LLC's rights and obligations under the above-referenced insurance policy, that Ms. LaRock continues to act as broker for Acartha and the Insured Persons, and that Ms. Hanaway is acting as defense counsel for Mr. Morriss.

EXHIBIT B

By email from Ms. LaRock dated January 17, 2012, Federal received a copy of the complaint in the litigation captioned *SEC v. Morriss et al.*, No. 4:12-cv-80 (E.D. Mo.) (the "SEC Action"). On behalf of Federal, we have reviewed the SEC Action under Venture Capital Asset Protection Policy No. 8207-6676 (the "Policy") issued to Acartha Group LLC. The Policy has a Policy Period of December 1, 2010 to December 1, 2011 and Limits of Liability of $3,000,000 and a deductible amount of $100,000 under Insuring Clause 2 and Insuring Clause 5.[1] As set forth herein, Federal has accepted this matter as a Claim and will reimburse Defense Costs incurred on behalf of Mr. Morriss, and, if tendered for coverage, will consider reimbursing Defense Costs incurred on behalf of Acartha, subject to the Policy terms and conditions, those reservation of rights cited herein, and the allocation discussed below.[2]

I. <u>THE SEC ACTION</u>

The SEC filed the complaint in the SEC Action on January 17, 2012. The Complaint names Burton Douglas Morriss ("Morriss"), Acartha Group, LLC ("Acartha"), MIC VII, LLC ("M7"), Acartha Technology Partners, LP ("ATP"), and Gryphon Investments III, LLC ("G3") as defendants, and Morriss Holdings, LLC ("MH") as a relief defendant. According to the complaint, Acartha is the managing member of M7 and manages G3. ¶ 5. G3, in turn, is allegedly the general partner of ATP. ¶ 8. According to the complaint, Morriss is CEO and chairman of the board of Acartha, managing member of M7, a manager of G3, and the general partner of ATP. ¶ 4. The complaint further alleges that Morriss is the chairman and controlling member of MH, which is "a family business Morriss controls." ¶¶ 4, 9.

The complaint alleges that Morriss and the Acartha entities raised over $88 million from 97 investors to invest in the equity funds and related entities. ¶ 15. According to the complaint, Morriss "misappropriated more than $9 million" from the Acartha entities for his personal use. ¶ 19. The complaint alleges that "[a]round" 2008, Morriss's deteriorating financial condition led him to "move money from the Investment Entities to himself and Morriss Holdings." ¶ 23. The complaint further alleges that by "the summer of 2009" Morriss had borrowed more money from the entities than he had advanced, owing more than $2 million to the entities by the end of 2009. ¶ 24. The complaint alleges that Acartha's CFO sent an email to Morriss expressing concern about one transfer, and that the CFO left the company "in part

[1] *See* Policy, Endorsement 1.

[2] Capitalized terms not otherwise defined herein are used as they are defined in the Policy.

due to Morriss' transfers." ¶ 25. The complaint further alleges that a 2009 email from an Acartha officer to Morriss advised that another Acartha officer was "upset and shocked by the amount of funds proceeds Morriss transferred to himself." ¶ 25.

The complaint alleges that in 2008 and 2009 Morriss transferred $1.7 million of new G3 investor funds to himself and MH, used $305,000 of investor funds to pay interest on a personal line of credit, and took $1.4 million of new ATP investor funds. ¶ 26. The complaint further alleges that in 2010 and 2011, the net amount of transfers from Acartha to Morriss or MH increased to $6.6 million plus interest. ¶ 28. Morriss allegedly used these funds for personal expenditures. ¶ 29.

The complaint alleges that Morriss and the entities "defrauded investors" by failing to disclose that Morriss would or could use investor funds for personal use. ¶ 30. The complaint alleges that the operating documents of ATP, G3, M7, and Acartha either did not permit or failed to disclose the transfers. ¶¶ 31-35. The complaint further alleges that Morriss misappropriated $2.5 million of proceeds from sale of stock held by M7 to pay down a personal debt unrelated to a $2.5 million debt held by M7. ¶ 38. The complaint also alleges that Morriss "deliberately circumvented" the M7 operating agreement with a fraudulent scheme to allow additional investors in M7 without obtaining unanimous consent of existing investors. ¶ 39.

The complaint further alleges that Morriss, Acartha, and G3 defrauded G3 investors by failing to disclose that Morriss and Acartha used their investments "almost exclusively to fund Acartha Group's operations, provide loans to Morriss and Morriss Holdings, and service Morriss' personal debt." ¶ 42. The complaint also alleges that Morriss and G3 represented that G3 would manage ATP, when "in reality Acartha Group acted as its manager." ¶ 42. The representations Morriss purportedly made in connection with G3's fundraising in 2008, ¶ 43, were allegedly contradicted by G3's transfers between March 2008 and June 2009 of $1.7 million to Morriss and MH for Morriss's personal use, $305,000 to pay interest on Morriss's personal line of credit, and $1.6 million to Acartha, ¶ 44. Morriss, Acartha, and G3 allegedly did not disclose these transactions to investors. ¶ 44. The complaint further alleges that G3 "outsourced" its management of ATP to Acartha in November 2008, "unbeknownst to investors." ¶ 45.

The complaint brings eight causes of action: two for fraud in the sale of securities in violation of the Securities Act of 1933, against all defendants; one for fraud in the sale of securities in violation of the Securities Exchange Act of 1934 and Rule 10b-5, against all defendants; one for aiding and abetting the 10b-5 violations, against

Morriss; two for fraud by investment advisors in violation of the Investment Advisors Act of 1940, against Morriss, Acartha, and G3; and two for aiding and abetting the Advisors Act violations, against Morriss. For relief, the complaint seeks declaratory relief, injunctions against further violations, disgorgement of ill-gotten gains, civil penalties, and a bar order against Morriss.

II. THE POLICY

The Policy is a claims-made policy with a Policy Period of December 1, 2010 to December 1, 2011. Policy, Declarations, Item 7. It has a limit of liability of $3,000,000 for each Loss, and an Aggregate Limit of Liability Each Policy Period of $3,000,000. Policy, Declarations, Item 3. A Deductible Amount of $100,000 applies to Loss under Insuring Clauses 2 and 5. Policy, Declarations, Item 4, as amended by Endorsement 1. The payment of Defense Costs erodes the limits of liability. Policy, § 11. Federal shall not be liable for any amount within the Deductible Amount or in excess of any Limit of Liability.

By prior correspondence, Federal accepted an earlier SEC Order and related subpoenas as a Claim, subject to certain reservations of rights. Pursuant to Policy Section 32, Interrelated Wrongful Acts is defined to mean all Wrongful Acts based upon, arising from, or in consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events. Policy Section 32 defines Related Claims as all Claims for Wrongful Acts and Interrelated Wrongful Acts. Federal has determined that the present matter and the SEC investigation arise from the same or related series of facts and has determined that they constitute Related Claims. Accordingly, the Related Claims are deemed to be a single Claim first made on the date the earliest of such Related Claims was made, which in this case is a date during the Policy Period. *See* Policy, § 11.

A. Insuring Clause 5

Under Insuring Clause 5 of the Policy, Federal agreed to pay Loss on behalf of an Organization for which the Organization becomes legally obligated to pay on account of any Claim first made against such Organization for a Wrongful Act during the Policy Period, subject to all of the other Policy terms and conditions.

The term Organization is defined in the Policy as (a) the entity general partner or entity managing partner of each Private Fund that is organized as a limited partnership or limited liability partnership; (b) the entity managing member of each

Private Fund that is organized as a limited liability company; (c) the entity management company identified in the partnership agreement or operating agreement of a Private Fund, whether organized as a stock corporation, general partnership, limited liability partnership or limited liability company; (d) any Subsidiary of (a) through (c) above; (e) each Private Fund; or (f) any Investment Holding Company. Policy, § 32.

A Private Fund is defined as any pooled investment vehicle scheduled under Item 2 of the Declarations. Policy, § 32. A Subsidiary is defined as any organization, at or prior to the inception of this Policy, in which more than 50% of the outstanding securities or voting rights representing the present right to vote for election of directors or to select general partners or managing members is owned or controlled, directly or indirectly, in any combination, by one or more Organizations. Subsidiary shall not include any Portfolio Company. Policy, § 32.

Federal's understanding is that Acartha was the Manager or the Managing Member of M7 and G3. Assuming this is true, Acartha appears to qualify as an Organization under the Policy.

ATP and M7 are listed as Private Funds in item 2 of the Declarations of the Policy.

The complaint alleges that G3 is the general partner of ATP. Please confirm in writing whether this allegation is correct. If it is true, G3 also appears to qualify as an Organization under the Policy.

MH is not listed as a Private Fund, nor is Federal aware of any other information suggesting that MH constitutes an Organization. Accordingly, this entity does not appear to be an Insured under the Policy.

Accordingly, Federal will treat the SEC Action as a Claim against Acartha and G3 under Insuring Clause 5. While ATP and M7 also qualify as Insureds under the Policy, no coverage is available to these Insureds for reasons discussed below.

B. <u>Insuring Clause 2</u>

Under Insuring Clause 2 of the Policy, Federal agreed to pay Loss for which the Organization grants indemnification to each Insured Person as permitted or required by law, which the Insured Person becomes legally obligated to pay on account of any Claim first made against such Insured Person for a Wrongful Act during the Policy Period, subject to the other Policy terms and conditions.

The Policy defines Insured Person in relevant part as any natural person who was, now is, or shall be a director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governors or equivalent executive in an Organization. Policy, § 32.

Mr. Morriss is an Insured Person under the Policy. Accordingly, to the extent Acartha provides indemnification to Mr. Morriss in connection with this Claim, it may be entitled to coverage for amounts in excess of the applicable Deductible Amount.

C. Insuring Clause 1

Under Insuring Clause 1 of the Policy, Federal agreed to pay Loss for which the Insured Person is not indemnified by the Organization and which the Insured Person becomes legally obligated to pay on account of any Claim first made against such Insured Person, individually or otherwise, during the Policy Period for a Wrongful Act.

Please inform us whether the Receiver intends to permit Acartha to provide indemnification to Mr. Morriss in connection with this Claim. Federal hereby demands that Acartha so provide indemnification to the fullest extent permitted by law. Please also note that the Policy provides that in the event of any payment under the Policy, Federal shall be subrogated, to the extent of such payment, to all of the Insured's rights of recovery, and the Insured shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable the Company to bring suit in the name of the Insured. Federal reserves all rights under this provision, including the right to recover any amounts in indemnification Acartha was legally required to pay on behalf of its former officers. Federal further reminds the Insureds to take no action which may impair Federal's subrogation rights.

Because the court appointed the Receiver, Acartha is in Financial Impairment as the Policy defines that term. Policy, § 32. Accordingly, to the extent Acartha may refuse to indemnify Mr. Morriss, Federal may indemnify Mr. Morriss for all covered Loss, including amounts otherwise within the $100,000 Deductible Amount. *See* Policy, § 13. By separate correspondence with Mr. Morriss's counsel, Federal has discussed the terms under which it will advance Defense Costs.

D. Priority of Payments

Per Endorsement 11 of the Policy, in the event of Loss for which payment is due under Insuring Clause 1 and Loss for which payment is due under any other insuring clause, Federal shall, upon written request of any Insured Person, first pay all Loss for which coverage is provided under Insuring Clause 1; and then and only to the extent of the remaining Limit of Liability available, if any, after payment under Insuring Clause 1, pay such other Loss for which coverage is provided under any other Insuring Clause. Except as so provided, Federal may pay Loss as it becomes due without regard to the potential for other future payment obligations under the Policy. Federal will make payments according to this provision, and reserves all rights in connection with the priority of payments provision.

III. RESERVATION OF RIGHTS

We recognize that the statements contained in the SEC Action are unsubstantiated at this time. Nothing in this letter is intended to suggest or imply that these allegations have any legal or factual merit. Nevertheless, the Policy does not cover all of the matters raised in the SEC Action complaint, and Federal must therefore reserve the right to decline coverage should any of the exclusions, endorsements, or any other provision of the Policy additionally prove to be applicable.

A. Private Equity Venture Investing and Professional Services

We initially note that pursuant to Policy Endorsement 3, the Professional Liability Coverage portion of the Policy contained within Insuring Clause 3 was deleted. To that end, Endorsement 3 provides that Federal shall not be liable for Loss on account of any Claim (i) for Private Equity Venture Investing or (ii) based upon, arising from, or in consequence of any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the Policy Period by an Organization, an employee of an Organization or an Insured Person in an Insured Capacity in connection with the rendering of or failure to render services to others on behalf of the Organization.

Private Equity Venture Investing is defined as (a) the formation, capitalization, operation or management of a Private Fund by an Insured; (b) any act performed by an Insured for a Portfolio Company or proposed Portfolio Company of a Private Fund, arising from the extending or refusal to extend credit or granting or refusal to grant a loan or any transaction in the nature of a loan; (c) an Insured's investment in,

formation, capitalization or disposition of, or rendering of management, investment, administrative, economic or financial advice (other than tax or legal services rendered for compensation) to a Portfolio Company . . .; and (d) an Insured's purchase or sale of, or offer to purchase or sell, any securities issued by a Portfolio Company of which any Organization is deemed to be a Controlling Shareholder. Policy, § 32.

In addition to Endorsement 3, subparagraph 3 of Endorsement 1 provides that with respect to coverage afforded by Insuring Clause 5, Federal shall not be liable for Loss on account of any Claim made against any Insured for rendering or failing to render any professional service to a third party, including but not limited to any Claim that would otherwise be covered under Insuring Clause 3.

The SEC Action alleges that the defendants, while acting as investment advisors, made false statements to investors or prospective investors. Such conduct relates to Private Equity Venture Investing and/or otherwise is based upon, arises from, or in consequence of an error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted or allegedly committed or attempt by an Organization, any employee of the Organization or an Insured Person in an Insured Capacity in connection with the rendering of or failure to render services to others on behalf of an Organization. Accordingly, no coverage is available pursuant to Endorsements 3 and 1 for Loss, which includes Defense Costs, in connection with conduct that falls within the definition of Private Equity Venture Investing or for professional services performed by Insureds for others. Federal reserves all rights under these endorsements, including the right to disclaim coverage entirely if further factual development demonstrates that the SEC Action entirely arises from Private Equity Venture Investing. At a minimum, it will be necessary to allocate Loss to take into account these allegations.

As discussed above, ATP and M7 qualify as Insureds under the Policy. However, as pooled investment vehicles, any conduct ascribed to these Private Funds relates entirely to Private Equity Venture Investing and/or arises from an alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty allegedly committed by an Organization in rendering or failing to render services to others on behalf of the Organization. Given these entities' status as Private Funds, combined with the nature of the allegations in the complaint, no coverage exists for these Insureds under the Policy pursuant to Endorsements 3 and 1.

B. **Application Warranty**

In connection with the issuance of the Policy, on January 12, 2007, Christopher Aliprandi, as Chief Financial Officer, executed a warranty letter on Acartha letterhead. The warranty states that:

> No person(s) or entity(ies) proposed for this insurance has any knowledge or information of any fact, circumstance or situation which might reasonably be expected to give rise to any claim that would fall within the scope of the proposed insurance for Acartha Group, LLC to be added to the above-referenced policy, except as follows:
>
> None.
>
> It is agreed that if such knowledge exists any claim from such fact or circumstances will not be covered by the policy.

The Policy defines "Application" to include "all signed applications, including attachments and materials incorporated therein, submitted by the Insured to the Company for . . . any Policy issued by the Company of which this Policy is a direct or indirect renewal or replacement." Policy, § 32. Thus, the warranty letter is part of the Application, as well as part of the Policy.

The SEC Action makes allegations concerning transfers and acts that occurred prior to January 12, 2007. *See, e.g.*, ¶¶ 1, 21, 34, 47, 50, 53, 56-57, 61, 65-66, 69, 72. Federal reserves all rights pursuant to the warranty letter, including the right to disclaim coverage if this Claim arises out of knowledge which an Insured Person might reasonably have expected to give rise to a Claim as of January 12, 2007.

C. **Endorsement No. 14 and Representations**

In connection with the issuance of the Policy, Acartha submitted a Renewal Application Venture Capital Asset Protection Policy with signatures dated November 14, 2010. In response to Item D.1, Acartha answered "no" to the question "[h]ave there been during the last Policy Period, or are there now pending, any suits, claims or proceedings against this Applicant, Private Fund, Organization or any subsidiary?" In response to Item D.2, Acartha likewise answered "no" to the question "[h]ave there been during the last Policy Period, or are there now pending, any suits, claims, or proceedings against any person proposed for this insurance in

their capacity as either direct, officer, general partner, managing general partner, managing member, member of a Board of Managers, governor, or equivalent executive of this Applicant, or any Private Fund, Organization or any subsidiary proposed for insurance?"

In response to Item D.3.b, Acartha answered "no" to the question "[h]as the Applicant, Private Fund, Organization or its subsidiary, or any director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governor, or equivalent executive of this Applicant, during the last Policy Period, been involved in: [a]ny civil or criminal action or administrative proceeding involving a violation of any federal or state security law or regulation?"

Item H.1 of the Application required Acartha to submit the latest two audited annual financial statements and the latest quarterly financial statements for Acartha and each Subsidiary. Federal received various financial statements in connection with the Application and prior applications, including but not limited to the Acartha Group, LLC Balance Sheet As of September 30, 2010 and the Acartha Group, LLC Balance Sheet as of December 31, 2009. *See* Policy, § 32 (defining "Application" to include "all signed applications, including attachments and materials incorporated therein, submitted by the Insured to the Company for this Policy or any Policy issued by the Company of which this Policy is a direct or indirect renewal or replacement. All such applications, attachments and materials are deemed attached to, incorporated into and made a part of this Policy.").

The allegations of the SEC Action and the documents the SEC filed in the district court suggest that one or more Insured Persons may have been aware of Claims, potential securities claims, or other inaccuracies in information submitted to Federal as part of the Application. The Policy provides if any Application information was not true and accurate, then the Policy is void with respect to "any Insured who knew as of the effective date of the Application the facts that were not truthfully and accurately disclosed (whether or not the Insured [k]new of such untruthful disclosure in the Application) or to whom knowledge of such facts is imputed." Policy, § 23(i), as amended by Endorsement 14. Federal reserves all rights under Policy Section 23.

D. Prior Knowledge Exclusion

The Policy Application signed on November 14, 2010 also contains a prior knowledge exclusion. Question D.3.b inquires about the Insured's involvement in "[a]ny civil or criminal action or administrative proceeding involving a violation of

any federal or state security law or regulation." Underneath the question, the application states:

> Pertaining to question D.3 above, it is agreed that if the undersigned or any director, officer, general partner, managing general partner, managing member, member of a board of managers, governor, or equivalent executive of this applicant proposed for this insurance is aware of any fact, circumstance, situation or wrongful act, then any claim subsequently arising therefrom shall be excluded from the proposed insurance policy.

(capitalization removed). Federal reserves all rights to exclude coverage for this Claim to the extent any director or officer of Acartha was aware of the facts, circumstances, situations or wrongful acts from which the SEC Action arose.

E. <u>Insured Capacity</u>

Subject to the other terms and conditions, the Policy provides coverage on account of Loss arising from Wrongful Acts alleged against an Insured. A Wrongful Act, for purposes of Insuring Clauses 1 and 2, is defined as any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, before or during the Policy Period, by an Insured Person, individually or otherwise, in an Insured Capacity. Insured Capacity is defined as the position or capacity described in the definition of Insured Person held by an Insured Person but shall not include any position or capacity in any organization other than the Organization, even if the Organization directed or requested the Insured Person to serve in such other position or capacity. Accordingly, the Policy will not respond to any acts, omissions, misstatements, or breaches of duty by any Insured Person on behalf of a company that is not an Organization or which did not occur in an Insured Capacity, and Federal reserves its rights accordingly.

F. <u>Exclusion H</u>

Exclusion H(i) as amended by Endorsement 13 precludes coverage for Loss based upon, arising from, or in consequence of "the committing of any deliberately fraudulent act or omission or any willful violation of any statute or regulation by such Insured" if established by a final adjudication that such Insured committed a deliberately fraudulent act, omission, or willful violation. In addition, Exclusion H(ii) precludes coverage for "such Insured having gained any profit, remuneration

or advantage to which such Insured was not legally entitled" as evidenced by "any written statement or written document by any Insured" or "any judgment or ruling in any judicial, administrative, or alternative dispute resolution proceeding." The SEC Action references possible fraudulent conduct. Accordingly, Federal reserves its rights under Exclusion (H)(i) and (ii) should it be determined that an Insured engaged in such conduct, including the right to recoup Defense Costs advanced on behalf of any Insured if and to the extent it is determined that Exclusion (H) applies. *See* Policy, §§ 14, 15. Federal will therefore require the Insureds to execute undertakings guaranteeing the repayment of Loss if it is finally determined that Loss incurred by such Insured is not covered.

G. Definition of Loss

The definition of Loss, as amended by Endorsement 10, does not include: (a) any amount not indemnified by the Organization for which the Insured Person is absolved from payment by reason of any covenant, agreement or court order; (b) any amount incurred by the Organization (including its board of directors, any committee of the board of directors, or its general partners or managing members) in connection with the investigation or evaluation of any Claim or potential Claim by or on behalf of the Organization; (c) fines, penalties or taxes imposed by law (other than punitive or exemplary damages, or the multiple portion of any multiplied damage award as provided above); (d) any amount not insurable under the law pursuant to which this Policy is construed; (e) with the exception of Defense Costs, the actual principal, interest, or other monies either paid, accrued or due as a result of any loan, lease, extension of credit or equity contribution; (f) any amount allocated to non-covered loss pursuant to Section 15 of this Policy; or (g) any amount incurred by an Insured in a proceeding or investigation that is not then a Claim even if such (i) amount also benefits the defense of a covered Claim; or (ii) proceeding or investigation subsequently gives rise to a Claim.

Accordingly, Federal will not pay any amounts in the defense, settlement or adjudication of this matter that do not constitute Loss under the Policy, including amounts that constitute disgorgement or restitution or are otherwise uninsurable by law, and Federal reserves its rights accordingly.

H. Exclusion K

The Policy excludes coverage for Loss on account of any Claim based upon, arising from, or in consequence of any intentional breach of contract, if a judgment or other

final adjudication adverse to such Insured establishes any intentional breach of contract. Policy, § 8(k). Federal reserves all rights under this provision.

I. Allocation

Section 15 of the Policy governs Allocation and provides in part that "[i]f both Loss covered by this Policy and loss not covered by this Policy are incurred, either because a Claim against the Insured includes both covered and uncovered matters or covered and uncovered parties, then the Insured and [Federal] shall allocate such amount between covered Loss and uncovered loss based upon the relative legal and financial exposures of the parties to covered and non-covered matters and, in the event of settlement of such Claim, also based upon the relative benefits to the parties from such settlement. The Company shall not be liable under this Policy for the portion of such amount allocated to non-covered loss." Federal reserves all rights under this provision. For the reasons set forth above, it will be necessary to determine an appropriate allocation.

J. Other Insurance

Section 18 of the Policy generally provides that the Policy is excess over any other valid or collectible insurance policies. Accordingly, we ask that you please notify any other insurers whose policies may have coverage for this matter and provide Federal with a copy of the notice, the applicable policy, and the insurer's response regarding coverage under any such policies.

IV. DEFENSE OF THE CLAIM

The Policy states that it shall be the duty of the Insured to defend any Claim made against it. Policy, § 14. Federal understands that Ms. Hanaway is defending Mr. Morriss, and Federal is communicating separately with her regarding Federal's consent to that defense. If the Receiver intends to seek coverage for Defense Costs under Insuring Clause 2 or Insuring Clause 5, please so inform us, and please provide information regarding the attorneys proposed to work on the defense.

Please note that prior to advancement of any Defense Costs, Federal will require a comfort order from the district court in which the Acartha receivership is proceeding permitting advancement and/or lifting, to the extent applicable, the orders freezing Acartha's assets. Please also note that the Policy provides that "[a]s a condition of any payment of Defense Costs [Federal] may, at its sole option, require a written undertaking on terms and conditions satisfactory to [Federal]

guaranteeing the repayment of any Defense Costs paid to or on behalf of any Insured if it is finally determined that Loss incurred by such Insured would not be covered." Policy, § 15. Prior to advancing Defense Costs, Federal will forward an undertaking for the Insureds to execute.

Further, please note that the Policy further provides that the Insureds agree not to settle or offer to settle any Claim, incur any Defense Costs, or otherwise assume any contractual obligation or admit any liability with respect to any Claim without Federal's written consent. Policy, § 14. Federal shall not be liable for any settlement, Defense Costs, assumed obligation, or admission to which it has not consented. Policy, § 14. Defense Costs are part of and not in addition to the Limits of Liability, and payment by Federal of Defense Costs reduces such Limits of Liability. Policy, § 11.

In addition, Federal has the right and shall be given the opportunity to effectively associate with the Insureds in the investigation, defense, and settlement of any Claim reasonably likely to be covered in whole or in part by this Policy. Policy, § 14. The Insureds must provide Federal with all information, assistance, and cooperation which Federal reasonably requests. Policy, § 14. In addition, the Insureds must do nothing that may prejudice Federal's position or its potential or actual rights of recovery. Policy, § 14.

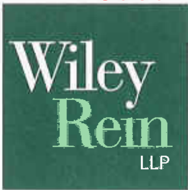
* * * * *

Federal's position with respect to this matter is based upon the information provided to date, and is subject to further evaluation as additional information becomes available. Federal reserves its right to assert additional terms and provisions under the Policy and at law which may become applicable as new information emerges. Please forward us any additional information you wish Federal to consider in connection with this matter.

Please feel free to contact me with any questions.

Please note the following internal procedures in the event you dispute the final coverage determination applicable to your claim pursuant to N.J.A.C. 11:25-2.5(a):

1) you may submit your written objections (appeal) to the final coverage determination to your insurer;



2) upon receipt of your written objections (appeal), a panel of at least three representatives from the insurer who had no prior involvement with the handling of your claim will review the disputed decision;

3) within ten (10) business days of receipt of your appeal the internal appeals panel will make its decision;

4) within three (3) business days thereafter, the appeals panel will send you its decision.

Should you wish to file an appeal please notify the Appeals Administrator through your insurer's claims administrator at Chubb & Son, a division of Federal Insurance Company, 82 Hopmeadow Street, Simsbury, CT 06070. Alternatively, you may fax your complaint to (860) 408-2464.

Sincerely,

David H. Topol

cc: Mary Ann Alsnauer (via email)

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. STANFORD INTERNATIONAL BANK, LTD., et al., Defendant.

Civil Action No. 3:09-CV-298-N

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2009 U.S. Dist. LEXIS 124377

October 9, 2009, Decided
October 9, 2009, Filed

SUBSEQUENT HISTORY: Decision reached on appeal by *SEC v. Janvey, 2010 U.S. App. LEXIS 25873 (5th Cir. Tex., Dec. 17, 2010)*

PRIOR HISTORY: *SEC v. Stanford Int'l Bank, Ltd., 2009 U.S. Dist. LEXIS 130930 (N.D. Tex., Apr. 20, 2009)*

COUNSEL: [*1] For Securities and Exchange Commission, Plaintiff: David B Reece, LEAD ATTORNEY, D Thomas Keltner, J Kevin Edmundson, Michael D King, Steve J Korotash, US Securities & Exchange Commission, Fort Worth, TX.

For United States (IRS), Intervenor Plaintiff: Manuel P Lena, Jr, LEAD ATTORNEY, Michael D Powell, US Department of Justice, Dallas, TX.

For Stanford International Bank Ltd, Stanford Group Company, Stanford Capital Management LLC, Stanford Financial Group, Defendants: Ruth Brewer Schuster, LEAD ATTORNEY, The Brewer Law Group PLLC, Washington, DC; Alan J Yee, Johanna Gabrielle Myers, The Brewer Law Group PLLC, Houston, TX; Lauren G Walsh, PRO HAC VICE, The Gulf Law Group PLLC, Washington, DC.

For R Allen Stanford, Defendant: Ruth Brewer Schuster, LEAD ATTORNEY, The Brewer Law Group PLLC, Washington, DC; Alan J Yee, Johanna Gabrielle Myers, The Brewer Law Group PLLC, Houston, TX; Bradley W Hoover, Jacks C Nickens, Richard P Keeton, Nickens Keeton Lawless Farrell & Flack, Houston, TX; Dick DeGuerin, DeGuerin & Dickson, Houston, TX; John W Schryber, PRO HAC VICE, Patton Boggs LLP, Washington, DC; Lauren G Walsh, PRO HAC VICE, The Gulf Law Group PLLC, Washington, DC; Lee H Shidlofsky, Visser [*2] Shidlofsky LLP, Austin, TX; Michael D Sydow, Sydow & McDonald LLP, Houston, TX; Paul D Flack, PRO HAC VICE, Nickens Keeton Lawless Farrell & Flack, Houston, TX; Ronald E Cook, Cook & Roach, Houston, TX; Shannon W Conway, Patton Boggs LLP, Dallas, TX.

For James M Davis, Defendant: David M Finn, LEAD ATTORNEY, Milner & Finn, Dallas, TX.

For Laura Pendergest-Holt, Defendant: Jeffrey M Tillotson, LEAD ATTORNEY, Chris J Akin, Lynn Tillotson Pinker & Cox LLP, Dallas, TX; Lee H Shidlofsky, LEAD ATTORNEY, Visser Shidlofsky LLP, Austin, TX; Brent R Baker, Erik A Christiansen, PRO HAC VICE, Parsons Behle & Latimer, Salt Lake City, UT; John D Volney, Lynn Tillotson & Pinker, Dallas, TX.

For Randi Stanford, Respondent: Joe Kendall, LEAD ATTORNEY, Kendall Law Group LLP, Dallas, TX.

For Rebecca Reeves-Stanford, Respondent: Jeronimo Valdez, LEAD ATTORNEY, Valdez | Washington LLP, Dallas, TX; Bradford Cohen, Cohen Law, Fort Lauderdale, FL.

For Farmers & Merchants Bank, Intervenor Defendant: Ashley T Parrish, LEAD ATTORNEY, Cantey Hanger LLP, Dallas, TX.

Exhibit C

For David Quintos, Diana Dimitiova, Movant: Randall A Pulman, LEAD ATTORNEY, PRO HAC VICE, Pulman Cappuccio Pullen & Benson LLP, San Antonio, TX; Adam S [*3] Block, David Lopez, Pulman Cappuccio Pullen & Benson LLP, San Antonio, TX.

For David Haggard, Steve Slewitzke, Movant: Michael J Quilling, LEAD ATTORNEY; Brent Jason Rodine, Quilling Selander Cummiskey & Lownds, Dallas, TX; Eric L Jensen, Jason W Graham, PRO HAC VICE, Graham & Penman LLP, Atlanta, GA.

For Michael Mansur, Movant: Michael J Quilling, LEAD ATTORNEY; Brent Jason Rodine, Quilling Selander Cummiskey & Lownds, Dallas, TX.

For Ernesto Pena, Movant: Richard D Yeomans, LEAD ATTORNEY, James V Hoeffner, Graves Dougherty Hearon & Moody PC, Austin, TX.

For Gagosian Gallery, Inc., Movant: Deborah G Hankinson, LEAD ATTORNEY, Rick Thompson, Hankinson Levinger LLP, Dallas, TX; Bijan Amini, Storch Amini & Munves PC, New York, NY; Michael D Warner, Warner Stevens, Fort Worth, TX.

For Exchange Fund II Illiquid Asset Holding and Distribution, L.P., Movant: Edward P Perrin, Jr, LEAD ATTORNEY, Michael S Alfred, Hallett & Perrin, Dallas, TX.

For Richard O Hunton, Jr, Movant: Eugene B Wilshire, Jr, LEAD ATTORNEY.

For U.S. Coins, LLC, Movant: Millard A Johnson, LEAD ATTORNEY, Johnson DeLuca Kennedy & Kurisky, Houston, TX; Allison R Edwards, Johnson DeLuca Kennedy & Karisky PC, Houston, TX.

For Thomas [*4] H Turner, Michael K. Wheatley, Movant, Luther Hodges Movant, Cheray Hodges, Movant,Louis J. Schaufele, Jr. Movant, Carolyn Schaufele Movant, Nora E. Gay Movant, Richard E. Gay Movant, Robert L. Ward Movant, Courtney Ward Movant, J. Michael Gaither Movant, Phillip, Equus VI, LLC, Bert Benton, J. Russell Mothershead, Jeff P. Purpera, Jr., Movants: Michael J Quilling, LEAD ATTORNEY.

For Charles J Vollmer, Bill Metzinger, Eddie Rollins, John Barrack, Roberto Ulloa, Movants: Robert L Wright, LEAD ATTORNEY; Jason W Graham, Graham & Penman LLP, Atlanta, GA.

For Carroll D Leu, Lawrence Messina, Movant: Ernest W Leonard.

For Omar Lopez Garcia, Movant: Clifton J McAdams, LEAD ATTORNEY.

For ELECTRI International, Inc., Movant: Jeffrey S Levinger, LEAD ATTORNEY, Hankinson Levinger LLP, Dallas, TX.

For Carlos Tony Perez, Movant: Michael J Stanley, LEAD ATTORNEY.

For Robert S. Conte, Movant: Allan G Levine, Christian Smith & Jewell LLP, Houston, TX.

For Dillon Gage Inc of Dallas, Movant: Mark L Taylor, LEAD ATTORNEY, Cash Klemchuk Powers Taylor, Dallas, TX; James Joseph Doyle, III, Doyle Law, Dallas, TX; John L Genung, Law Offices of John L Genung, Little Elm, TX.

For City Plaza, LLC, Movant: James R Swanson, [*5] LEAD ATTORNEY, PRO HAC VICE, Fishman Haygood Phelps Walmsley Willis & Swanson LLP, New Orleans, LA; Patricia Hair, Phelps Dunbar LLP, Houston, TX.

For Financial Insurance Management Corp, Movant: Ernest W Leonard, LEAD ATTORNEY.

For Hannah Kay Peck, individually and as Trustee of the Peck Family Trust, Movant: Ashlea Brown, LEAD ATTORNEY, Newland & Associates PLLC, Little Rock, AR.

For Pre-War Art Inc, doing business as Gagosian Gallery, Movant: Deborah G Hankinson, LEAD ATTORNEY, Rick Thompson, Hankinson Levinger LLP, Dallas, TX.

For Nigel Hamilton-Smith, Peter Wastell, Movants: Wes Loegering, LEAD ATTORNEY, Craig F Simon, Daniel P Winikka, Greg Weselka, Gregory M Gordon, Jones Day, Dallas, TX.

For Stanford Condominium Owners Association, Movant: Peter Gregory Irot, LEAD ATTORNEY, David D Peden, Jr, Porter & Hedges LLP, Houston, TX; W Kyle Gooch, Canterbury Stuber Elder Gooch & Surratt, Dallas, TX.

For Wilma Diner, Movant: Debby Linton, LEAD ATTORNEY, Randy Coleman, Jack Nelson Jones Fink Jiles & Gregory PA, Little Rock, AR.

For Dr. Samuel Bukrinsky, Jaime Alexis Bornstein, Mario Gebel, Movant: Paul B Lackey, LEAD ATTORNEY, Michael P Aigen, Scott S Hershman, Lackey Hershman, Dallas, TX; [*6] Rachel K Marcoccia, LEAD ATTORNEY, Gregory A Blue, Peter D Morgenstern, PRO HAC VICE, Morgenstern & Blue LLC, New York, NY.

For Susan L Blount, Movant: R James George, Jr, LEAD ATTORNEY, George & Brothers, Austin, TX; Sommer Lee Coutu, George & Brothers LLP, Austin, TX.

For Trustmark National Bank, Movant: Julie Kristine Biermacher, LEAD ATTORNEY, Kane Russell Coleman & Logan PC, Houston, TX; Joseph A Hummel, Kane Russell Coleman & Logan PC, Dallas, TX; Kenneth C Johnston, Kane Russell Coleman & Logan, Dallas, TX.

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JUDGES: David C. Godbey, United States District Judge.

OPINION BY: David C. Godbey

OPINION

ORDER

This Order addresses Defendant Laura Pendergest-Holt's motion for clarification of the Court's receivership order [docket no. 538]. Holt asks the Court: (1) to clarify that directors' and officers' ("D&O") insurance policy proceeds are not part of the receivership estate, or alternatively, (2) to exercise its equitable discretion and authorize disbursement of those proceeds for payment of defense costs. Because the Court finds that it would exercise its equitable discretion to permit payment of defense costs even if the proceeds were part of the [*12]

receivership estate, it is unnecessary to determine at this time whether proceeds are part of the estate or not.

I. BACKGROUND: THE STANFORD LITIGATION

This dispute arises out of a large, complex, and ongoing securities fraud case. The Securities Exchange Commission ("the Commission") brought this action against various players in what it calls a "massive Ponzi scheme" controlled by Defendants R. Allen Stanford and James Davis. These players include various Stanford entities: Stanford International Bank, Stanford Group Company, and Stanford Capital Management ("the Stanford entities"). They also include Holt, the chief investment officer of the Stanford Financial Group. The Commission asserts that Holt "facilitated the fraudulent scheme," misrepresenting to investors that she managed Stanford Investment Bank's multibillion dollar investment portfolio.

A. The Asset Freeze and the Creation of the Receivership

The Commission requested that the Court freeze Defendants' assets and appoint a receiver to "marshal, conserve, protect, and hold funds and assets" obtained in connection with this scheme. The Court issued orders freezing Defendants' assets [docket no. 8] and an order appointing a receiver [*13] [docket no. 157]. The Court assumed jurisdiction over and took possession of Defendants' "assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located." Am. Order Appointing Receiver at 1-2. The Court appointed Ralph S. Janvey as the Receiver of these assets, and vested him "with full power of an equity receiver under common law as well as such powers as are enumerated herein in this order." *Id*. at 2.

B. The Insurance Policies

Holt's motion asks whether three insurance policies (the "D&O policies") are within the scope of the Court's receivership order. All three policies, purchased by the Stanford entities, insure the directors and officers for liabilities incurred in the course of duty. But the policies also insure the companies themselves, in addition to their officers and directors. The policies are as follows:

> . **Lloyd's D&O and Company Indemnity Policy, reference no. 576/MNK558900**. This policy has three relevant insuring clauses. The first says that the underwriters will pay "on behalf of the Directors and Officers," losses resulting from "any Claim" made against them for "a Wrongful Act." The second says that [*14] the underwriters will pay "on behalf of the Company" loss it incurs for indemnifying its officers and directors. The third says that the underwriters will pay "on behalf of the Company, Loss sustained by the Company" for claims made against the entity for "a Wrongful Act." Def.'s Mot. for Clarification, App. at 6.
>
> . **Lloyd's Financial Institutions Crime and Professional Indemnity Policy ("PI policy"), § 3, reference no. 576/MNA851300**. This policy has one insuring clause: "Underwriters shall reimburse the Assureds for Loss resulting from any Claim first made during the Policy Period for a Wrongful Act in the performance of Professional Services." The policy defines "Assureds" as "the Company and the Directors, Officers and Employees." Def.'s Mot. for Clarification, App. at 102.
>
> . **Lloyd's Excess Blended "Wrap" Policy, reference no. 576/MNA831400**. This "excess policy" is linked to the first two policies, which are its "underlying policies." The policy essentially expands the limits of liability of the underlying policies.

Holt would like to access the policies' proceeds to fund her defense in this case and a related, pending criminal case. The Receiver urges that these proceeds should be [*15] preserved for the receivership estate. Certain Underwriters at Lloyd's of London ("Lloyd's"), the issuer of these policies, has requested clarification. Like Holt, Lloyd's wants to know whether it can pay directors' and officers' defense costs without running afoul of the receivership order. Lloyd's does not want the Court to decide whether and to what extent any insured is *entitled* to coverage. Lloyd's argues that policy limitations may bar Defendants' coverage, including coverage for the Stanford entities themselves. In fact, Lloyd's has filed a separate action against the Receiver, seeking a declaratory judgment that the Stanford receivership is not entitled to payment of claims. *See* Complaint at 14-15, *Certain Underwriters at Lloyd's of London v. Janvey*, Civil Action No. 09-CV-1736 (N.D. Tex. filed Sept. 17, 2009). Lloyd's asserts that the Stanford entities will be barred from coverage due to various policy exclusions and limitations, including exclusions for fraudulent activities.

II. THE COURT WOULD PERMIT PAYMENT OF DEFENSE COSTS EVEN IF THE POLICY PROCEEDS WERE PART OF THE ESTATE

The Court will first address whether it would permit payment of defense costs if the policy proceeds [*16] were part of the receivership estate. For purposes of this discussion the Court will assume, without deciding, that the proceeds are part of the receivership estate.

A. The Court Has Discretion to Permit Payment of Defense Costs

Few cases address a district court's oversight of an equity receivership. When they do, their holdings are often limited the case's peculiar facts. *See, e.g., SEC v. Safety Finance Serv., Inc., 674 F.2d 368, 373 (5th Cir. 1982)* ("[W]e emphasize that our holding stands on the peculiarity of the facts before us and the wide discretionary powers that we accord to a court of equity charged with overseeing a receivership."). Nevertheless, one clear principle emerges from cases dealing with a district court's supervision and administration of an equity receivership: "'[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.'" *Id. at 372-73* (quoting *SEC v. Lincoln Thrift Association, 577 F.2d 600, 606 (9th Cir. 1978)).* [1]

1 This point of law is well-settled. *See, e.g., SEC v. Elliott, 953 F.2d 1560, 1569 (11th Cir.1992)* (holding that a district court did not abuse its discretion in disallowing tracing specific [*17] assets); *SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir.1986)* ("[A] district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad."); *FDIC v. Bernstein, 786 F. Supp. 170, 177 (E.D.N.Y.1992)* ("[A] district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration."); *see also* 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 66.06[4][a] (3d ed.1997) ("[L]itigation regarding the actual supervision of the court over the receivership is rare . . . . Nonetheless, the opinions that do discuss this issue tend to agree that the district court has remarkably broad discretion in its supervision of the receivership and . . . the administration of the receivership.").

The parties cite no cases addressing today's issue: whether a receivership Court's discretion extends to allowing disbursement of D&O insurance proceeds for defense costs. Some receivership cases have addressed whether a Court *must* release frozen assets to pay defense costs. *See, e.g., SEC v. Quinn, 997 F.2d 287, 289 (7th Cir. 1993)*; [*18] *FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1032 & n.10 (7th Cir. 1988).* In both *Quinn* and *World Travel*, the district courts had released some frozen assets to pay defense costs, even absent a showing that the assets were untainted by fraud. *Quinn, 997 F.2d at 289*; *World Travel, 861 F.2d at 1032 & n.10*. Both the *Quinn* and *World Travel* defendants' challenges arose when the district court refused to release more funds than they already had. Addressing that issue in *Quinn*, the Seventh Circuit colorfully held:

> Parties to litigation usually may spend their resources as they please to retain counsel. 'Their' resources is a vital qualifier. Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime.

Quinn, 997 F.2d at 289 (citations omitted). Further, a receivership court "has a duty to ensure that Defendants' assets are available to make restitution to the alleged victims." *SEC v. Dobbins, Civil Action No. 04-CV-0605, 2004 U.S. Dist. LEXIS 6362, 2004 WL 957715, at *2 (N.D. Tex. 2004).*

The Court holds that it has discretion to allow disbursement of insurance [*19] proceeds if they are part of the receivership estate. In keeping with the principle that a defendant cannot fund a defense with "loot" or "gleanings of crime," this Court denied Stanford's earlier motion to unfreeze $ 10 million in assets to pay attorneys fees. Order Denying Def.'s Mot. to Modify Prelim. Inj. at 1 [docket no. 544]. The concern there was that Stanford had not made an accounting showing that the requested amount was "untainted by potential fraud." *Id*. Here, though, there is no argument that insurance proceeds are potentially tainted by fraud, [2] and the Court has no duty to preserve them as such.

2 It could be argued that the insurance policies are tainted by fraud if their premiums were paid with stolen money. While unjust and regrettable, this would not entitle victims to proceeds of policies intended to pay defense costs.

B. Possible Impact on the Receivership Estate

The Receiver argues that allowing defense costs would deplete policy limits. This, he says, would de-

crease the coverage dollars eventually available for distribution to Stanford investors. Here, he touches on another broad principle governing courts' supervision of equity receiverships: "[A] primary purpose [*20] of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors," and in this case, investors. *SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986)* (citing *Safety Finance, 674 F.2d at 373*; *SEC v. Wencke, 783 F.2d 829, 837 n.9 (9th Cir. 1986))*.

The Court does not take this issue lightly. But at this point the possibility that the D&O proceeds might one day be paid into the receivership does not justify denying directors' and officers' claims. The Receiver has not yet tendered any claim against the Stanford entities to Lloyd's for a defense. Even if he had, is not at all clear at this time that Lloyd's will ever pay a claim into the receivership. Lloyd's is adamant that it will not. Lloyd's asserts - in a separate suit pending before this Court - that claims on behalf of the receivership entities will be barred by various policy exclusions, including exclusions for fraudulent activities. Lloyd's further maintains that the Receiver will be estopped from arguing that the exclusions do not apply, given that he has repeatedly accused the Stanford entities of fraud. These are questions for another day. But they do demonstrate [*21] that the receivership's claim to insurance proceeds is presently hypothetical.

C. The Court Would Exercise Its Discretion to Permit Lloyd's to Disburse D&O Proceeds to Pay Defense Fees

The Court finds it in the interest of fairness to allow directors and officers to access insurance proceeds to which they are entitled for several reasons. First, although the Court is sensitive to concerns about preserving coverage dollars for aggrieved investors, the receivership's claim to the policy proceeds is presently speculative. Second, the directors and officers, many of whom deny any knowledge of fraudulent activities, relied on the existence of coverage. They expected that D&O proceeds would afford them a defense were they to be accused of wrongdoing in the course of duty. The potential harm to them if denied coverage is not speculative but real and immediate: they may be unable to defend themselves in civil actions in which they do not have a right to court-appointed counsel. The Court, therefore, would exercise its discretion and permit payment of defense costs out of the policy proceeds.

III. THE COURT NEED NOT DECIDE WHETHER POLICY PROCEEDS ARE PART OF THE ESTATE

If policy proceeds, at least [*22] to the extent of defense costs, were not part of the receivership estate, the covered directors and officers would be entitled to whatever payment of defense costs the policies would provide. Alternatively, if all of the policy proceeds were part of the receivership estate, the Court would exercise its discretion to permit payment. Since the same result obtains either way -- payment of defense costs is not prohibited -- the Court need not decide today whether the proceeds are part of the estate.

CONCLUSION

Today the Court holds only that its prior orders do not bar Lloyd's from disbursing policy proceeds to fund directors' and officers' defense costs in accordance with the D&O policies' terms and conditions. The Court does not, however, hold that any defendant is *entitled* to have its defense costs paid by D&O proceeds. [3] Lloyd's reminds the Court that Lloyd's may ultimately deny coverage for even the individual directors' and officers' claims as barred by various policy exclusions. The Court also does not today authorize Lloyd's to pay any claims other than those for defense costs. Whether and how any successful claims within policy coverage will be paid is a matter the Court can address [*23] if and when that issue is ripe.

3 Holt's codefendants Allen Stanford and James Davis move to join her motion [docket nos. 567, 659]. Also, several groups of relief defendants move to intervene in Holt's motion [docket nos. 632, 673, 678, 682, 736]. Because the Court finds that codefendants' and relief defendants' interests are adequately represented by Holt's motion, their motions are denied. That said, the Court's authorization to disburse proceeds extends to any covered officer or director whose claim is approved by Lloyd's.

Signed October 9, 2009.

/s/ David C. Godbey

David C. Godbey

United States District Judge

102QSJ

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2 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
3 --x
In the Matter of:
4
ENRON CORP., ET AL.,
5 Case No.
01-16034
6 Debtor.
7 --x
8
9
April 11, 2002
10 2:00 p.m.
United States Custom House
11 One Bowling Green
New York, New York
12
13 B E F O R E:
14 HON. ARTHUR J. GONZALEZ, U.S. BANKRUPTCY JUDGE
15
16 Ruling in reference to: One, the schedules; two,
exclusivity; and three, the D&O insurance issue
17
18 Reported by:
Linda D. Noto, RPR, CSR
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Exhibit D

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20 GREG KADEN, ESQ.
21
22
23
24
25

1 ENRON CORP., ET AL.,

2 THE COURT: Please be seated.

3 All right. My recollection, if I

4 left something out I'll have to go back in and get

5 some more papers, but my recollection is that

6 there are three decisions I have to read into the

7 record: One, the schedules; two, exclusivity; and

8 three, the D&O insurance issue.

9 Was there anything else that I

10 reserved on this morning?

11 All right. I'll deal first with

12 exclusivity and then I'll read a decision with

13 respect to the D&O. And when I deal with

14 exclusivity, I'll deal as well with the schedules.

15 Cause exists to extend the Debtors

16 exclusive periods as to all the Debtors.

17 With respect to ENA, the Court will

18 do the following: One, extend ENA's exclusive

19 period to August 31st, 2002; two, sua sponte

20 expand the ENA Examiner's role to that of the

21 facilitator of a plan in the ENA case and direct

22 him to file a report regarding the status of those

23 efforts including a recommendation as to any

24 further extension of ENA's exclusivity; three,

25 such report shall be filed on or before July 26,

1 ENRON CORP., ET AL.,
2 2002.
3 With respect to the other Enron
4 Debtors, the exclusive period is extended as
5 requested by the Debtor and the Committee for the
6 six-month period sought.
7 With respect to the schedules, the
8 Court grants the Debtors' request for the
9 additional 60 days and the related relief sought.
10 And the Debtor is to serve an order with respect
11 to both of those issues, and obviously settle it
12 upon the ENA Examiner with respect to the
13 exclusivity issue.
14 Regarding the AEGIS motion and the
15 outside directors. Concerning the motions filed
16 by AEGIS and the outside directors to lift the
17 automatic stay to allow AEGIS to pay amounts under
18 the AEGIS D&O Policy and the AEGIS Fiduciary and
19 Employee Benefit Liability Policy, first, as set
20 forth by the Movants, their motion to lift the
21 stay is the procedurally correct method to have
22 this matter presented to the Court.
23 Therefore, currently at issue is
24 the payment of the defense costs incurred by the
25 officers and directors.

1 ENRON CORP., ET AL.,
2 The D&O Policy provides for
3 coverage of the directors and officers,
4 indemnification coverage for the Debtor, and
5 entity coverage for the Debtor.
6 Pursuant to the terms of the D&O
7 Policy, the directors have a right to advancement
8 of defense costs under a priority of payments
9 endorsement.
10 The Debtors' entity coverage and
11 its indemnification coverage are expressly
12 subordinated to the rights of the directors and
13 officers under the AEGIS D&O policy.
14 As the Debtors' property rights are
15 defined by state law, it is that law that governs
16 the contractual obligation; thus, any directors
17 and officers currently due defense costs covered
18 by the policy must be paid from the proceeds of
19 the policy first. The Debtors are then entitled
20 to have their own claims for defense costs paid.
21 The Debtors note the importance of
22 providing the officers and directors with this
23 type of coverage. The Debtors assert that the
24 Debtor, itself, is entitled to currently-due
25 defense costs and will seek payment once the

1 ENRON CORP., ET AL.,
2 directors and officers receive payments for the
3 amounts currently due them.
4 With respect to the payment of
5 officers and directors' defense costs, to the
6 extent that any such payments would negatively
7 impact the Debtors' interest in the proceeds of
8 the D&O policy, that result is dictated by the
9 negotiated terms of the policy.
10 As certain officers and directors
11 may have present rights to payment of defense
12 costs, the fact that certain parties may in the
13 future assert claims and potentially become
14 entitled to payment from the insurance policies
15 does not preclude those who are currently entitled
16 to payment from receiving it.
17 In any case, the parties are bound
18 by the contractual provisions of the policy. The
19 Debtors' interest in the policy is limited by its
20 contractual provisions including a priority
21 advancement and payment obligations contained in
22 those policies. The Court cannot rewrite the
23 provisions of the contract.
24 The Objectants acknowledge the
25 terms of the contract. Some of the Objectants

1 ENRON CORP., ET AL.,
2 argue that because AEGIS and the outside directors
3 are seeking to invoke this Court's jurisdiction
4 concerning the lifting of the stay, that gives
5 this Court leeway to set conditions upon which the
6 stay would be lifted. However, in this case, any
7 such action would result in changing the terms of
8 the contract.
9 The Court finds that, while
10 exercising jurisdiction concerning the issue of
11 lifting the stay, it should not exercise
12 jurisdiction over the terms of the contract and
13 will not interfere with those terms.
14 Under the AEGIS Fiduciary Policy,
15 the coverage afforded the relevant Debtors is
16 co-extensive with the coverage afforded the
17 individual insureds. However, that policy
18 provides a special $10 million fund earmarked for
19 defense costs.
20 Payment from that fund will protect
21 the coverage that is available for payment of
22 settlements and judgements. Moreover, payment
23 from the special funds requires written approval
24 from the Debtor. These two aspects protect the
25 Debtors' interest.

1 ENRON CORP., ET AL.,

2 In addition, the Debtors have

3 referenced the estates' interest in having

4 individual defendants vigorously defend themselves

5 in light of the potential for vicarious liability.

6 The Debtors also have asserted that

7 the payment of the individual claimants' defense

8 cost from the special $10 million fund should not

9 limit the availability of proceeds that may be

10 required by the Debtor.

11 Based upon the pleadings filed and

12 the record of this hearing, the Court finds that

13 because of the entity coverage, the stay is

14 implicated. However, the Debtors' interest appear

15 minimal.

16 Moreover, the Debtors' interest

17 should not be expanded by this Court. They should

18 receive no greater protection than their contract

19 rights afford them.

20 The Court finds cause to lift the

21 stay and grant the motion to permit the parties to

22 exercise their contractual rights under the D&O

23 Policy.

24 In addition, the Court grants the

25 motion to lift the automatic stay to the extent

1 ENRON CORP., ET AL.,
2 that the individual insureds and the Debtors may
3 exercise their contractual rights against the
4 $10 million special fund portion of the Fiduciary
5 Policy.
6 The Movants shall settle an order
7 upon the appropriate parties.
8 We will begin again, I think, at
9 2:30. Thank you.
10
11 (Time noted: 2:05 p.m.)
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C E R T I F I C A T E

STATE OF NEW YORK)

)SS.:

COUNTY OF NEW YORK)

I, LINDA D. NOTO, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of April, 2002.

LINDA D. NOTO, C.S.R., R.P.R.
License Number XI 01887 - N.J.
License Number 001002 - N.Y.

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The original certified E-Transcript file was electronically signed using RealLegal technology.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In the matter of	)	
	)	
LERNOUT & HAUSPIE SPEECH	)	
PRODUCTS N.V., et al.,	)	Case No. 00-4397 (JHW)
	)	through 00-4399 (JHW)
Debtors.	)	

United States Bankruptcy Court
824 Market Street - Sixth Floor
Wilmington, Delaware

Tuesday, May 8, 2001
11:35 a.m.

BEFORE: HONORABLE JUDITH H. WIZMUR,
United States Bankruptcy Judge

TRANSCRIPT OF PROCEEDINGS

WILCOX & FETZER
1330 King Street - Wilmington Delaware 19801
(302) 655-0477

Exhibit E

1 depending on the practical implications of the coverage,
2 specifics of the coverage, so it is important to
3 understand the specifics of this coverage and this
4 coverage, as we discussed in the course of argument,
5 breaks down into three forms of coverage.
6 The first, and, frankly, by order of
7 payment under endorsement 25 the first priority as well
8 is the direct liability coverage to the directors and
9 officers.
10 Indeed, counsel for AXA is correct to
11 reflect that that is a present interest in the proceeds
12 that is established on the face of the policy without
13 question.
14 Secondly, in terms of reimbursement
15 coverage to the debtor for presumably payments made to
16 directors and officers for indemnification or otherwise,
17 and we have had acknowledged rejection by the debtors of
18 the prospect of any such indemnification to the directors
19 and officers, that those kinds of claims would be
20 considered prepetition unsecured claims and would have no
21 special place for payment in the scheme of the debtors at
22 this point.
23 Third, there is entity coverage for
24 securities claims, and we have discussed, and I agree

1 claims.

2 Let me situate the factual predicate of

3 this, of an argument advanced by the creditors' committee

4 to reflect that on this record I cannot accept the

5 creditors' committee's contention that endorsement 31,

6 which deals exclusively with entity coverage for

7 securities claims, and does include the debtor, the

8 company in the definition of insured persons for the

9 purpose of entity coverage for secured claims, somehow is

10 required to be inserted in the reading of endorsement 25,

11 which provides for the order of payment among the various

12 claimants, the various claimants being the directors and

13 officers on the one hand, and the company on the other.

14 The direct liability coverage that that

15 order of priority provides for as a first priority is

16 protected by endorsement 25, to which the company agreed.

17 The endorsement 31 is limited by its terms

18 to the entity coverage for securities claims, and there

19 is no ambiguity about that, that I could see. So

20 endorsement 25, as I indicated in the discussion, would

21 be eliminated if we were to understand that company, the

22 company was included in the concept of insured persons.

23 In fact, endorsement 31 lists several

24 previous endorsements that are deleted specifically by

1 the operation of endorsement 31. Endorsement 25 is not
2 included among those deleted, and it seems to me that it
3 must be accepted on its face for what it says.
4 There is also advanced by the creditors'
5 committee a concern that AXA will seek indemnification
6 from L&H as an administrative claim and there really has
7 not been a basis provided to support that proposition.
8 There is even acknowledgment, if I
9 understood counsel's argument on the record, that the
10 best that AXA would look for would be an unsecured claim
11 against L&H, and I am not quite sure how that would
12 arise, especially if L&H, as it is anticipated, will not
13 advance any moneys to the directors and officers.
14 We do understand that AXA reserves the
15 right to pursue the defense costs that are expended in
16 favor of directors and officers, but that right is
17 directed to the recipient of those benefits or
18 recipients, the directors and officers, and not L&H. So
19 how that translates to the risk of administrative claim I
20 am not sure.
21 I am convinced that AXA's argument that the
22 directors and officers have an independent right to
23 assert their present interest in the proceeds on the face
24 of the policy must be recognized, and that AXA is under a

1 contractual obligation to act in conformance with that
2 contract, and they are attempting to do so in good faith,
3 that the outcome of that action will be to reduce the
4 pool available to L&H and to others is understood, is
5 inevitable, is the reality of this kind of coverage, and
6 cannot bar the relief that is requested.
7 So for those reasons I will grant the
8 motion by AXA to pay defense costs ongoing.
9 We haven't reached the question of the
10 imposition on the funds beyond defense expenses. That
11 hasn't been raised.
12 If there is the request for declaratory
13 relief as to entitlement otherwise, it certainly can be
14 raised by adversary proceeding. On this record I am
15 prepared to grant the motion as requested. Is there any
16 question?
17 MR. LEDWIN: Your Honor, we had submitted
18 an order with our motion papers. I don't know if you
19 would like us to resubmit that to the Court?
20 THE COURT: Let me see if I have it here.
21 MR. LEDWIN: But one point that we would
22 obviously state, and I think this is a given, and it is
23 requested in the relief sought by our papers, and that's
24 obviously our advancement of defense costs is subject to

1 State of Delaware)
)
2 New Castle County)

3

4

5 CERTIFICATE OF REPORTER

6

7 I, Eleanor J. Schwandt, Registered

8 Professional Reporter and Notary Public, do hereby

9 certify that the foregoing record, pages 1 to 80

10 inclusive, is a true and accurate transcript of my

11 stenographic notes taken on May 8, 2001, in the

12 above-captioned matter.

13

14 IN WITNESS WHEREOF, I have hereunto set my

15 hand and seal this 10th day of May, 2001, at Wilmington.

16

17

18

19 Eleanor J. Schwandt

20

21

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23

24

United States Bankruptcy Court, M.D. Florida,
Jacksonville Division.
In re: TAYLOR BEAN & WHITAKER MORTGAGE CORP., et al., Debtor.
No. 3:09-bk-07047-JAF.
October 11, 2011.

Order Granting National Union's Motions for Relief from the Automatic Stay

Jerry A. Funk, United States Bankruptcy Judge.
Chapter 11

This case came before the Court on the Motion for Relief from the Automatic Stay, to the Extent Applicable, to Permit Insurer to Advance Defense Costs of Certain of the Debtors' Former Directors and Officers (the "Original Motion"), filed on June 11, 2010 (Doc. No. 1534), by National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), and the Motion for Additional Relief from the Automatic Stay, to the Extent Applicable, to Permit Insurer to Advance Defense Costs of Lee Farkas (the "Supplemental Motion"), filed on August 13, 2010 (Doc. No. 1796), by National Union.

In the Original Motion, National Union, as Debtors' insurer, seeks to advance defense costs incurred by Paul Allen ("Allen"), former CEO of Taylor Bean & Whitaker Mortgage Corp. ("TBW"), and Ray Bowman ("Bowman"), former president of TBW, with respect to debarment proceedings instituted by the U.S. Department of Housing and Urban Development ("HUD"). In the Supplemental Motion, National Union, as Debtors' insurer, seeks to advance defense costs incurred by Lee Farkas ("Farkas"), former chairman of TBW, with respect to criminal proceedings instituted against him. In both the Original Motion and the Supplemental Motion, National Union is seeking permission to advance up to $1,000,000.00 each for the defense costs of Allen, Bowman and Farkas, totaling up to $3,000,000.00 of the $5,000,000.00 policy limit.

On June 25, 2010, the Official Committee of Unsecured Creditors of TBW (the "Committee") filed a response in opposition to the Original Motion (Doc. No. 1623). On July 2, Allen and Bowman filed a response supporting the Original Motion (Doc. No. 1652), to which the Committee replied on July 14, 2010 (Doc. No. 1691). Farkas filed a Notice of Joinder in the Original Motion on July 13, 2010 (Doc. No. 1680). National Union replied to the Committee's response on July 14, 2010 (Doc. No. 1685). The Court held a hearing on the Original Motion on July 16, 2010, during which all interested parties presented arguments, and after which the Court took the matter under advisement.

On August 13, 2010, National Union filed the Supplemental Motion. On August 25, 2010, the Committee filed a response in opposition to the Supplemental Motion (Doc. No. 1869). Farkas filed a Notice of Joinder in the Supplemental Motion on September 3, 2010 (Doc. No. 1886). The Court held a hearing on the Supplemental Motion on September 10, 2010, during which all interested parties presented arguments, and after which the Court took the matter under advisement.

Upon consideration of the record and the arguments of the parties, the Court will grant National Union's Original Motion for Relief from the Automatic Stay as well as the Supplemental Motion for Relief from the Automatic Stay, to the extent provided herein.

Background

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Exhibit F

National Union issued a Directors', Officers', and Private Company Liability Insurance Policy (the "Policy") to TBW covering September 1, 2008 through September 1, 2009. Under the Policy, TBW was insured for any loss arising from claims against TBW i) first made against TBW, or ii) first made against an officer or director ("Coverage B"). The Policy also provided direct coverage for TBW officers and directors ("Coverage A"). The Policy provided a coverage limit of $5,000,000.00 for both TBW and its officers and directors during the policy period (Coverage A and B). The Policy is a wasting policy, meaning every dollar spent out of the Policy reduces the remaining proceeds available by the same amount.[FN1]

FN1. The Policy contains a self-retention clause which obligates each individual insured under the Policy to expend the first $1,000,000.00 towards his or her own defense costs before coverage under the Policy applies. A dispute exists between National Union and Allen, Bowman and Farkas as to whether the self-retention clause applies to the matters at issue. The Committee argues this dispute necessitates denial of the motions for relief from stay. However, the self-retention issue is a contractual dispute not currently before the Court. By granting National Union's motions for relief from stay, the Court is merely permitting National Union to advance funds to the extent authorized by the Policy. The Court makes no determination regarding interpretation of the Policy's self-retention provision.

TBW submitted claims under the Policy for expenses related to the defense of several regulatory and administrative proceedings. After reviewing TBW's claims, National Union determined TBW's claims were not covered under Coverage B, and denied entity coverage to TBW on all such claims. Presently, the claims by Allen, Bowman and Farkas under Coverage A are the only claims National Union has determined to warrant coverage.

Discussion

Section 541(a)(1) of the Bankruptcy Code provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(l). Numerous bankruptcy cases have held that debtor-owned insurance policies are property of the estate. *See, e.g., A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 1001 (4th Cir. 1986) (*citing In re Davis,* 730 F.2d 176, 185 (5th Cir. 1984)); *In re Johns-Manville Corp. et al.,* 40 B.R. 219, 230-31 (S.D.N.Y. 1984). However, many courts have made a distinction between insurance policies owned by a debtor and the proceeds payable under the policies, holding that the proceeds are not property of the estate where the debtor owns the policies but has no interest in the proceeds. *See, e.g., In re CHS Electronics, Inc.,* 261 B.R. 538, 542 (Bankr. S.D. Fla. 2001); *In the Matter of Edgeworth,* 993 F.2d 51, 56 (5th Cir. 1993) ("When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate.").

In *CHS Electronics,* the bankruptcy court for the Southern District of Florida focused on who has rights to the proceeds of the insurance policy when determining whether the proceeds were property of the estate. Finding no Eleventh Circuit precedent on point, the court adopted the reasoning of a Fifth Circuit case, holding "where the liability coverage covers the exposure of the directors and officers of the Debtor, and only is payable for the benefit of those directors and officers, it is they, and not the estate, that have a property interest in the liability proceeds for bankruptcy purposes." *CHS Electronics,* 261 B.R. at 542 (*citing In re Louisiana World Exposition, Inc.,* 832 F.2d 1391, 1400 (5th Cir. 1987)). More importantly, the *CHS Electronics* court "rejected the argument that the estate's status as a competing claimant creates any property interest in the proceeds covering the liability of the directors and officers." *CHS Electronics,* 261 B.R. at 542.

There are several cases which have concluded that insurance proceeds may be part of the estate where there is also coverage for liability claims against a debtor. *See, e.G., In re Laminate Kingdom LLC,* 2008 WL 1766637, *3 (Bankr. S.D. Fla. 2008); *In re Sacred Heart Hospital of Norristown,* 182 B.R. 413, 419-420 (Bankr. E.D. Pa. 1995). The court in *Sacred Heart* reasoned that where payment to the directors and officers would diminish the pot of proceeds

available to cover insured claims against the Debtor, the proceeds were property of the estate. *Sacred Heart,* 182 B.R. at 420. The *CHS Electronics* court considered this approach and rejected it, concluding that although entity coverage could conceivably exist, it did not exist in actuality because all entity claims had been discharged. *CHS Electronics,* 261 B.R. at 543.

The Committee emphasizes the *Laminate Kingdom* case, wherein the court held that while insurance proceeds may be property of the estate where there is a direct claim by the debtor to policy proceeds, the proceeds at issue were not part of the estate because a "priority of payments" endorsement in the insurance policy required the directors and officers to be paid first. *Laminate Kingdom,* 2008 WL at *3 (Bankr. S.D. Fla. 2008). Because National Union's Policy contains no such "priority of payment" endorsement, the Committee argues the Debtors' claims for entity coverage necessitate the conclusion that the proceeds are property of the estate, because any payments to Allen, Bowman and Farkas would deplete the proceeds available to pay the Debtors' claims. However, regardless of the lack of a "priority of payment" endorsement, the Debtors have no current viable claims under the terms of the Policy. All such entity claims have been denied coverage. In *Laminate Kingdom,* the proceeds at issue were not part of the estate because depletion of the proceeds did not diminish the protection afforded the estate's assets under the terms of the policy. Here, depletion of the proceeds will not diminish the Debtors' assets under the Policy because the Debtors have no current viable claims to proceeds under the terms of the Policy.

The Court agrees with and adopts the reasoning set forth in *CHS Electronics.* The Policy proceeds which are being used to advance defense costs to Allen, Bowman and Farkas are from the Policy's Coverage A. The Debtors have no property interest in the proceeds available under Coverage A, the coverage for claims against TBW's directors and officers. The Debtors must look to Coverage B, which insures TBW against entity claims. However, National Union has denied entity coverage to TBW on all its claims. As such, there are no current viable claims against proceeds available under Coverage B.

Granted, the Debtor may make additional entity claims against the Policy or may be successful if it attempts to challenge National Union's coverage determinations.[FN2] Such a scenario, if successful, would create a competing claim against proceeds of the Policy. For this reason, the Committee argues that because the Policy is a wasting policy, no proceeds should be paid under the Policy until all coverage determinations are fully resolved and the time for challenging such determinations has lapsed. The Court disagrees with the Committee's argument and has found no authority supporting such a delayed, protracted result. The Court is not obligated to postpone payments contractually owed to the former directors and officers based on mere hypothetical claims that may never be asserted and the possibility that coverage determinations may be reversed at some point in the future.

> FN2. Under the Policy, the insureds (including TBW) have until August 24, 2012, to make claims for coverage. The Committee also notes that under Florida law, there is a five-year statute of limitations for breach of contract claims, meaning the Debtors have five years to contest National Union's denial of entity coverage under the Policy.

Consequently, the Court finds that the $3,000,000.00 in proceeds that may be advanced to Allen, Bowman and Farkas under Coverage A of the Policy is not property of the bankruptcy estate. Nonetheless, to the limited extent that the proceeds of the Policy necessary to satisfy the Debtors' hypothetical entity claims could be considered property of the estate, and to the extent the automatic stay would apply under such circumstances, the Court can and will grant stay relief for cause under 11 U.S.C. Section 362(d)(1). Courts conduct a case-by-case inquiry and apply a totality of the circumstances test to determine whether cause for relief from the stay exists. *In re Alosi,* 261 B.R. 504, 508 (Bankr. M.D. Fla. 2001). The decision to lift the stay is within the discretion of the Bankruptcy Court Judge. *In re Dixie Broad., Inc.,* 871 F.2d 1023, 1026 (11th Cir. 1989).

In the present case, "cause" exists for granting relief from the stay to permit National Union to advance the defense costs to Allen, Bowman and Farkas under the Policy. As stated by the New York Bankruptcy Court: "D & O policies are obtained for the protection of individual directors and officers .... in essence and at its core, a D & O policy remains

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a safeguard of officer and director interests and not a vehicle for corporate protection." *In re First Central Financial Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). Numerous courts have granted relief from the automatic stay to permit the advancement of defense costs to a debtor's directors and officers even though the insurance policies also provided direct coverage to debtor. *See, e.g., In re World Health Alternatives. Inc.*, 369 B.R. 805, 811 (Bankr. Del. 2007); *Laminate Kingdom,* 2008 WL at *4 (Bankr. S.D. Fla. 2008).

Accordingly, it is

ORDERED:
The $3,000,000.00 in proceeds that may be advanced to Allen, Bowman and Farkas under Coverage A of National Union's Policy is not property of the bankruptcy estate and, therefore, the automatic stay imposed by 11 U.S.C. § 362(a) is not applicable.

Alternatively, it is

ORDERED:
1. The Original Motion for Relief from the Automatic Stay is granted to permit National Union to advance up to $1,000,000.00 each towards defense costs of behalf of Allen and Bowman in connection with the HUD debarment proceedings.
2. The Supplemental Motion for Relief from the Automatic Stay is granted to permit National Union to advance up to $1,000,000.00 towards defense costs of behalf of Farkas in connection with his criminal proceedings.
3. The relief granted herein is without prejudice to National Union seeking supplementary relief from the automatic stay to advance additional funds, if it determines the advancement of such funds is required by the Policy.

DATED this 14th day of September, 2010, in Jacksonville, Florida.

<<signature>>

JERRY A. FUNK

United States Bankruptcy Judge

In re Taylor Bean & Whitaker Mortg. Corp.
2011 WL 6014089 (Bkrtcy.M.D.Fla.) (Trial Order)

END OF DOCUMENT

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