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7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF NEVADA**

9 In re: ) Case No. 2:16-cv-00060-JAD-GWF  
)  
10 AMERI-DREAM REALTY, LLC, )  
) Bankruptcy Case No.: 15-10110-LED  
11 Debtor. )  
) Chapter 7  
12 \_\_\_\_\_ )  
VICTORIA NELSON, In Her Capacity As The )  
13 Chapter 7 Trustee Of AMERI-DREAM )  
REALTY, LLC, )  
14 Plaintiff, )  
) Adv. Proceeding No.: 15-01183-LED  
15 v. )  
)  
16 XL AMERICA, INC.; XL INSURANCE )  
17 AMERICA, INC.; XL SELECT )  
PROFESSIONAL; PEARL INSURANCE )  
18 GROUP, LLC; GREENWICH INSURANCE )  
COMPANY; and DOES I through X; and ROE )  
19 CORPORATE DEFENDANTS XI through )  
20 XX, )  
Defendants. )  
21 \_\_\_\_\_ )

22 **PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS PURSUANT TO FED. R. CIV.**  
23 **PRO. 12(B)(6) OF DEFENDANTS XL AMERICA, INC., XL INSURANCE AMERICA,**  
24 **INC., XL SELECT PROFESSIONAL, AND PEARL INSURANCE GROUP, LLC**

25 Victoria L. Nelson, in her capacity as the Chapter 7 Trustee (the “**Plaintiff**” or the  
26 “**Trustee**”) of the bankruptcy estate of Ameri-Dream Realty, LLC (the “**Debtor**” or the  
27 “**Company**”), by and through her attorneys of record, Schwartz Flansburg PLLC, submits her

1 opposition to the Motion the To Dismiss the Trustee’s Complaint (the “**Complaint**”) Pursuant  
2 To Fed. R. Civ. Pro. 12(B)(6) (the “**Motion**”)<sup>1</sup> of defendants XL America, Inc., XL Insurance  
3 America, Inc., XL Select Professional (collectively, the “**XL Companies**”) and Pearl Insurance  
4 Group, LLC (“**Pearl**” and collectively with the XL Companies, the “**Defendants**”). In support  
5 of the Opposition, the Trustee respectfully states as follows:

6 **Preliminary Statement**

7  
8 1. The Defendants seek to dismiss the Complaint because they content they have no  
9 contractual relationship with Ameri-Dream Realty, as only Greenwich Insurance Company  
10 (“**Greenwich**”) issued the underlying insurance Policy.

11 2. Importantly, however, despite the Defendants’ contentions, the Complaint should  
12 not be dismissed as to the Defendants under a FRCP 12(b)(6), as all allegations in the Complaint  
13 must be taken as true, and all reasonable inferences are drawn in favor of the non-moving party.  
14 Indeed, as set forth herein, the XL Companies and Pearl are listed on the Policy, are in privity of  
15 contract with the Plaintiff, and the Complaint alleges all Defendants provided the Policy.  
16

17 3. Accordingly, in the context of a motion to dismiss, all facts and reasonable  
18 inferences must be construed in favor of the Trustee, as Plaintiff, and any ambiguities in the  
19 Policy must be interpreted to allow coverage where possible. As a result, the Motion should be  
20 denied.  
21

22 **Background Facts**

23 4. On January 9, 2015, Ameri-Dream Realty, LLC (the “**Company**” or the  
24 “**Debtor**”), filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy  
25  
26

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27 <sup>1</sup> Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Motion.

1 Code in the United States Bankruptcy Court for the District of Nevada (the “**Bankruptcy**  
2 **Court**”), Bankruptcy Case No. 15-10110-LED (the “**Bankruptcy Case**”).

3 5. The Company was a real estate sales and property management company based in  
4 Las Vegas, Nevada prior to filing for relief under Chapter 7 of the United States Bankruptcy  
5 Code.

6 6. The Plaintiff is the Court-appointed Chapter 7 Trustee over the bankruptcy estate  
7 of the Company in Case No. 15-10110-LED, United States Bankruptcy Court for the District of  
8 Nevada (the “**Action**”).

9 7. On May 21, 2015, the Trustee, in her capacity as Chapter 7 Trustee for the  
10 Company, initiated that certain adversary proceeding against Elise Peladas-Brown (“**Ms.**  
11 **Peladas-Brown**”), a former manager of the Company, in the United States Bankruptcy Court for  
12 the District of Nevada, Adversary Case No. 15-01087-LED, due to Ms. Peladas-Brown’s secret  
13 embezzlement of over \$1 million in security deposits from the Company.  
14

15 8. In her complaint, the Trustee asserted four claims for relief against Ms. Peladas-  
16 Brown: (i) breach of fiduciary duty; (ii) common law misrepresentation; (iii) negligent  
17 misrepresentation; and (iv) declaratory relief that the Company and Mr. John Brown, Ms.  
18 Peladas-Brown’s ex-husband and former manager of the Company, are innocent and had no  
19 knowledge of Ms. Peladas-Brown’s wrongdoings (collectively, the “**Peladas-Brown Claims for**  
20 **Relief**”).  
21

22 9. The Defenants, with notice, elected not to participate in the Action or the Peladas-  
23 Brown adversary proceeding.  
24

25 10. On October 26, 2015, the United States Bankruptcy Court held a hearing on the  
26 Trustee’s motion for summary judgment on all of the Peladas-Brown Claims for Relief.  
27

1           11.     On October 27, 2015, the bankruptcy court entered an order granting summary  
2 judgment on all Peladas-Brown Claims for Relief, with findings of fact and conclusions of law.  
3 See Adv. Case No. 15-01087-LED, Docket Nos. 20 and 21. Both the Company and Mr. John  
4 Brown were found to be innocent.

5           12.     The Judgment against Ms. Peladas-Brown is in the amount of \$1,174,373.63,  
6 together with prejudgment interest at the rate of 5.75%, compounded annually starting February  
7 1, 2013, and post-judgment interest at the rate established by 28 U.S.C. § 1961, compounded  
8 annually. See Adv. Case No. 15-01087-LED, Docket No. 21.

9           13.     Shortly after the entry of summary judgment against Ms. Peladas-Brown, the  
10 Plaintiff initiated the above-captioned adversary proceeding (the “**Adversary Proceeding**”)  
11 against the Defendants/Insurers. The Trustee’s Complaint is related to the actions of Ms.  
12 Peladas-Brown, which triggered the Policy and required the Defendants to reimburse the  
13 Company for the theft of the security deposits by Ms. Peladas-Brown.  
14

15           14.     The Complaint seeks various claims for relief against the Defendants for their  
16 failure to comply with the Policy, including claims for: (1) breach of contract; (2) breach of the  
17 implied covenant of good faith and fair dealing; (3) breach of fiduciary duty; (4) violations of  
18 NRS 686A.310; and (5) declaratory relief.  
19

20           15.     In December 2015, the Plaintiff filed her Motion for Summary Judgment on the  
21 Complaint, while the Defendants filed Motions to Dismiss the Complaint, along with the instant  
22 Motion.  
23

24           16.     On November 14, 2016, this Court granted Defendants’ Motion to Withdraw the  
25 Reference from the Bankruptcy Court to this Court. See Docket No. 9. As a result, at the status  
26  
27

1 hearing on December 5, 2016, this Court instructed the parties to refile their pending motions in  
2 this Court.

3 17. On December 22, 2016, the Trustee re-filed her Complaint in this Court. See  
4 Docket Nos. 11 and 19 (Docket No. 19 consisting of an errata to the filed Complaint).

5 18. On December 22, 2016, the Trustee also filed her Motion for Summary Judgment  
6 against all Defendants. See Docket No. 12.

7 19. On December 27, 2016, Defendants XL America, Inc., XL Insurance America,  
8 Inc., XL Select Professional and Pearl Insurance Group, LLC filed their Motion to Dismiss the  
9 Complaint. See Docket No. 15. That same day, Defendant Greenwich filed its Motion to  
10 Dismiss the Complaint. See Docket No. 16.

11  
12 **Argument**

13 **A. Relevant Legal Standard.**

14 20. Federal Rule of Civil Procedure 12(b)(6) authorizes the Court to dismiss the  
15 Complaint for failure to state a claim upon which relief can be granted. Dismissal is only proper  
16 under Rule 12(b)(6) where it appears beyond doubt that the complaining party can prove no set  
17 of facts to support its claims. Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004).

18 21. To discharge his or her burden, the plaintiff must show his or her entitlement to  
19 relief on the face of the complaint. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1664-66  
20 (2007).

21 22. The court must accept all factual allegations in the complaint as true and draw  
22 reasonable inferences in the plaintiff's favor, though speculation, conjecture, labels, legal  
23 conclusions, bald contentions, unsupported characterizations, and a formulaic recitation of the  
24 elements of a cause of action are insufficient. Id.; Tellabs, Inc. v. Makor Issues & Rights, Ltd.,

1 127 S.Ct. 2499, 2509 (2007); G.K. Las Vegas Ltd. P’ship v. Simon Prop. Group. Inc., 460  
2 F.Supp.2d 1246, 1261 (D. Nev. 2006); Sprewell v. Golden State Warriors, 266 F.3d 978, 988  
3 (9th Cir. 2001). Here, Plaintiff has demonstrated the facts necessary to support the claims for  
4 relief as alleged in the Complaint. Therefore, the Motion must be denied.

5 **B. Pearl and the XL Companies are in Privity of Contract with Plaintiff.**

6 23. The crux of the Defendants’ Motion is that only Greenwich, as insurer, is in  
7 privity of contract with the Plaintiff, and therefore, the XL Companies and Pearl cannot be held  
8 liable for breach of contract.  
9

10 24. The face of the Policy, however, suggests otherwise. Specifically, the top of page  
11 1 of the Policy indicates “[t]he company providing insurance afforded by this coverage is  
12 indicated above.” See Policy, p. 1. Above this line are two companies, “XL Insurance” and  
13 “Greenwich Insurance Company – Members of the XL America Companies.” Id. Moreover, the  
14 face of the Policy lists the Producer of the Policy as “Pearl Insurance Group.” Id. Page 1 of the  
15 Policy also requires “Notices to be Sent to:  
16

17 Report a Claim: XL Select Professional Claims

18 Material Changes: Pearl Insurance Group, LLC

19 See Policy, p. 1, Item 8.

20 25. In addition, the bottom of p. 1 of the Policy is signed by Gary P. Pearl, as  
21 President and CEO of Pearl. Id. The bottom of p. 1 of the Policy also lists XL America, Inc. Id.  
22

23 26. Finally, the Defendants attached their coverage denial letter to this Motion as  
24 Exhibit D (see Docket No. 16-4), which is signed by Lee Santos, on behalf of XL Select  
25 Professional. See Docket No. 16-4. The coverage denial letter also bears the letterhead of XL  
26 Group Insurance. Id.  
27

1           27. In accordance with the above, paragraph 11 of the Complaint states “[t]he  
2 Defendants provided a Real Estate Professionals Errors and Omissions Policy.” See Docket No.  
3 11, ¶ 11. Accordingly, the Defendants are simply wrong that the Complaint does not allege the  
4 Defendants entered into a contractual relationship with Ameri-Dream Realty. Paragraph 11 of  
5 the Complaint proves otherwise.

6           28. Therefore, the Complaint, and the face of the Policy both indicate that all of the  
7 Defendants were involved with the issuance of the Policy, and as a result, all are in contractual  
8 privity with the Plaintiff. As the Defendants’ Motion to dismiss Claim 1 (breach of contract),  
9 Claim 2 (breach of implied covenant of good faith and fair dealing) and Claim 5 (declaratory  
10 relief) are all based on lack of privity of contract between the Defendants and Ameri-Dream, the  
11 Defendants’ Motion to Dismiss those claims should be denied.

12  
13           29. **C. The Defendants Owed a Fiduciary Duty to Ameri-Dream.**

14           30. The Defendants seek to dismiss the Trustee’s third claim for relief (breach of  
15 fiduciary duty) because “[t]he Trustee’s third cause of action for breach of fiduciary duty is also  
16 based on Greenwich’s denial of coverage under the Greenwich Policy.” See Motion, p. 6.

17           31. As set forth above, however, the Policy itself and the Coverage Denial Letter  
18 prove the other Defendants, not just Greenwich, were involved in the issuance of the Policy and  
19 the claims denial process.

20           32. In fact, the Defendants admit that an insurer’s duty as a policyholder is akin to a  
21 fiduciary relationship. See Motion, p. 6, citing Powers v. U.S. Auto. Ass’n, 962 P.2d 596, 602  
22 (Nev. 1998). In fact, the Nevada Supreme Court in Powers found that the jury was properly  
23 instructed regarding the fiduciary duty an insurance carrier owes to its policy holder. Id. at 602-  
24 04.  
25  
26  
27

1           33.     While the Powers case did not expressly adopt a new cause of action based on an  
2 insurance company's failure to put an insured's interests above its own, it did not say a cause of  
3 action for breach of fiduciary duty would not exist, rather, the Power court stated "we are merely  
4 recognizing that beach of the fiduciary nature of the insurer-insured relationship is party of the  
5 duty of good faith and fair dealing." Id. at 603.

6           34.     Indeed, in the Complaint, the Trustee is alleging facts that can amount to bad faith  
7 and a breach of "the trust and confidence" of the Defendants, which could support a separate  
8 breach of fiduciary claim. Accordingly, the Trustee's claim for breach of fiduciary duty should  
9 survive a FRCP 12(b)(6) motion to dismiss.

10           35.     **D.     The Defendants Are Subject to Liability Under NRS 686A.310.**

11           36.     Last, the Defendants argue because they are not the actual insurer, they cannot be  
12 subject to liability under NRS 686A.310. See Motion, p. 6. In fact, the Defendants go so far as  
13 to say that "[t]he Complaint contains no allegations that Pearl and/or the XL Entities were parties  
14 to the insurance contract and/or were involved in any claims decisions." Id. The Defendants'  
15 argument is flat out wrong.

16           37.     Importantly, as set forth above, the Defendants are all parties to the Policy and are  
17 in contractual privity with the Plaintiff. Indeed, p. 1 of the Policy indicates that all claims  
18 reporting must be directed to XL Select Professional. See Policy, p. 1, Item 8. Importantly, the  
19 coverage denial letter is signed by Lee Santos on behalf of XL Select Professional, which letter  
20 contains the letterhead of XL Group Insurance. See Docket No. 16-4.

21           38.     Accordingly, contrary to the Defendants' allegations, the Defendants were  
22 directly involved in the claims reporting and resolution process, and Claim 4 of the Complaint  
23  
24  
25  
26  
27



1 asserts the Defendants violated NRS 686A.310 in several ways with respect to the claims  
2 resolution process. See Complaint, Docket No. 11, ¶¶ 67-70.

3 39. Simply put, in the context of a motion to dismiss under FRCP 12(b)(6), where are  
4 all allegations in the Complaint must be taken as true, and all reasonable inferences are drawn in  
5 favor of the non-moving party, the Defendants' motion to dismiss Claim 4 of the Complaint must  
6 be denied.

7  
8 **Conclusion**

9 WHEREFORE, the Trustee respectfully requests that the Court deny the Defendants'  
10 Motion in its entirety.

11 Dated this 13th day of January, 2017.

12 Respectfully Submitted,

13 /s/ Samuel A. Schwartz

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24  
25  
26  
27

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent electronically via the Court's CM/ECF system on January 13, 2017, to the following:

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/s/ Lori Kennedy  
Lori Kennedy