UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. BURTON DOUGLAS MORRISS, et al., Defendants, and MORRISS HOLDINGS, LLC, Relief Defendant.	)	Case No. 4:12-cv-00080-CEJ

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

INTRODUCTION

After considering evidence provided by the Securities and Exchange Commission that Relief Defendant B. Douglas Morriss illegally diverted millions of dollars from investment funds to personal use, this Court appointed a Receiver over those funds and imposed a freeze on all assets related to them. Morriss now asks this court to lift the freeze on one of those assets to enable him to pay attorneys' fees to defend himself in this action. Because the proceeds of that policy represent one of the primary sources of recovery for the Receiver, equity dictates that this Court should deny his request, particularly because it was Morriss' own misconduct that necessitated the freeze in the first place.

BACKGROUND

For nearly ten years, Relief Defendant B. Douglas Morriss ("Morriss") created and ran private equity funds to support the development of start-up companies, principally in the technology and financial services sectors. Morriss raised capital from business associates and friends. An investigation by the Securities and Exchange Commission ("SEC") found that Morriss had engaged in a scheme to divert more than $9 million from those funds to either his personal use or to Morriss Holdings, LLC, a family holding company that he controlled. After the SEC's investigation and its presentment of its findings, this Court ordered a receiver appointed and all assets related to the Defendant entity venture capital investment funds frozen.

1. Factual Background

a. The Nature of the Business

Following its incorporation in 2003, Acartha Group LLC ("Acartha") managed MIC VII, LLC ("MIC VII") and Acartha Technology Partners, LP ("ATP")—private equity funds that invested in early to mid-stage companies in the financial services and technology sectors. [SEC Ex. 1; SEC Ex. 4 at BDM0000009-0000428; SEC Ex. 8.[1]] Until January 2012, Morriss served as the CEO and chairman of the board of directors for Acartha. *Id.* Acartha also controlled several special purpose vehicles that invested in the same private companies. [SEC Ex. 2 at 200-201; SEC Ex. 10 at 45-46, lns. 17-18.]

[1] Citations to SEC exhibits refer to those exhibits submitted in support of the SEC's motion to appoint a receiver and obtain emergency relief, including an asset freeze, found at Docket Entry 18 in these proceedings.

From 2003 until 2011, Morriss raised at least $88 million from approximately 97 investors. [SEC Ex. 13, ¶13 & Ex. C.] These investors were investing in preferred shares or membership interests of the equity funds of MIC VII and ATP, the related special purpose vehicles, and the management companies – Acartha and Gryphon Investments III, LLC. *Id.*

b. The Misappropriation

In seeking the appointment of a receiver and a freeze upon the assets of Morriss' controlled entities, the SEC presented voluminous evidence to this Court, including affidavits of witnesses, the transcripts of sworn statements given by officers of the investment entities including Morriss himself, and detailed documents and analyses of accountants. [Docket Entry 18.] The thrust of the SEC's submissions was that over time Morriss had misappropriated investment funds for his personal use, either by directing the receivership entities to transfer funds to himself or to Morriss Holdings. [SEC Ex. 13, ¶¶12 & 17; SEC Ex. 10 at 67, lns. 4-15; SEC Ex. 18, W. Morriss Dep. Tr. at 29, lns. 6-7.] Significantly, the SEC found these transfers were directly contrary to the offering documents or the subscription agreements of the entities through which Morriss solicited investments. [Docket Entry 1; SEC Ex. 3 at 291, lns. 10-15.] According to the SEC, the amount misappropriated exceeded $9 million. [SEC Ex. 13, ¶¶12 & 17; SEC Ex. 10 at 67, lns. 4-15; SEC Ex. 18, W. Morriss Dep. Tr. at 29, lns. 6-7.] Morriss is currently the debtor in a Chapter 7 bankruptcy proceeding.

2. Procedural Background

The various schemes employed to support Morriss' excessive lifestyle are well-documented in the materials presented to this Court by the SEC on January 17, 2012 with its complaint and its requests for a freeze order and other emergency relief. [Docket Entries 1, 3, 6, 18.] After consideration of the evidence presented, this Court made a determination that the SEC

had made a *prima facie* case that securities violations had occurred sufficient to support orders for emergency relief and the appointment of Receiver over Acartha, MIC VII, ATP and Gryphon Investments III, LLC (collectively referred to herein as the "Receivership Entities"). [Docket Entries 16 and 17.]

That same day, the Court entered an Asset Freeze Order restraining any entity within the jurisdiction of the United States Courts holding any assets of the Receivership Entities from dissipating or disposing of such assets. [Docket Entry 17.] The Freeze Order likewise restrained any individual associated with the Receivership Entities from withdrawing or disposing of any of the Entities' assets. *Id.* Following the show cause hearing January 27, 2012, the Court continued the asset freeze indefinitely. [Docket Entry 59.] The Receiver is exempt from the asset freeze. *Id.*

3. Policy Issues

Acartha purchased and holds a policy of insurance from Federal Insurance Company Numbered 8207-6676 (the "Policy"). [Ex. A to Morriss' Motion.] The Policy is referred to as a venture capital asset protection policy. *Id.* It is written on claims-made basis and contains a policy period of December 1, 2010 to December 1, 2012.[2] *Id.* Among other aspects, the Policy contains insuring clauses for management liability coverage and organization liability coverage. *Id.* The aggregate limit of coverage is $3,000,000. *Id.* Unlike many other insurance policies, the Policy is written so that defense costs paid on behalf of any insured reduce or deplete the $3,000,000 available to satisfy claims against any of the other insureds. On February 2, 2012, Morriss' counsel requested the Receiver and the SEC agree to permit the advancement of

[2] By an endorsement absent from Exhibit A to Morriss' Motion, the Policy period was extended from December 1, 2011 to December 1, 2012. [Attached Ex. 1.]

defense costs under the Policy for Morriss' benefit. [Attached Ex. 2.] The Receiver rejected the proposed stipulation as contrary to her obligation to preserve assets and achieve recoveries for the benefit of investors. [Attached Ex. 3.]

ARGUMENT

1. The Insurance Policy Is Part of the Receivership Estate and Subject to the Freeze

This Court possesses inherent equity authority to order an asset freeze. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103-06 (2nd Cir. 1972); *SEC v. International Swiss Investments Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990). It also has substantial discretion in deciding whether and how to freeze assets and defining the scope, terms, and duration of its order. *SEC v. Unifund Sal*, 917 F.2d 98, 99 (2nd Cir. 1990); *SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991). The ultimate purpose of the freeze is to facilitate recovery by the SEC and defrauded investors. *SEC v. Unifund Sal*, 910 F.2d 1028, 1041 (2nd Cir. 1990). The freeze is usually entered against all of the assets related to the entities placed in receivership and typically the freeze order utilizes broad language to achieve that end. *SEC v. Comcoa Ltd.*, 887 F. Supp. 1521 (S.D. Fla. 1995). Because Acartha purchased the Policy and is its holder, the Policy is an asset of Acartha and thus directly subject to the control of the Receiver and part of the Receivership Estate. That the Policy is part of the Receivership Estate was affirmed by Morriss in his Chapter 7 bankruptcy proceedings[3] where he acknowledged that "[i]f anything, the policy itself is property of Acartha, which is presently in receivership. *See Securities and Exchange Commission v. Morriss, et al.*, Case No. 4:12-cv-80-CEJ (E.D. Mo.)" [Attached Ex. 4, page 7, n.3 of memorandum.]

[3] *In Re Burton Douglas Morriss*, United States Bankruptcy Court, Eastern District of Missouri, Case 12-40164-659.

Despite that, Morriss suggests here, however, that even though the Policy may belong to the Receivership Estate, its *proceeds* are a distinct and separate asset belonging to Morriss. To support this position, Morriss relies heavily on an unreported decision in *SEC v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-298, 2009 U.S. Dist. Lexis 124377 (N.D. Tex. Oct. 9, 2009). But notwithstanding the court's action in that case, the ruling does not support his position that the policy proceeds are outside of the receivership estate and outside the reach of the freeze order. Specifically, and while the district court in *Stanford* found "it unnecessary to determine at this time whether insurance proceeds are part of the estate or not,[4] the court did emphasize a federal court's equitable powers: "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 *16 (internal citations omitted). Here, as in *Stanford*, that discretion extends to disbursement of insurance proceeds that are part of the receivership estate. Just as a district court has discretion to *permit* the payment of defense costs from policy proceeds under its equitable powers, it has equal discretion to *preclude* such payments from policy proceeds.

2. The Equities Favor Preservation of the Policy Proceeds

This case involves a single Policy with a $3 million limit that erodes with the expenditure of defense costs. While its investigation continues, the Receiver has thus far identified a limited number of liquid assets within the Receivership Estate and the Policy proceeds are an identifiable source of potential recovery on behalf of investors.[5]

[4] *Id.* at *11-12.

[5] The *Stanford* Court was faced with a situation involving significantly greater policy limits, with multiple coverage layers. In *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 566n.2 (5th Cir. 2010), the circuit court explained the policies in *Stanford* provided $100 million in combined limits. It is also unclear what

The *Stanford* Court recognized a legitimate concern in preserving insurance proceeds for aggrieved investors. *Id.* at *19-20. Moreover, the Receiver has made claim (as defined in the Policy) on one other insured, Dixon Brown. [Attached Ex. 5.] Policy proceeds could be used to satisfy the Receiver's claim against Mr. Brown. Policy proceeds could most definitely be used to satisfy claims against Morriss and the Receiver intends to pursue those claims after seeking appropriate relief to the extent necessary to do so. [Attached Ex. 6.]

In addition, there are pending claims against the Receivership entities, including this action, the Nixon litigation identified in Morriss' Motion, and other claims recently received by the Receiver. The Policy can be used for the benefit of the Receivership Entities with respect to such claims and others if its limits are not depleted on Morriss' defense.

3. The Balance of Equities Weigh Heavily Against Morriss' Request

As the district court recognized in *Stanford*, a federal court in an SEC receivership has wide latitude in supervising and administering the receivership. Here, the equities weigh heavily against Morriss' request to this Court to "unfreeze" the proceeds of the insurance Policy. Indeed, using the proceeds of a Policy owned by the Receivership Entities to fund his legal defense, when it was his conduct that put the Receivership Entities in the position they are now in, would be fundamentally inequitable to the interests of the investors he allegedly defrauded on charges that he unlawfully depleted the assets of the Receivership.

Morriss is in a bankruptcy proceeding and has argued in his own pleading that he has no assets. Based upon the SEC's investigation so far, there appears to be a significant commingling of assets, functions, and records of the Receivership Entities and other entities in Morriss'

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other sources of recovery presented themselves or the involvement of all of those seeking the use of proceeds for defense purposes.

control – namely, Morriss Holdings. The employees and the electronic mail accounts of the Receivership Entities and Morriss Holdings overlap. Morriss and Morriss Holdings syphoned funds from the Receivership Entities. The Receiver has identified few liquid assets and the Policy is an identifiable asset that could satisfy investor claims.

Federal Insurance Company suggests that it intends to preserve a reimbursement right against Morriss. [Ex. B to Morriss' Motion.] Specifically, if it is finally determined that Morriss has committed fraudulent acts excluded from coverage, Federal Insurance Company will seek to claw back monies should this Court permit it to provide for Morriss' defense. *Id.* But, once paid to Morriss' attorneys, it is unclear how Federal Insurance Company seeks to protect this right that it claims the Policy permits. As a practical matter, every dollar spent on Morriss' defense is a dollar that cannot be recovered for the benefit of investors. Based upon the equities involved (the very equities that caused this Court to order the broadly worded freeze in January 2012), this Court should exercise its broad discretion to preclude the use of policy proceeds for Morriss' defense in this action and others.

4. Bankruptcy Cases Do Not Dictate The Result Sought By Morriss

Morriss identifies one other unreported "receivership case" addressing the issue presented in his motion – whether the advancement of defense costs is consistent with receivership orders – called *Executive Risk Indemnity, Inc. v. Integral Equity, L.P.*, 2004 WL 438936 (N.D. Tex. 2004). That case, however, did not deal with the equitable issues presented in this motion. The parties did not brief or discuss and the district court could not find any law dealing with the issue of advancing policy proceeds to entities outside of a receivership when the policy proceeds could also benefit entities subject to state receiverships. For that reason, the district court turned to the bankruptcy cases for guidance and Morriss suggests this Court do the same.

But, there are numerous bankruptcy cases in which policy proceeds are viewed as an estate asset or otherwise subject to protections against exhaustion. *See, e.g., In re Vitek, Inc.*, 51 F.3d 530 (5th Cir. 1995) (bankruptcy court's decision to allow the estate exclusive use of all of the proceeds for a settlement benefitting the estate proper); *In re Cybermedica, Inc.*, 280 B.R. 12, 18 (Bankr. D. Mass 2002) (adopting logic of cases holding D&O insurance proceeds are property of the estate, but permitting use where no facts indicating potential policy depletion); *In re Circle K. Corp.*, 121 B.R. 257, 260-62 (Bankr. D. Ariz. 1990) (expressing concern with reducing availability of indemnification proceeds of D&O policies, diminishing value of estate, on defense costs for directors and officers); and *In re Sacred heart Hosp. of Norristown,* 182 B.R. 413, 419-21 (Bankr. E.D. Pa. 1995).

Contrary to Morriss' argument, there is no *per se* rule to permit individual insureds to deplete the proceeds of insurance that is part of a bankruptcy estate. The facts of each case dictate the treatment. *In re Cybermedica, Inc.*, 280 B.R. 12, 16. The test used is whether or not property belongs to the estate and worthy of preservation is whether the estate is worth more with the property or without it. *In re Minoco Group of Cos., Ltd.,* 799 F.2d 517, 519 (9th Cir. 1986). Unquestionably, the Receivership estate is worth more with the Policy's limits fully intact.

Even in bankruptcy cases that have permitted some use of insurance policy proceeds for defense efforts, the courts are mindful of the very concerns at issue here – the improper and unchecked depletion of eroding limits to the detriment of the estate and potential recovery. Courts have employed reporting requirements, caps, and other devices to ensure that the use of policy proceeds is controlled. One such example is *In re Allied Digital Technologies, Corp.*, 306 B.R. 505 (Bankr. D. Del. 2004), a case relied on by Morriss, in which the trustee agreed to a

lifting of the automatic stay to permit payment out of the policy that benefits the creditors or advances reasonable defense costs subject to a cap and court review to prevent the unlimited dissipation of the policy proceeds. *Id.* at 514.

5. The Need For Legal Fees Is Not A Basis To Modify A Freeze Order

Finally, Morriss makes much of his inability to mount any defense without use of policy proceeds. While the Receiver and presumably the trustee over his bankruptcy estate are unclear as to the nature of Morriss' interest in a hunting club, Morriss contends such interest falls outside the reach of his bankruptcy, is valued at $150,000, and can be used to pay his counsel. [See Attached Ex. 4.] As Morriss has not come forward in his bankruptcy proceedings to date with the required schedules and filings and has not appeared at the scheduled meeting of creditors, it is unclear what other assets he possesses. Regardless, Morriss' inability to pay Ms. Hanaway either her normal rate or reduced rate ($550 per hour) is not grounds to award Morriss the requested relief. [Attached Ex. 4 at E, concerning proposed fee arrangement between Morriss and Federal Insurance Company.]

It is not unusual for a defendant to seek modification of a freeze order to access funds for legal fees to defend against the SEC claims or for other litigation. Those requests are typically denied despite contention that funds are required to employ counsel. *SEC v. Cherif*, 933 F.2d 403, 416-17 (7th Cir. 1991); *SEC v. Coates*, 1994 WL 455558 at *1 (S.D. N.Y. August 23, 1994) (the movant must establish that the modification sought is in the best interest of defrauded investors and legal fees for defense bear no relation to the interest of investors); *SEC v. Credit Bancorp LTD*, 2010 WL 768944 (S.D. N.Y. March 8, 2010). Such denials do not violate constitutional rights or improperly deprive a defendant to right to counsel. Rather, they are an appropriate exercise of a federal district court's broad equitable powers.

The equities lie heavily in favor of preserving the proceeds of the Policy in favor of the receivership estate, not the benefit of the very individual whose conduct required the appointment of the Receiver and the freezing of assets in the first instance. To permit Morriss to deplete the policy to defend against his own misconduct would violate every principle of fairness and equity.

CONCLUSION

Based on the foregoing as well as the materials previously submitted to this Court by the SEC in obtaining this Court's January 17, 2012 and January 27, 2012 Orders to Freeze Assets, the Receiver respectfully suggests that this Honorable Court deny Morriss the relief sought and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Brian A. Lamping

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2012, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system which will send a notice of electronic filing to the following:

Catherine Hanaway, Esq.
Ashcroft Hanaway LLC
222 South Central Ave., Suite 110
St. Louis, Missouri 63105
Counsel for Defendant Burton Douglas Morriss

Adam L. Schwartz
Robert K. Levenson
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Securities and Exchange Commission
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Sher Corwin LLC
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105
Counsel for Morriss Holdings, LLC

/s/ Brian A. Lamping

Effective date of
this endorsement: December 1, 2011

Federal Insurance Company

Endorsement No.: 15

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

Issued to: Acartha Group LLC

EXTENSION OF POLICY PERIOD ENDORSEMENT

It is agreed that ITEM 7. of the Declarations, **Policy Period**, is deleted in its entirety and replaced with the following:

ITEM 7. **Policy Period:** from: 12:01 A.M. on December 1, 2010
to: 12:01 A.M. on December 1, 2012
Local time at the address in ITEM 1.

The Aggregate Limit of Liability set forth in ITEM 3.(B) of the Declarations and provided during the period from December 1, 2010 to December 1, 2012 shall be the remaining portion, if any, of the Aggregate Limit of Liability from December 1, 2010 to December 1, 2011.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Date: December 2, 2011

By _____
Authorized Representative

Schenk, Claire M.

From: Hanaway, Catherine <chanaway@ashcroftlawfirm.com>
Sent: Thursday, February 02, 2012 2:57 PM
To: schwartza@sec.gov; Schenk, Claire M.; Higgins, Stephen
Subject: Morriss
Attachments: Acartha Draft Stipulation.doc

Adam, Claire, and Steve,

Attached please find a draft stipulation wherein we propose to agree that the receiver would allow Acartha's D & O policy to pay Doug Morriss' defense costs. The draft stipulation was suggested by and drafted by attorneys for Federal, a subsidiary of Chubb. They advise us that similar stipulations have been entered into regularly in cases where a receiver has been appointed. The factual and legal justifications for such an agreement are set forth in the stipulation. Please let me know your thoughts on this.

Thank you for your consideration of this stipulation.

Catherine

ASHCROFT HANAWAY

Catherine Hanaway
(314) 863-7001 (office)
(314) 863-7008 (fax)

chanaway@ashcroftlawfirm.com | http://www.ashcroftlawfirm.com

Exhibit 2

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.	)	

STIPULATION AND AGREED ORDER AMONG THE RECEIVER, THE SEC, AND MR. MORRISS REGARDING THE ADVANCEMENT OF DEFENSE EXPENSES UNDER INSURANCE POLICY NOTWITHSTANDING ASSET FREEZE ORDER

WHEREAS, Federal Insurance Company ("Federal") issued Venture Capital Asset Protection Policy No. 8207-6676 to Acartha Group LLC ("Acartha") for the **Policy Period** from December 1, 2010 to December 1, 2011 (the "Policy") (copy attached as Exhibit A);

WHEREAS, the SEC initiated this litigation against Acartha and B. Douglas Morriss ("Morriss") by Complaint dated January 17, 2012;

WHEREAS, on January 17, 2012, by Order Appointing Receiver, the Court appointed Claire M. Schenk to be the Receiver and directed her to take possession of and hold all property of Acartha;

WHEREAS, the Order Appointing Receiver further 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";

WHEREAS, on January 17, 2012, the Court entered an Asset Freeze Order 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";

WHEREAS, 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");

WHEREAS, as part of the SEC Investigation, the SEC subsequently issued subpoenas seeking testimony from certain individuals, including Morriss, Dixon Brown, Christopher Aliprandi, and John Wehrle;

WHEREAS, 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");

WHEREAS, Federal has received notice of this litigation, the related SEC Investigation, and the Nixon Litigation under the Policy;

WHEREAS, the Policy has, as is relevant here, three insuring clauses: Insuring Clause 1, which provides Management Liability Coverage, Insuring Clause 2, which provides Management Indemnification Coverage, and Insuring Clause 5, which provides Organizational Liability Coverage;

WHEREAS, Insuring Clause 1 provides, subject to all of the terms, conditions, and exclusions of the Policy, 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**;

WHEREAS, Insuring Clause 5, as added by Endorsement 1, provides, subject to all of the terms, conditions, and exclusions of the Policy, 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**;

WHEREAS, section 32 of the Policy, as amended by Endorsement 10, defines **Loss** to include **Defense Costs**, and defines **Insured Person** 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 of equivalent executive in an **Organization**;

WHEREAS, Mr. Morriss, Mr. Brown, Mr. Aliprandi, and Mr. Wehrle are **Insured Persons** under the Policy;

WHEREAS, subject to a reservation of rights and the satisfaction of other Policy conditions, Federal has agreed to advance Defense Costs under the Policy, including: (1) consenting to representation of Mr. Morriss in connection with the SEC's civil complaint by Catherine Hanaway of Ashcroft Hanaway ("Defense Counsel"); and (2) agreeing to advance on a

current basis allocated Defense Costs, as that term is defined in the Policy (hereinafter "Defense Costs"), under the Policy incurred by Defense Counsel on behalf of Mr. Morriss until satisfaction of the Policy's $3 million limit of liability;

WHEREAS, subject to reservation of rights and the satisfaction of other Policy conditions, Federal may agree to advance Defense Costs under the Policy to other Insured Persons as appropriate;

WHEREAS, Mr. Morriss has incurred and continues to incur defense fees and costs in connection with this litigation;

WHEREAS, to the extent Insured Persons are entitled to coverage under the Policy, they are entitled to coverage under the Policy's Insuring Clause 1 by reason of the **Parent Organization**'s **Financial Impairment**, *see* Policy §§ 1, 13, 32;

WHEREAS, certain Acartha entities may seek coverage under the Policy's Insuring Clause 5 to the extent the $100,000 Deductible Amount is exhausted;

WHEREAS, the Policy contains a priority-of-payments provision in Endorsement 11, which provides that "[i]n 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";

WHEREAS, while no bankruptcy stay currently applies with respect to this matter, the matter is analogous to situations in which insurers seek to advance policy proceeds on behalf of insured persons notwithstanding 11 U.S.C. § 362's automatic stay, including its bar on "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," *see* § 362(a)(3);

WHEREAS, bankruptcy courts routinely hold in analogous situations in which individuals seek insurance proceeds that will deplete a policy's limit of liability, despite the bankruptcy estate's theoretical contingent claim on the policy proceeds, that the policy proceeds are not property of the estate that is subject to the automatic bankruptcy stay. *See, e.g.*, *Bursch v. Beardsley & Piper*, 971 F.2d 108, 115 n.8 (8th Cir. 1992) ("Although a debtor's interest in an insurance policy is property of the debtor's estate, the proceeds of the policy only become part of the estate once it is held that coverage for a claim exists."); *In re Petters Co., Inc.*, 419 B.R. 369, 379 (Bankr. D. Minn. 2009) (holding that insured individual's right to portion of policy proceeds was not impaired by automatic stay, even though stay applied to some portion of policy proceeds in connection with claims against the bankrupt entity); *see also 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);

WHEREAS, even when courts find that policy proceeds are subject to a bankruptcy stay, courts routinely find that a policy's Priority of Payments provision, which gives individual insureds a priority to the Policy proceeds, requires advancement of defense expenses on behalf of the individuals. *See, e.g., Miller v. McDonald (In re World Health Alternatives, Inc.)*, 369 B.R. 805, 811 (Bankr. D. Del. 2007) (finding that the priority of payments provision "requires that payments first be made to Coverage A insureds"); *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 B); *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 the priority of payments provision provides that the directors and officers have first priority to payment of policy proceeds under the direct liability coverage) (copy attached as Exhibit C); *see also In re Laminate Kingdom LLC*, No. 07-10279-BKC-AJC, 2008 WL 1766637, at *3 (Bankr. S.D. Fla. Mar. 13, 2008) ("[P]ayment 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 [c]osts of [d]efense are paid."); and

WHEREAS, the parties therefore seek the Court's approval of this stipulation;

IT IS NOW THEREFORE STIPULATED AND AGREED that, notwithstanding the Court's orders of January 17, 2012, January 27, 2012, and any other similar order which the Court may enter, to the extent applicable, Federal shall be and hereby is authorized to make payments under the Policy 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, the FDIC Investigation, the Nixon Litigation, or any related Claim.

[Morriss counsel]

[Receiver counsel]

[SEC counsel]

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February 6, 2012

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VIA ELECTRONIC & REGULAR MAIL

Catherine Hanaway, Esq.
The Ashcroft Law Firm, LLC
222 South Central Ave., Suite 110
St. Louis, MO 63105

Re: *SEC v. Morriss, et al.,* Case 4:12-cv-80-CEJ
(Response to Proposed Stipulation Regarding Insurance Proceeds)

Dear Catherine:

We received your email last Thursday attaching a proposed stipulation that would permit Federal Insurance Company ("Chubb") to advance Douglas Morriss's defense costs against Acartha's D&O liability policy. We have reviewed the materials provided and note that the draft stipulation recognizes that the Court not only appointed a Receiver with full control over company assets, but entered an Asset Freeze Order intended to restrain direct or indirect depletion of any assets that may ultimately inure to the benefit of investors.

While we are certainly sympathetic to your need to get paid by your client (and have been in similar circumstances ourselves), we oppose anything that would deplete the proceeds of the D&O policy. Indeed, the depletion of insurance proceeds to fund your client's defense expenses is particularly objectionable in light of the fact that it was his conduct that put the Acartha entities where they are now. Stated another way, committing funds available under Acartha's D&O liability policy would enable your client to defend himself against claims of depleting company assets. That, in my opinion, would be directly contrary to the best interests of the Receivership estate, and directly contrary to the interests of the investors whose investments have been placed at serious risk.

If there are additional materials that you would like us to review, please send those to my attention.

Exhibit 3

Very truly yours,

Thompson Coburn LLP

By
Stephen B. Higgins

SH/msd

cc: Claire Schenk, Receiver

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Chapter 7
	)	
BURTON DOUGLAS MORRISS	)	Case No.: 12-40164-659
	)	
Debtor.	)	
	)	

MEMORANDUM IN SUPPORT OF APPLICATION FOR ORDER PURSUANT TO 11 U.S.C. SECTION 327 OF THE BANKRUPTCY CODE AUTHORIZING EMPLOYMENT AND RETENTION OF THE ASHCROFT LAW FIRM, LLC AS COUNSEL FOR DEBTOR *NUNC PRO TUNC* TO JANUARY 20, 2012 OR, ALTERNATIVELY, A RULING THAT THE RETENTION OF THE ASHCROFT LAW FIRM, LLC IS BEYOND THE SCOPE OF THE DEBTOR'S ESTATE

INTRODUCTION

The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway ("Ashcroft Hanaway"), respectfully requests that the Court authorize its retention and employment by Debtor Burton Douglas Morriss ("the Debtor"). After this bankruptcy case was filed, The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway, was retained to represent the Debtor in two related matters -- a civil action filed on January 17, 2012 by the Securities and Exchange Commission against the Debtor and other parties ("SEC Case"), and a related criminal investigation being conducted by the Office of the United States Attorney, Eastern District of Missouri ("USAO Criminal Investigation").

Ashcroft Hanaway has not been paid for its services to the Debtor. Ashcroft Hanaway wishes to continue its representation of the Debtor in the SEC Case and the USAO Criminal Investigation. In addition, the Debtor is currently being investigated by the Internal Revenue Service, the Federal Bureau of Investigation, and the Postal

Exhibit 4

Inspection Service, and he seeks representation in those matters as well by Ashcroft Hanaway.

Ashcroft Hanaway therefore seeks an order under 11 U.S.C. Section 327 authorizing its employment and retention as counsel for the Debtor *nunc pro tunc* to January 20, 2012. As described below, Ashcroft Hanaway anticipates that its fees and expenses can be paid by the proceeds for the sale of an asset held by an irrevocable trust and a D&O insurance policy, both of which are beyond the scope of the Debtor's estate, upon information and belief. In the alternative, Ashcroft Hanaway seeks a ruling that its retention by the Debtor is beyond the scope of the Debtor's estate.

STATEMENT OF FACTS

1. On January 9, 2012, the Debtor filed his voluntary bankruptcy petition in this case under Chapter 11. Doc. # 1.

2. On January 20, 2012, Ashcroft Hanaway was retained to represent the Debtor in two related matters. First, the SEC Case was filed on January 17, 2012 by the Securities and Exchange Commission against the Debtor and other parties. *Securities and Exchange Commission v. Morriss, et al.*, Case No. 4:12-cv-80-CEJ (E.D. Mo.). On that same date, Claire M. Schenk was appointed as receiver for Acartha Group, LLC and other defendants (not including Morriss) in the SEC Case. The second matter is the related USAO Criminal Investigation.

3. On January 31, 2012 the U.S. Trustee moved to convert Debtor's Chapter 11 proceeding to a Chapter 7 proceeding or in the alternative to dismiss the Chapter 11 case. Doc. # 22. That motion is still pending, and set for hearing on March 5, 2012. Doc. # 38.

4. On February 6, 2012, Claire M. Schenk, as receiver in the SEC Case, filed a Motion to Appoint a Trustee or, in the alternative, to convert the Chapter 11 proceeding to a Chapter 7 proceeding. Doc. # 30, # 39.

5. On February 13, 2012, the Court converted this case to a Chapter 7 proceeding and appointed a trustee. Doc. # 49.

6. The proceedings in the SEC Case are not, according to the SEC's pleadings, subject to the automatic stay which would normally freeze all litigation against the Debtor. *See* Doc. 43, at p.2 n.1 ("The Commission's continued prosecution of the District Court Action against Morriss during the pendency of this bankruptcy case is as an action by a governmental unit to enforce such governmental unit's police or regulatory power, in accordance with the exception to the automatic stay provided in Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4). In its January 17 and 27, 2012 Orders, the District Court ruled that continuation of the enforcement action against Morriss does not violate the automatic stay.").

7. Absent approval by this Court for the Debtor to retain and compensate counsel through some means, the Debtor will be unrepresented in the SEC Case, which is clearly a precursor to and factually closely related to the USAO Criminal Investigation. In addition, the Debtor is currently being investigated by the Internal Revenue Service, the Federal Bureau of Investigation, and the Postal Inspection Service.

8. Ashcroft Hanaway seeks to have this Court approve the retention of Ashcroft Hanaway as counsel effective as of January 20, 2012, the first date on which Ashcroft Hanaway rendered services to the Debtor, or, alternatively, to have this Court

rule that the retainer and legal fees and expenses to be paid to Ashcroft Hanaway are beyond the scope of the bankruptcy estate of the Debtor.

9. Ashcroft Hanaway has not yet received payment of any fees or expenses with respect to its representation of the Debtor.

10. Ashcroft Hanaway has been promised the proceeds from the sale of a membership interest in Malinmor Land Company, LLC as a retainer. On information and belief, this membership interest is valued at $143,000, and is held by an irrevocable trust -- the Burton Douglas Morriss Irrevocable Trust (the "Trust") dated March 6, 1996 -- that is outside the scope of these proceedings. On information and belief, the membership interest was transferred to the Trust by Barbara and Rueben Morriss in 1996. During the Debtor's lifetime, he has a beneficiary interest in income and principal from the Trust, and any distribution of income or principal is to be made at the sole and absolute discretion of the trustees. As of the date of this writing, the Trust has two co-trustees, the Debtor and Dixon Brown. Dixon Brown has expressed his intention to resign as co-trustee very soon and likely before the membership interest is sold and the proceeds transferred to Ashcroft Hanaway as a retainer. Therefore, the transfer will be executed by the Debtor as sole trustee.

11. Ashcroft Hanaway anticipates the remainder of its fees to be paid from the proceeds of a D&O insurance policy purchased by Acartha Group, LLC. The policy (number 8207-6676) was written by the Federal Insurance Company ("Federal"). A copy of the policy is attached hereto as Exhibit A.

12. Federal has indicated its intent to advance defense costs under the policy, subject to a reservation of rights and the satisfaction of other Policy conditions. In

particular, it has consented to the Debtor's representation by Ashcroft Hanaway in connection with the SEC's civil complaint. Federal has also agreed to advance allocated defense costs incurred by counsel on behalf of the Debtor "on a current basis," as provided for in the policy. A copy of Federal's February 13, 2012 coverage letter is attached hereto as Exhibit B.[1]

13. Partners, associates and of counsel attorneys, paralegals and legal assistants from Ashcroft Hanaway and partners, associates, paralegals and legal assistants from the Graves, Bartle, Marcus and Garrett law firm ("GBMG"), who has contracted with Ashcroft Hanaway to provide joint defense in this matter, will also provide services to the Debtor in the above-described representation.

14. Ashcroft Hanaway and GBMG do not hold or represent any interest adverse to the Debtor's estate in the matters upon which Ashcroft Hanaway and GBMG are to be employed, and Ashcroft Hanaway and GBMG are "disinterested" as such term is defined in section 101(14) of the Bankruptcy Code. Neither Ashcroft Hanaway nor GBMG nor its professionals have any connection with the Debtor, the creditors or any other party in interest.

[1] Federal had previously been notified of two related claims. First, before the SEC filed the SEC Action, it had issued a 9/15/11 SEC Order Directing a Private Investigation and Designating Officers to Take Testimony (the "SEC Investigation"). Second, Federal was notified of a 11/29/11 lawsuit brought by Ron Nixon, as Co-Trustee of the Bailey Quin Daniel 1991 Trust, and others against Morriss, Acartha, and a related entity in Missouri state court (the "Nixon litigation"). (The Nixon litigation has been stayed as to Morriss because of the present bankruptcy case.) Federal responded to these notices by letters dated 11/23/11 and 12/20/11 respectively (copies attached as Exhibits C and D). Federal accepted the SEC Investigation and the Nixon litigation as related claims against Morriss and other insureds, and agreed to begin advancing an allocated portion of defense costs, in excess of the deductible, incurred on their behalf.

15. Ashcroft Hanaway will calculate its fees for professional services based on its customary hourly billing rates, which in the normal course of business are subject to revision. For the Court's information, the range of billing rates that Federal has agreed to pay Ashcroft Hanaway for this matter are: Partners $300 -- $555; Of Counsel $300-$495; Associates $150-$245; Paralegals, Legal Assistants and Staff $50-$135. *See* 1/25/12 email from D. Topol, Counsel for Federal, to C. Hanaway, a copy of which is attached hereto as Exhibit E. No bills will be submitted directly by GMBG, whose attorneys will serve as "of counsel" to Ashcroft Hanaway. Anticipated expenses include the retention of such experts and services as will be required to adequately defend the case (including but not limited to forensic accountants and document imaging and management services). All billings will be submitted to Federal directly from Ashcroft Hanaway for payment in accordance with the provisions set forth above, with copies sent to the Debtor. As they are earned and billed, Federal intends to pay defense costs to Ashcroft Hanaway and not to the Debtor.

16. No previous application for the relief sought herein has been made by Ashcroft Hanaway or GMBG to this or any other Court.[2]

ARGUMENT

I. The Policy Proceeds Are Not Part of the Bankruptcy Estate

The D&O policy issued by Federal was purchased by Acartha Group, LLC to provide coverage for the Debtor and other directors and officers, as well as Acartha

[2] Ashcroft Hanaway has also filed a motion in the SEC Case seeking a ruling that the receivership and asset freeze orders in that case do not prohibit the advancement of defense costs from the Federal policy. If granted, that Motion will allow Federal to advance costs, but does not reach the issue of whether the defense costs can be "received" by the debtor. Counsel has informed the Eastern District of their intent to file the present motion with this Court as well.

Group, LLC. Since the Debtor is not the policyholder, but merely a covered insured, the policy itself is clearly not property of the Debtor's bankruptcy estate.[3] Whether or not the policy *proceeds* are part of a debtor's estate depends on the specific facts of each case. *See, e.g., In re CyberMedica, Inc.*, 280 B.R. 12, 16 (Bankr. D. Mass. 2002) ("Whether the proceeds of a D & O liability insurance policy is property of the estate must be analyzed in light of the facts of each case."); *In re Sfuzzi, Inc.*, 191 B.R. 664, 668 (Bankr. N.D. Tex. 1996) ("[T]he question of whether the proceeds [or an insurance policy] are property of the estate must be analyzed in light of the facts of each case.").

In this case, the policy proceeds at issue are being sought to pay the attorneys who have been representing the Debtor. None of these funds would be available to the Debtor personally. Courts have often distinguished between first-party insurance coverage – such as life or property insurance – where the insurance proceeds are paid directly to the insured, and D&O and other types of liability coverage, where the proceeds are not paid to the debtor. *See, e.g., In re Sfuzzi, Inc.*, 191 B.R. at 668 ("Unquestionably, proceeds from collision, life, and fire insurance policies are property of the estate when the proceeds are made payable to the debtor rather than to a third party, such as a creditor.") In the case of D&O coverage, as in this case, "the question to be answered is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on the claim: (1) if the answer to that question is 'yes,' then the proceeds of the liability insurance policy are property of the estate; (2) if the answer is 'no,' then the proceeds are

[3] If anything, the policy itself is property of Acartha, which is presently in receivership. *See Securities and Exchange Commission v. Morriss, et al.*, Case No. 4:12-cv-80-CEJ (E.D. Mo.).

not property of the estate and they cannot enhance the bankruptcy estate for other creditors." *Id.*[4]

In this case, the facts do not support treating the policy proceeds as part of the bankruptcy estate. Other than the defense costs at issue in this motion (and those related claims listed in footnote 1), any potential claim against the bankruptcy estate, or indeed the policy, is entirely speculative at this point. In the analogous situation where officers of a bankrupt corporation seek access to D&O coverage for defense costs, the courts often hold that the policy proceeds are not part of the bankruptcy estate merely because there might in the future be other claims made against the policy. This is especially true when there is a priority of payments clause, as here, where coverage of defense costs for individual insureds is payable before any coverage for claims against the corporate policyholder. *See* Policy Endorsement #11. As one court explained:

> [T]he 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.

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[4] The *Sfuzzi* court added that in some cases, courts have found that "the proceeds from liability insurance policies are property of the bankruptcy estate, but these courts were usually dealing with cases that involved mass torts or cases in which the major asset was the insurance policy." *Id.* There is no evidence that this is the type of situation involved in this case. Indeed, other than the SEC lawsuit, the only case filed against Morriss is a state court action which has been stayed pending the outcome of the SEC Case. *See Nixon, et al. v. Morriss, et al.*, Case No. 11SL-CC04718 (Mo. Cir. Ct. St. Louis Co.).

In re Laminate Kingdom, LLC, 2008 WL 1766637, *3 (Bankr. S.D. Fla. Mar. 13, 2008) (emphasis in original) (not reported in B.R.). In other words, even if there were other claims against the insurance policy, Federal is contractually bound by the policy's terms to cover the Debtor' claim for defense costs first.

II. Even if the Policy Proceeds Are Part of the Bankruptcy Estate, the Insurer Should Be Permitted to Advance Defense Costs for Payment to Debtor's Counsel

Thus, the policy proceeds should not be treated as part of the bankruptcy estate in this case. However, even if they are considered to be part of the estate, this Court should grant relief from the stay to allow for the payment of defense costs to the Debtor's counsel. Many courts have authorized D&O carriers to fund defense costs notwithstanding the bankruptcy of one of the insureds. (Typically, this situation arises because the corporate insured is in bankruptcy, but the courts' reasoning in these cases is equally applicable here.)

There exists good cause for the Court here to authorize payment of the Debtor's defense costs by the insurer. First, as a practical matter, his ability to mount an effective defense against any claims will inure to the benefit of the bankruptcy estate. The Debtor has no other means of funding his defense of the SEC action or the criminal investigation. If he is prevented from having counsel assist in his defense, there is obviously a much greater risk of an adverse judgment, which would diminish the estate and/or the policy limits. Since the basis of the USAO's criminal investigation is the SEC Case, the Debtor will be greatly prejudiced in his ability to defend against any criminal charges that may be brought, if during the prosecution of the SEC's case, he is unrepresented by counsel.

Courts have often stressed that coverage of defense costs is governed largely by the policy terms themselves, and that when a priority of payments clause is present, it should be honored. In the *Laminate Kingdom* case, for example, the court held that 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.[5]

Courts often hold that there is cause to lift an automatic bankruptcy stay when an individual insured faces the immediate need for coverage of defense costs, notwithstanding that the policy might in the future be needed to pay other claims. *See, e.g., 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 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

[5] Any deprivation of Mr. Morriss's choice of counsel might 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).

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.")

One bankruptcy court in this Circuit was faced with a situation similar to this case, where an insurance policy covered both an individual insured and corporate entities. *See In re Petters Co., Inc.*, 419 B.R. 369 (Bankr. D. Minn. 2009). In *Petters*, both the individual insured and the entities had competing claims for defense costs from a single policy. One insured was in receivership, while the others were in bankruptcy (In circumstances precisely opposite of the present case, the individual insured was in receivership while the entities were in bankruptcy). The court recognized that the bankruptcy estate and others might have rights against the policy at some point, but held that such a contingency could not justify freezing the entire policy amount in the meantime:

> [W]here there is a universe of potential claimants, a bankruptcy estate among them, and insured losses via the accrual of defense expenses are an ongoing process in intense legal proceedings, all insureds' future rights to the value of the coverage are completely indeterminate. Further, no insured's rights to a current payment are determinate until a claim is presented against an unexhausted balance of coverage. When the availability of reimbursement or indemnification is subject to a first-come, first-served order of distribution, as apparently is the case here [as the policy contained no priority of payments clause], the potential jeopardy to the bankruptcy estate's rights is obvious: it may have accrued but unpresented claims, or may accrue them shortly, in large amounts, against the unknown ripening of competitors' rights.
>
> But on the other hand, there is no way that the possibility of a right to payment in the bankruptcy estate, via some claim in some amount, can make the full balance of coverage property of the estate.

Id. at 378. The court therefore held that it would release the majority of the available policy proceeds to fund the insureds' defense costs. *Id.* at 380. *See also In re Boston*

Regional Medical Center, Inc., 285 B.R. 87, 94-98 (Bankr. D. Mass. 2002) (D&O coverage could be paid to individual insureds, who had no other means of funding immediately-needed defense costs, notwithstanding fact that payments would reduce amount available to estate of corporate debtor; any harm to bankruptcy estate was "uncertain, less severe than the opposing harm to the [individual insureds], and probably not irreparable").

WHEREFORE, Ashcroft Hanaway requests an entry of an Order authorizing the Debtor to employ and retain Ashcroft Hanaway as described above, including the retention of such experts and services as will be required to adequately defend the case (including but not limited to forensic accountants and document imaging and management services), effective January 20, 2012, or, alternatively, to find that the terms of the engagement of Ashcroft Hanaway are beyond the bankruptcy estate of the Debtor, and granting the Debtor and Ashcroft Hanaway such other and further relief as this Court deems just and proper.

Respectfully Submitted,

ASHCROFT HANAWAY, LLC

By: /s/ Catherine L. Hanaway

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 21, 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 all counsel of record.

/s/ Catherine L. Hanaway

CHUBB GROUP OF INSURANCE COMPANIES

2001 Bryan Street, Suite 3400 Dallas, Texas 75201
Phone (214) 754-0777

November 23, 2011

Via Email - wmorriss@acarthatechpartners.com

Wynne Morriss
General Counsel
Acartha Group
2 Tower Center, 20th Floor
East Brunswick, NJ 08816

RE:	INSURED:	Acartha Group LLC
	POLICY TYPE:	Venture Capital Asset Protection Policy
	POLICY NO.:	8207-6676
	CLAIM REF NO.:	267472
	WRITING COMPANY:	Federal Insurance Company
	MATTER:	*In the Matter of Acartha Group, LLC* – FL - 3707

Dear Mr. Morriss:

This follows our prior communications with respect to the above referenced matter.

On behalf of Federal Insurance Company ("Federal" and/or the "Company"), we have received and reviewed a copy of the September 15, 2011 SEC Order Directing a Private Investigation and Designating Officers to Take Testimony (the "Order") in the above referenced matter. The Order was submitted to Federal for a review under the Venture Capital Asset Protection Policy No. 8207-6676 (the "Policy") issued to Acartha Group. 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 will agree to accept this matter as a **Claim** and reimburse **Defense Costs** incurred on behalf of B. Douglas Morriss, Dixon Brown, and Acartha Group LLC, subject to the Policy terms and conditions, those reservation of rights cited herein, and the allocation discussed below.

We appreciate Acartha Group LLC as a customer. Should you have any questions after reading this letter or wish to discuss anything contained herein, please contact the undersigned directly. To assist you in understanding this letter, we suggest that the Policy be reviewed together with this letter. This letter does not modify the terms and conditions of the Policy. Words that appear in **bold** print are defined in the Policy.

A The Order

[1] See Policy Endorsement No. 1

EXHIBIT C

We understand that the SEC first provided Acartha Group LLC with a copy of the Order on October 13, 2011. Paragraph A of the Order collectively refers to "Acartha" as Acartha Group LLC; Acartha Technology Partners, LP; MIC VII, LLC; Integrien Acquisition LLC; Integrin Acquisition II, LLC; and Tervela Acquistion II, LLC.

Paragraph B of the Order states that in possible violation of Sections 5(a) and 5(c) of the Securities Act of 1933, Acartha, their officers, directors, employees, partners, subsidiaries and/or affiliates, and/or other persons or entities directly or indirectly, may have been or may be offering to sell, selling, and delivering after sale to the public, certain securities, including, but not limited to Acartha, as to which no registration statement was or is in effect or on file with the Commission, and for which no exemption was or is available.

Paragraph C of the Order states that in possible violation of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, Acartha, the officers, directors, employees, partners subsidiaries, and/or affiliates and/or other persons or entities, directly or indirectly, in the offer or sale or in connection with the purchase or sale of certain securities, may have been or may be employing devices, schemes, or artificies to defraud, obtaining money or property by means of untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were or are made, not misleading, or engaging in transactions, acts, practices or courses of business which operated, operate, or would operate as a fraud or deceit upon any person. As part of or in connection with these activities, such person or entities, directly or indirectly, may have been or may be, making false statements of material fact or failing to disclose material facts concerning, among other things, the funds rates of return and the use of investor money.

Paragraph D of the Order states that in possible violation of Sections 206(l), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-8 thereunder, Acartha, ~~their officers, directors, employees, partners, subsidiaries, and/or affiliates, and/or other persons or entities, while acting as investment advisers, directly or indirectly,~~ may have been or may be employing devices, schemes, or artifices to defraud any client or prospective client, engaging in transactions, practices, or courses of business which operated or operate as fraud or deceit upon any client or prospective client, making untrue statements of material facts or omitting to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in a pooled investment vehicle, or engaging in acts, practices, or courses of business that were or are fraudulent, deceptive, or manipulative with respect to any investor or prospective investors in a pooled investment vehicle. As part of these activities, such persons or entities, directly or indirectly, may have been or may be making false statements of material fact or omitting to state material facts concerning, among other things, the funds' rates of return and the use of investor money.

Paragraph E of the Order states that the persons or entities described in Paragraph A-D may have been or may be making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, or of any facility of any national securities exchange.

B. The Policy

The Policy is a "claims made" policy with a **Policy Period** of December 1, 2010 to December 1, 2011. It has limit of liability of $3,000,000 for each **Loss**, each **Policy Period**, and is subject to a Deductible Amount of $100,000 under Insuring Clause 2 and Insuring Clause 5.[2] The Company shall not be liable for any amount within the Insured's Deductible Amount or in excess of any Limit of Liability.

i. Insuring Clause 5

Under Insuring Clause 5 of the Policy we agreed to pay **Loss** on behalf of the **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 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**.

A **Private Fund** is defined as any pooled investment vehicle scheduled under Item 2 of the Declarations.

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**.

As stated above, the Order refers to "Acartha" as Acartha Group LLC; Acartha Technology Partners, LP; MIC VII, LLC; Integrien Acquisition LLC; Integrin Acquisition II, LLC; and Tervela Acquistion II, LLC. Each will be addressed separately.

Acartha Group LLC – It is our understanding that Acartha Group LLC was the Manager of the Managing Member of MIC VII, LLC, Tervela Acquisition II, LLC, and Integrien Acquisition, LLC – all of whom are listed as **Private Funds** in Item 2 of the Declarations. If this true, it would appear that Acartha Group LLC qualifies as an **Organization** under the Policy. Subject to written confirmation that Acartha Group LLC was either the entity managing member of a **Private Fund** listed in the Policy and/or the entity management company identified in the partnership agreement or operating agreement of a **Private Fund**, Federal will agree to treat Acartha Group LLC as an **Insured** under the Policy.

[2] See Endorsement No. 1.

Acartha Technology Partners LP – listed as a Private Fund pursuant to Item 2 of the Declarations and thus constitutes an Organization, and in turn, is an Insured under the Policy.

MIC VII, LLC – listed as a Private Fund pursuant to Item 2 of the Declarations and thus constitutes an Organization, and in turn, is an Insured under the Policy.

Integrien Acquisition II, LLC – not listed as a Private Fund nor is Federal aware of any other information suggesting that Integrien Acquisition LLC constitutes an Organization as that term is defined. Accordingly, Integrien Acquisition LLC does not constitute an Insured under the Policy.

Integrien Acquisition , LLC – listed as a Private Fund pursuant to Item 2 of the Declarations and thus constitutes an Organization, and in turn, is an Insured under the Policy.

Tervela Acquisiton II, LLC – listed as a Private Fund pursuant to Item 2 of the Declarations and thus constitutes an Organization, and in turn, is an Insured under the Policy.

Accordingly, Federal agrees to treat the Order as a **Claim** against Acartha Group LLC under Insuring Clause 5. While Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition, LLC, and Tervela Acquisiton II, LLC qualify as **Insureds** under the Policy, it is Federal's position that no coverage is available to these **Insureds** for the reasons discussed below.

(ii) Insuring Clause 2

Under Insuring Clause 2 of the Policy, we 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 term **Insured Person** is defined in relevant part as the 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; or (b) who was now is, or shall become a director, officer, general partner, managing general partner, managing member, member of a Board of Managers, governors or equivalent executive it an **Organization**.

The Order states that "Acartha's" officers, directors, employees, and partners possibly violated various provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisors Act of 1940. However, the Order does not specifically identify by title or name any individual that qualifies as an **Insured Person**. Accordingly, the mere reference in the Order to unnamed officers, directors, employees, and partners does not constitute a **Claim** against any **Insured Person** for purposes of Insuring Clause 2 of the Policy. However, Federal will agree to accept the Order as notice of circumstances, pursuant to Section 16 of the Policy as

amended by Endorsement No. 6, that could give rise to a **Claim** against an **Insured Person** for the matters referenced in the Order.[3]

Notwithstanding the above, we understand that certain individuals have received subpoenas from the SEC following the issuance of the Order. Specifically, we understand that B. Douglas Morriss and Dixon Brown have received subpoenas to provide documents and testimony to the SEC. As to Douglas Morriss, we understand he is the Chairman of Acartha Group LLC and that Dixon Brown is a Director and the Secretary of Acartha Group LLC and thus both qualify as **Insured Persons** under the Policy. Standing alone, neither the Order nor the Subpoenas constitute a **Claim** against an **Insured Person** under the Policy. However, given the existence of the Order combined with the receipt of the subpoenas by these two indvidauls, Federal will agree to treat the Order as **Claim** solely as to Douglas Morriss and Dixon Brown under Insuring Clause 2.

C Reservation of Rights

We recognize that the statements contained in the Order 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 maters raised in the Order and we must reserve our right to decline coverage should any of the exclusions, endorsements, or any other provision of the Policy additionally prove to be applicable to limit coverage.

We initially note that pursuant to Policy Endorsement No. 3, the Professional Liability Coverage portion of the Policy contained within Insuring Clause 3, was deleted. To that end, Endorsement No. 3 provides that 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 the **Organization**.

The term **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;

[3] This would include T. Wynne Morris and Ameet Patel, both of who were referenced in Mark Jacobs November 4, 2011 letter to the undersigned, to the extent these individuals otherwise would qualify as **Insured Persons** under the Policy.

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**.

In addition to Endorsement No. 3, subparagraph 3 of Endorsement No. 1 provides that "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."

The Order references possible conduct by "Acartha" which encompasses Acartha Group LLC and its directors and officers. As directors and officers, the Order, combined with the subpoenas can therefore can be read to assert that Acartha Group LLC as well as Mr. Morriss and Mr. Brown failed to file registration statements in connection with security offerings, made false statements in connection with the funds' rates of return and use of investor money and while acting as investment advisors, made false statements to investors or prospective investors in a pooled investment vehicle. Such conduct relates to **Private Equity Venture Investing** and/or are otherwise is based upon, arise from, or in consequence of an error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted or allegedly committed or attempted by an **Organization**, any employee of the **Organization** or an **Insured Person** in an **Insured Capacity** in connection with the rending of or failure to render services to others on behalf of an **Organization**. Accordingly, no coverage is available pursuant to Endorsement No. 3 and Endorsement No. 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. In addition, to the extent it is determined that this matter relates entirely to those activities the Policy defines as **Private Equity Venture Investing**, Endorsement No. 3 would preclude coverage and Federal reserves its rights accordingly. As well, to the extent it is determined that this **Claim** is based upon, arises from, or is consequence of any error misstatement, misleading statement act, omission, neglect, or breach of duty committed, attempted or allegedly committed by an **Organization** or an **Insured Person** in connection with rendering or failing to renders services to others, no coverage would exist for this matter and Federal reserves its rights on this basis as well pursuant to Endorsements 1 and 3 of the Policy.

As discussed *infra*, Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition , LLC, and Tervela Acquisiton II, LLC qualify as **Insureds** under the Policy. However, as pooled investment vehicles, it is Federal's position that any conduct ascribed to these **Private Funds** in the Order 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**. On this point, we note that these Private Funds are included in how the SEC defines "Acartha" and that the Order alleges failures in connection with registrations requirements, false statements regarding the funds' rates of return and the use of investor money, and various acts and omissions in connection with acting as an investment advisor. Given these entities status as **Private Funds**, combined with the nature of the allegations in the Order, it is Federal position that no coverage exists for these **Insureds** under the Policy for this **Claim** pursuant to Endorsement No. 3 and Endorsement No. 1.

Subject to the other terms and conditions, the Policy provides coverage on account of **Loss** arising from **Wrongful Acts** alleged against an **Insured**. As related to Insuring Clause 2 of the Policy, please provides that a **Wrongful Act** is defined as any error, misstatement, misleading statement act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an **Insured Person** individually, or otherwise, in an **Insured Capacity**. The term **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 Messrs. Morriss or Dixon on behalf of an affiliated company that is not an **Organization** and which did not occur in an **Insured Capacity** and Federal reserves its rights accordingly.

Additionally, Exclusion M precludes coverage for any **Claim** 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**. Federal reserves its right accordingly to the extent it is determined acts~~ or omissions are alleged against an **Insured Person** of an **Organization** at a time when it was not a **Subsidiary** of the **Organization**.

The Order references possible violations of the Investment Advisors Act of 1940, which include, but are not limited to misstatements and fraudulent conduct against **Insureds** while acting as investment advisors. In addition to Policy Endorsement No. 1 which precludes coverage for such alleged conduct, please note that Exclusion K precludes coverage for 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. Federal reserves its rights accordingly under Exclusion K.

Exclusion H(i) as amended by Endorsement No. 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 Order references possible fraudulent conduct to obtain money or property under the Securities Exchange Act and the Investment Advisors Act. Accordingly, Federal reserves its rights under Exclusion H(i) and (ii) should it be determined that an Insured engaged in such conduct.

The definition of **Loss**, as amended by Policy Endorsement No. 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, ore 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 and we reserve our rights accordingly. In addition, to the extent any payments are made by any **Insureds** in the form of restitution, such amounts disgorged from an **Insured**, would not constitute loss, let alone **Loss** under the Policy.

Section 18 of the policy generally provides that this 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.

D. Allocation

Given the nature of the nature of the possible violations being put forth by SEC against the **Insureds**, an appropriate allocation of **Defense Costs** will be necessary. Section 15 of the policy governs Allocation and provides in part that:

> 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 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.

As set forth in this letter, Federal has agreed to accept the Order as a **Claim** to which potential coverage for **Defense Costs** are available for Douglas Morriss, Dixon Brown, and Acartha Group LLC. And while Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition , LLC, and Tervela Acquisiton II, LLC qualify as **Insureds**, no coverage is available to these entities for the reasons discussed above. In addition, Integrien Acquisition II LLC does not qualify as an **Insured**. Accordingly, the Order constitutes a **Claim** against **Insureds** that includes covered and uncovered parties. In addition, the Order constitutes a **Claim** for potentially covered matters and uncovered matters as discussed in more detail below. For that reason, the Policy requires covered **Loss** and non-covered loss be allocated based on the relative legal and financial exposures of the parties to covered and non-covered matters. Because **Defense Costs** are included in the definition of **Loss**, **Defense Costs** are required to be allocated based on the relative legal and financial exposures method of allocation.

Paragraph B of the Order asserts that Acartha Group LLC, Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition, LLC, Integrien Acquisition II, LLC, and Tervela Acquisiton II, LLC may have been offering for sale securities for which registration statements were not on file with the SEC in possible violation of the Securities Act of 1933. As to paragraph B, it is Federal's view that to the extent registration documents were not filed in securities offerings by, on behalf of, or in connection with the **Private Funds** (ie. Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition, LLC, and Tervela Acquisiton II, LLC), a failure to do so would fall under **Private Equity Venture Investing** and/or would otherwise arise from an act or omission by an **Organization** in rendering or failing to render services to third parties/others and is thus excluded by Endorsement No. 1 and Endorsement No. 3. This must be taken into account in determining an appropriate allocation of **Defense Costs**. In addition, an allocation of **Defense Costs** should recognize that one of the funds identified in the Order (Integrien Acquistion II LLC) is not an **Insured** under the Policy. It is Federal's understanding that various offerings of securities in Acartha Group LLC were conducted. While coverage for **Defense Costs** associated with an allegation of failing to register such securities are potentially covered under the Policy, an allocation of **Defense Costs** should also recognize that any conduct ascribed to Acartha Group LLC in failing to register securities of any **Private Fund** would constitute **Private Equity Venture Investing** and not be covered. The same considerations would apply equally to Douglas Morris and Dixon Brown in connection with what is asserted in Paragraph B of the Order and allocation of **Defense Costs** should reflect this.

Paragraph C of the Order asserts that Acartha Group LLC, Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition, LLC, Integrien Acquisition II, LLC, and Tervela Acquisiton II, LLC as well as the directors and officers of "Acartha" may have been making misrepresentations in connection with the purchase or sale of certain securities in violation of the Securities Exchange Act. Paragraph B further states that such person or entities may have been

making false statements or failing to disclose material facts concerning among other things, the funds' rates of return and the use of investor money. However, allegations of false statements in connection with rates of returns of **Private Funds** and to the investors therein, regardless of which **Insured** allegedly made them, constitutes **Private Equity Venture Investing** and is further excluded form coverage by Endorsement No. 1 as well as Endorsement No. 3. As such, an allocation of **Defense Costs** should reflect this and should further recognize Integrien Acquistion II LLC is not an **Insured** under the Policy. Again, to the extent that Acartha Group LLC issued its own securities and misrepresentations in those offerings are being investigated, **Defense Costs** are potentially are potentially available to the extent that such offerings did not otherwise constitute **Private Equity Venture Investing**. However, it is Federal's view based on a reading of the Order, that the matters being investigated in Paragraph B, both as to Acartha Group LLC, the **Private Funds**, Douglas Morriss and Dixon Brown are centered around alleged misstatements made to investors in the various funds being offered, that such acts are excluded by the Policy, and an allocation of **Defense Costs** should reflect this.

Paragraph D of the Order asserts possible violations of the Investment Advisors Act of 1940 by "Acartha" and its directors and officers while acting as investment advisors. Paragraph D further alleges misleading statements to investors or prospective investors in pooled investment vehicles and asserts possible violations in the form of false statements regarding the fund's rates of return and the use of investor money. It is Federal's position that the matters raised and conduct described in Paragraph D relate entirely to **Private Equity Venture Investing** and/or in providing or failing to provide services or professional services by the **Organization** and **Insured Persons** to others. Accordingly, it is Federal's position that the nature of the conduct described in Paragraph D is excluded as to all **Insureds** under Endorsement No. 1 and Endorsement No. 3 and that an allocation of **Defense Costs** should reflect this.

Paragraph E alleges that "Acartha" and its directors and officers may have making use of any means or instruments of transportation or communication in interstate commerce. The same coverage considerations cited with respect to Paragraph B and C of the Order apply equally to Paragraph D and an allocation of **Defense Costs** should reflect this.

Based on Federal's review of the Order, it is therefore our position that any allocation of **Defense Costs** should reflect that the overwhelming legal and financial exposure in this matter here is to Acartha Group LLC, Acartha Technology Partners LP, MIC VII, LLC, Integrien Acquisition, LLC, Integrein Acquisition II LLC, Tervela Acquisiton II, LLC and the **Insured Persons** for uncovered matters that are specifically excluded by the Policy. Nevertheless, we will consider an agreement at this time to allocate twenty-five percent of the total reasonable **Defense Costs** incurred on behalf of the **Insureds**. The remaining seventy-five percent of **Defense Costs** will be the responsibility of the **Insureds**. Federal's contribution is subject to Limits of Liability of $3,000,000 each **Claim**, each **Policy Period**. Our contribution is further subject to a deductible amount of $100,000, which may be satisfied only by payments that are allocated to covered **Loss** as currently contemplated under the above percentage.[4] Therefore, pursuant to a 25% allocation,

[4] Federal's proposed allocation contained herein only applies to that part of **Loss** constituting **Defense Costs**, and we reserve the right to propose a different allocation as additional information is learned.

a total of $400,000 in fees and costs would be incurred on behalf of Acartha Group LLC, Douglas Morriss and Dixon Brown in connection with this matter prior to exhaustion of the $100,000 deductible.

E. Defense

Section 14 of the policy, captioned "Defense and Settlements", states that it shall be the duty of the Insured to defend any Claim made against it. We understand that Acartha Group LLC and Dixon Brown has retained Mark Jacobs of Jacobas Partners LLC as counsel in this matter. We also understand that Douglas Morriss has retained Robert Fleischer of Pryor Cashman LLP as counsel in this matter. Federal consents to the retention of Jacobs Partners LLC on behalf of Acartha Group LLC and Dixon Brown. Federal additionally consents to Pryor Cashman LLP on behalf of Douglas Morriss, subject to compliance with our litigation guidelines which will be forwarded under separate cover. Please provide rate and staffing information for these two firms to the undersigned for consideration. Upon receipt and review of the invoices from these firms, Federal will be prepared to credit 25% of the total **Defense Costs** incurred by Jacobs Partners LLC solely on behalf of Acartha Group LLC and Dixon Brown in this matter against the $100,000 deductible and which reflect professional services incurred on behalf of Acartha Group LLC after September 15, 2011 (the date of the SEC order) and that reflect professional services incurred on behalf of Dixon Brown after November 2, 2011 (the date listed on the Subpoena to Mr. Brown), subject to satisfaction of the deductible amount.[5] Federal will also be prepared to credit 25% of Defense Costs incurred on behalf of Douglas Morris that reflect professional services incurred after October 27, 2011 (the date listed on the Subpoena directed to Mr. Morriss), in this matter against the $100,0000 deductible.[6]

Further, please note that the Policy further provides that the **Insureds** agree not 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. Federal shall not be liable for any settlement, **Defense Costs**, assumed obligation or admission to which it has not consented. **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.

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[5] Federal was informed by letter dated November 23, 2011 that Jacobs Partners, in addition to representing Acartha Group LLC, also now represents Dixon Brown, Ameet Patel, and Wynne Morriss in connection with this matter. As discussed *infra*, it is Federal's position that no **Claim** has been made under the Policy as to Ameet Patel or T. Wynne Morriss. Accordingly, Federal is not prepared to reimburse **Defense Costs** incurred by Jacobs Partners LLC on behalf of these two individuals and we would request that the firm maintain separate billing files with respect to these individuals. In the same letter, Federal was advised that Jacobs Partners also represents Gryphon Investments III, LLC, Clearbrook Acquisition Capital LLC, Evergrid Acquisition Capital LLC, Acartha Merchant Partners LLC, Tervela Capital, LLC, and Tervela Capital II, LLC and these entities respective officers, directors, members, managers, and partners. Federal understands this letter to be a request for coverage under the Policy for these entities and such request will be considered and addressed in a separate letter. In the interim, we would again request that Jacobs Partners LLC maintain separate billing files for these entities pending Federal's review of the same under the Policy.

[6] Given that this matter constitutes a single **Claim**, it will be subject to a single $100,000 deductible amount and a single $3,000,000 Limit of Liability which is reduced by the payment of **Defense Costs**. After the deductible is satisfied on an allocated basis, Federal will reimburse 25% of **Defense Costs** incurred on behalf of its **Insureds** for which coverage is available.

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. The **Insureds** must provide Federal with all information, assistance and cooperation which the Company reasonably requests. In addition, in the event of a **Claim** the **Insureds** will do nothing that may prejudice the Federal's position or its potential or actual rights of recovery.

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 is learned.

Should you have any questions concerning the coverage available under the Policy, or the matters raised in this letter, please feel free to contact me at (214) 754-8162. My e-mail address is rlbrown@chubb.com.

Sincerely,

Chubb & Son
A division of Federal Insurance Company

By: _____
Richard L. Brown, Esq.
Assistant Vice-President

cc: Jackie LaRock — *Via Email - Jackie.LaRock@crumpins.com*
Crump Insurance

Mark Jacobs — *Via Email – mark.jacobs@jacobs-partners.com*
Jacobs Partners LLC

Robert Fleischer — *Via Email – rfleischer@pryorcashman.com*
Pryor Cashman LLP

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December 20, 2011

Wynne Morriss
General Counsel
Acartha Group
2 Tower Center, 20th Floor
East Brunswick, NJ 08816

RE:	**INSURED:**	**Acartha Group LLC**
	POLICY NO:	**8207-6676**
	CLAIM NO:	**271469**
	POLICY TYPE:	**Venture Capital Asset Protection 2003**
	WRITING COMPANY:	**Federal Insurance Company**
	SUBJECT:	**Ron Nixon**

Dear Mr. Morriss:

On behalf of Federal Insurance Company ("Federal" or the "Company") this will again acknowledge receipt of the above-referenced matter. The above-referenced Venture Capital Asset Protection 2003 Policy No. 8207-6676 ("Policy") issued to Acartha Group LLC ("Acartha") provides insurance protection to Acartha. Nevertheless, the Policy may not cover all of the allegations in the above-referenced matter. Existing law requires us to send this letter, which is known as a "reservation of rights" letter. This reservation of rights letter is not an attempt on our part to avoid our responsibilities under the Policy, but to outline our obligations and rights. For the reasons set forth below, the Company will provide a defense for this matter for B. Douglass Morriss ("Morriss"), MIC VII, LLC ("MIC") and Acartha Group, LLC ("Insured Defendants"), subject to the terms and conditions of the Policy and our reservation of rights, including allocation, as set forth herein.

Please feel free to share this letter with defense counsel if you feel that would be appropriate.

We appreciate and value our customers. We are committed to working closely with you in the defense of this matter. Should you have any questions or concerns after reading this letter, please feel free to contact me. To assist you in understanding this letter, we suggest that the Policy be reviewed together with this letter. This letter does not modify the terms and conditions of the Policy. Please note that the words that appear in **bold** print are defined in the Policy.

EXHIBIT D

It is our understanding that on November 30, 2011, the Insured Defendants were served with a civil complaint filed by Ron Nixon, as co-trustee of various trusts which we understand to be investors and members of both Acartha and MIC, against the Insured Defendants with the Circuit Court of the County of St. Louis, Missouri. The complaint alleges that the defendants have improperly recruited new investors in violation of the terms of the existing Operating Agreements resulting in dilution of their interests, and that defendants have utilized the assets of MIC and Acartha to discharge personal obligations of Morriss. The complaint assets counts for Breach of Contract against MIC and separately against Acartha; Breach of Fiduciary Duty against Acartha and Morriss; Accounting; Breach of the Implied Covenant of Good Faith and Fair Dealing against MIC; Request for Appointment of a Receiver for MIC and Acartha; and Claim for Injunctive Relief seeking a TRO prohibiting the transfer of funds by MIC.

This matter was submitted for coverage review under the above-referenced Policy which has a **Policy Period** of December 1, 2010 to December 1, 2011 and establishes a Limit of Liability of $3 million each **Loss** with an aggregate Limit of Liability of $3 million for each **Policy Period** subject to a deductible obligation of $100,000 under Insuring Clause 2 and Insuring Clause 5[1]. The Company shall not be liable for any amount within the **Insured's** deductible obligation or in excess of any Limit of Liability.

A prior matter involving an SEC Investigation was previously submitted and by correspondence dated November 23, 2011 from Richard L. Brown, Esq., Federal agreed to provide a defense subject to a reservation of rights and allocation to Acartha, Morriss and Dixon Brown. 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 of 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 of related series of facts, etc. and has determined that they constitute **Related Claims.** Pursuant to Policy Section 11, all **Related Claims** shall be treated as a single Claim first made on the date the earliest of such **Related Claims** was first made.

We recognize that the allegations set forth in the complaint are unsubstantiated contentions at this time. Nothing in this letter is intended to suggest or imply that these allegations have any legal or factual merit. Nevertheless, we must reserve our right to decline coverage should any of the exclusions set forth in Section 8 of the Policy, the endorsements to the Policy, or any other provision of the Policy prove to be applicable.

We initially note that pursuant to Policy Endorsement No. 3, the Professional Liability Coverage portion of the Policy found in Insuring Clause 3 was deleted. To that end, Endorsement No. 3 provides that 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 in connection with the rendering of or failure to render services to others on behalf of the **Organization.**

[1] Insuring Clause 5 is added by Endorsement No. 1.

Private Equity Venture Investing is defined in Policy Section 32 as:

a. the formation, capitalization, operation or management of a Private Fund by an Insured;
b. any act performed by and 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.**

Additionally, subparagraph 3 of Endorsement No. 1 provides that "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 services to a third party, including but not limited to any **Claim** that would otherwise be covered under Insuring Clause 3, Professional Liability Coverage." The complaint at issue involves allegations of improper conduct related to the operation and management of MIC and as such includes allegations of **Private Equity Venture Investing.**

The complaint alleges fraud. Please note that pursuant to Policy paragraph 8(h)(i) as amended by Endorsement No. 13, the Company shall not be liable for **Loss** due to any **Claim** arising out of fraudulent activity or the willful violation of any statute.

The complaint alleges that funds were improperly diverted for personal use. Please note that pursuant to Policy paragraph 8(h)(ii) as amended by Endorsement No. 13, the Company shall not be liable for **Loss** due to any **Claim** arising out of any **Insured** having gained any profit or advantage to which it was not otherwise entitled.

The complaint alleges breaches of the Operating Agreements. Please note that pursuant to Policy paragraph 8(k), the Company shall not be liable for **Loss** due to any **Claim** arising out of any intentional breach of contract.

Please note that pursuant to Endorsement No. 10, **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;

Please note that any items that do not constitute covered **Loss**, including but not limited to, disgorgement, return of fees or contractual obligations do not constitute **Loss.**

As indicated above, the complaint includes allegations involving **Private Equity Venture Investing,** which is not covered under the Policy as is also set forth above. For this reason, it will be necessary for us to allocate **Defense Costs** at this time. Allocation as to any indemnity or potential settlement will also be necessary but will need to be addressed separately. Policy Paragraph 15 provides that:

> 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.

While Federal believes that aspects of **Private Equity Venture Investing** are present in many of the allegations and counts brought against the Insured Defendants, Federal is willing to agree to an allocation of **Defense Costs** at this time of 40% to Federal and 60% to the Insured Defendants.

Policy Section 14 provides that it shall be the duty of the **Insureds** to defend **Claims** made against the **Insureds**, the policy requires the Company consent to the selection of the law firm. As agreed, the Company will consent to Jacobs Partners to defend the **Insureds** in the above-referenced matter, subject to our agreement on the fee structure between the law firm and Chubb & Son, including compliance with our Litigation Management Guidelines, and our rights under the Policy. Further, the **Insureds** may not 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 written consent. The Company shall not be liable for any settlement, **Defense Costs**, assumed obligation or admission to which it has not consented. Please note that **Defense Costs** are part of and not in addition to the Limits of Liability, and the payment by the Company of **Defense Costs** reduces such Limits of Liability.

In addition, the Company 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. The **Insureds** must provide the Company with all information, assistance and cooperation which the Company reasonably requests. In addition, in the event of a **Claim** the **Insureds** will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.

Policy Section 18 provides that this Policy is to be excess of any other valid insurance from a source other than the Company or any other insurer managed by Chubb & Son or Federal Insurance Company. You are requested to notify all insurers whose policies may have been triggered and to provide the Company with a copy of the notice, the applicable policy, and the insurer's response regarding coverage under such policy.

This position is based upon the information provided to date, and is subject to further evaluation as additional information becomes available. We reserve the right to assert additional terms and provisions under the Policy and at law.

Should you have any questions concerning the coverage available under the Policy, or the matters raised in this letter, please feel free to contact me.

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.

Very truly yours,

Chubb & Son
A division of Federal Insurance Company

Mary Ann Alsnauer, Esq.
Assistant Vice President
Northern Specialty Claims
Direct Dial: 412-456-8019
Fax: 412-456-8009
E-mail: malsnauer@chubb.com

cc: Katie Gooch, RPLU
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725 Cool Springs Boulevard, Suite 160
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Jacqueline LaRock, Esq.
Vice President
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725 Cool Springs Boulevard, Suite 160
Franklin, TN 37067

Sean Fleming
Federal Insurance Company

Fusco, Billie Jean

From: Topol, David <DTopol@wileyrein.com>
Sent: Wednesday, January 25, 2012 4:27 PM
To: Hanaway, Catherine
Cc: 'almartin@chubb.com'; Jenkins, Peter
Subject: Acartha Group LLC (267472)

Catherine,

I write on behalf of Federal Insurance Company ("Federal") to follow up on our conversations concerning Ashcroft Group's proposed rates for representing Mr. Morriss in connection with the SEC investigation and lawsuit. As we discussed, and as set forth in Federal's coverage letters concerning this matter, the advancement of Defense Costs is subject to an allocation because only a portion of the SEC investigation and lawsuit is covered under the Policy.

Based on its analysis of the allegations in the matter, Federal had proposed an allocation pursuant to which it would pay 35% of Defense Costs. Mr. Morriss had previously proposed an allocation in which he would retain counsel with rates substantially lower than Ashcroft Group's rates and that firm would further reduce its rates by 70%. In addition, we understand that Mr. Morriss has agreed to make his interests in a hunting club, which is valued at approximately $150,000, available toward his defense of the matter.

In an effort to reach a resolution of this matter, Federal would be willing to consent to your firm's retention subject to the following agreement on rates and use of the value of the hunting club interest. For Ashcroft's initial bills for this matter: (i) Federal would pay 35% of the full rates; (ii) 35% would be paid by Ashcroft drawing down on the interest in the hunting club, and (iii) the remaining 30% would be satisfied by a rate reduction. (In other words, Ashcroft would reduce its rates by 30% and the remaining amount would be divided evenly between Federal and the money available from the sale of the hunting club interests) After, the interest in the hunting club has been exhausted, Federal would pay 70% of Ashcroft's bills and the allocation would be satisfied with a 30% rate reduction.

Based on the rate reduction, Federal would pay the following effective rate:

Ms. Hanaway--$555
Mr. Bartle--$490
Ms. Greim--$420
Ms. Ottolini--$245
Mr. Ashcroft--$235
Mr. Fusco--$135

We also note a few other points in connection with this matter. First, the advancement is subject to Federal's continued reservation of rights under the Policy and at law, including the right to stop advancing Defense Costs if it determines that the matter is not covered. Second, this proposal is based on our understanding that the receiver appointed by the SEC intends to remove the Acartha entities from bankruptcy proceedings; if a bankruptcy stay remains in effect, Federal will require an order from the bankruptcy court permitting it to advance Defense Costs under the Policy. Third, this proposal only applies to Defense Costs incurred in defense of the SEC investigation, and does not apply to any work on related criminal proceedings. Federal's policy provides coverage for criminal proceedings "commenced by the return of an indictment." Policy, Section 32. If and when the U.S. Attorney obtains an indictment, Federal will make a determination as to the availability of coverage for the criminal matter.

EXHIBIT E

Please feel free to contact me with any questions.

Regards,

David

David H. Topol
Attorney At Law
Wiley Rein LLP

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Washington, DC 20006
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February 27, 2012

Matthew S. Darrough
314-552-6552
FAX 314-552-7552
mdarrough@
thompsoncoburn.com

VIA FACSIMILE & REGULAR MAIL

JoAnn Trog, Esq.
121 West Adams
Kirkwood, Missouri 63122

Re: Claim/Demand on Dixon Brown

Dear Ms. Trog:

I represent the Receiver of Acartha Group, LLC, MIC VII, LLC, Acartha Technology Partners, LP, and Gryphon Investments III, LLC (the "Receivership Entities"), appointed pursuant to the Order of January 17, 2012 in *The United States Securities and Exchange Commission* (the "SEC") *v. Burton Douglas Morriss, et al.*, Case No. 4:12-cv-80-CEJ, pending in the United States District Court for the Eastern District of Missouri. I am directing this letter to you as legal representative for Dixon Brown.

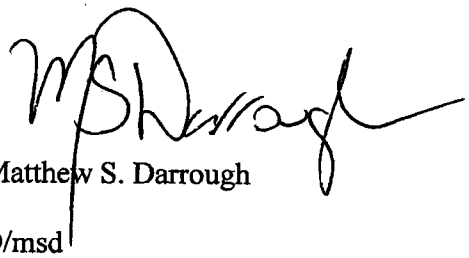
While the Receiver's investigation of the Receivership Entities is still in its early phase, the SEC has detailed certain wrongful acts committed by Mr. Morriss in its complaint and other filings in 4:12-cv-80-CEJ. The SEC has alleged that Mr. Morriss transferred $9.1 million or more in funds held by the Receivership Entities to himself and/or Morriss Holdings, LLC, in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisors Act of 1940. Based on Mr. Brown's executive role with certain of the Receivership Entities and other information currently available, the Receiver has reached a preliminary conclusion that Mr. Brown acted wrongfully with respect to the Receivership Entities, including his actions and inactions as an officer and director of Acartha Group LLC. Based upon this, I am asserting a claim on behalf of the Receiver against Mr. Brown for recovery of the $9.1 million transferred from the Receivership Entities by Mr. Morriss.

Finally, and based upon prior discussions with David Topol, counsel for Federal Insurance Company, and in the event that Mr. Brown will be making a claim under Policy 8207-6676 with respect to this demand, I also have copied him on this communication.

Exhibit 5

Very truly yours,

Thompson Coburn LLP

By 
Matthew S. Darrough

MSD/msd

cc: David Topol

THOMPSON COBURN LLP

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FAX 314-552-7000
www.thompsoncoburn.com

February 27, 2012

Matthew S. Darrough
314-552-6552
FAX 314-552-7552
mdarrough@
thompsoncoburn.com

VIA FACSIMILE & REGULAR MAIL

Catherine Hanaway, Esq.
Ashcroft Hanaway LLC
222 South Central Ave, Suite 110
St. Louis, MO 63105

Re: Notification of Intended Claim/Demand

Dear Ms. Hanaway:

I represent the Receiver of Acartha Group, LLC, MIC VII, LLC, Acartha Technology Partners, LP, and Gryphon Investments III, LLC (the "Receivership Entities"), appointed pursuant to the Court's Order of January 17, 2012 in *The United States Securities and Exchange Commission* (the "SEC") *v. Burton Douglas Morriss, et al.*, Case No. 4:12-cv-80-CEJ, pending in the United States District Court, Eastern District of Missouri.

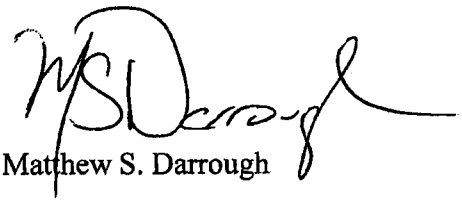
While the Receiver's investigation of the affairs of the Receivership Entities is still in its early phase, the SEC has detailed certain wrongful acts committed by Mr. Morriss in its complaint and other filings. The SEC alleged that Mr. Morriss transferred $9.1 million or more in funds that investors provided to the Receivership Entities to himself and/or Morriss Holdings, LLC. This letter is to advise that the Receiver intends to assert a claim against Mr. Morris for wrongful acts committed as an executive in his various roles with the Receivership Entities, including CEO and chairman of the board of Acartha Group, LLC, and seek damages in the amount of at least $9.1 million. To the extent necessary, we will seek relief from the Bankruptcy Court and/or the Receivership Court in order to pursue the claims against Mr. Morriss.

Based on prior discussions with Mr. Topol, counsel for Federal Insurance Company, and his expressed interest being advised of additional claims against executives of the Receivership Entities, I have copied him on this communication. I trust that you will be making claim under Policy 8207-6676 with respect to this communication.

Exhibit 6

Very truly yours,

Thompson Coburn LLP

By 
Matthew S. Darrough

MD/msd

cc: David Topol