

JENNIFER WILLIS ARLEDGE  
Nevada Bar No. 8729  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
300 South 4th Street, 11th Floor  
Las Vegas, NV 89101-6014  
(702) 727-1400; Fax (702) 727-1401  
jennifer.arledge@wilsonelser.com  
Attorneys for Defendants

**XL AMERICA, INC., XL INSURANCE AMERICA, INC.,  
XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC,  
AND GREENWICH INSURANCE COMPANY**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VICTORIA NELSON, In Her Capacity As The  
Chapter 7 Trustee Of AMERI-DREAM  
REALTY, LLC,

Plaintiff,

v.

XL AMERICA, INC.; XL INSURANCE  
AMERICA, INC.; XL SELECT  
PROFESSIONAL; PEARL INSURANCE  
GROUP, LLC; GREENWICH INSURANCE  
COMPANY; and DOES I through X; and ROE  
CORPORATE DEFENDANTS XI through XX,

Defendants.

Case No.: 2:16-cv-00060-JAD-GWF

Bankruptcy Case No.: 15-10110-LED

**DEFENDANTS XL AMERICA, INC., XL  
INSURANCE AMERICA, INC.,  
XL SELECT PROFESSIONAL, PEARL  
INSURANCE GROUP, LLC,  
AND GREENWICH INSURANCE  
COMPANY'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**

NOW COME Defendants, XL America, Inc., XL Insurance America, Inc., XL Select Professional, Pearl Insurance Group, LLC and Greenwich Insurance Company, by and through undersigned counsel, for their Opposition to Plaintiffs' Motion for Summary Judgment state as follows:

**I. INTRODUCTION**

This is an action brought by the Chapter 7 Bankruptcy Trustee for Ameri-Dream Realty, LLC ("Ameri-Dream") seeking indemnity coverage for the theft by one of Ameri-Dream Realty's members, Ms. Peladas-Brown. The Trustee seeks declaratory judgment that indemnity should be

1 provided to Ameri-Dream for a greater than \$1 million judgment entered solely against Ms. Peladas-  
2 Brown. The Trustee also seeks summary judgment for its claims of breach of contract, breach of the  
3 duty of good faith and fair dealing, breach of fiduciary duty and violations of NRS 686A.310 against  
4 Greenwich based on Greenwich's denial of insurance coverage for the claims against Ms. Peladas-  
5 Brown. Specifically, the Trustee, standing in the shoes of Ameri-Dream, argues that judgment in its  
6 favor is proper because Greenwich, and the other Defendants, failed to reimburse Ameri-Dream for  
7 the security deposits stolen by Ameri-Dream's member and employee, Ms. Peladas-Brown. The  
8 Trustee further argues that the "innocent insureds" provision of the Greenwich Policy provides for a  
9 \$1,000,000 reimbursement of the stolen security deposits under the Policy, regardless of Ms.  
10 Peladas-Brown's criminal and fraudulent activity.

11 In short, and as explained in greater detail below, the Greenwich Policy does not provide  
12 defense or indemnity coverage to Ms. Peladas-Brown based on Exclusions I, D, C and the Prior  
13 Knowledge Provision of the Insuring Agreement. Moreover, because no claim was ever brought  
14 against Mr. Brown and Ameri-Dream, Greenwich had no obligation (or opportunity or need) to  
15 defend them in connection with the Peladas-Brown Adversary Action. Furthermore, a judgment was  
16 never entered against Mr. Brown or Ameri-Dream and therefore Greenwich had no obligation to  
17 indemnify Mr. Brown and Ameri-Dream with respect to a judgment that was not entered against  
18 them. Therefore, the Trustee is not entitled to "reimbursement" of the stolen security deposits under  
19 the Greenwich Policy; as a result, the Trustee is not entitled to judgment on her claims.

20 First, the Greenwich Policy is a third-party defense and indemnity policy that is triggered  
21 when a "Claim", as defined by the Policy, is brought against an Insured for covered claims.  
22 Contrary to the arguments made by the Trustee, the Greenwich Policy is not a first-party policy that  
23 simply reimburses Ameri-Dream for any loss to the Company. The Greenwich policy indemnifies  
24 Ameri-Dream for sums it becomes legally obligated to pay to a third party. The Trustee admits that  
25 the only "Claim" was made against Ms. Peladas-Brown and the only judgment is against Ms.  
26 Peladas-Brown. The Trustee further admits that Mr. Brown and Ameri-Dream were never sued in  
27 the Peladas-Brown Adversary Action. The underlying adversary action was solely against Ms.  
28

1 Peladas-Brown. Therefore, the Greenwich third-party liability policy was never triggered as to Mr.  
2 Brown and Ameri-Dream.

3 Second, regardless of which Insured(s) the Peladas-Brown claims were brought against, the  
4 Greenwich Policy does not provide coverage for any Claim “by or on behalf of any **Insured** against  
5 any other **Insured.**” The underlying adversary action against Ms. Peladas-Brown was brought by  
6 the Chapter 7 Trustee. The Trustee qualifies as an “Insured” under the Greenwich Policy. Ameri-  
7 Dream Realty is the Named Insured under the Policy. Exclusion I of the Greenwich Policy does not  
8 provide coverage for claims “by or on behalf of any **Insured** against any other **Insured.**” Therefore,  
9 Exclusion I of the Policy bars coverage for any lawsuit by the Chapter 7 Trustee against an Insured,  
10 including but not limited to Ms. Peladas-Brown, and the Policy precludes coverage, both defense  
11 and indemnity, for the Peladas-Brown Adversary Action.

12 Third, no coverage exists under the Greenwich Policy for the Peladas-Brown Adversary  
13 Action because the claims against Ms. Peladas-Brown are excluded from coverage pursuant to  
14 Exclusions C and D. In the Peladas-Brown Adversary Action, the court adjudicated Ms. Peladas-  
15 Brown’s conduct as dishonest, intentional and fraudulent. The claims against her are uncovered  
16 under the Greenwich Policy by operation of Exclusion C and D of the Policy as well as  
17 subparagraph 4 of the Insuring Agreement. Thus, the Policy does not provide coverage for the  
18 judgment against Ms. Peladas-Brown, which were the only “Claims” brought against any Insured(s)  
19 under the Greenwich Policy.

20 The Trustee’s argument that the “innocence” adjudication of Ameri-Dream and Mr. Brown  
21 as to Ms. Peladas-Brown’s conduct triggers coverage is also misplaced. Ameri-Dream Realty and  
22 Mr. Brown were adjudicated “innocent of all claims asserted” in the adversary action against Ms.  
23 Peladas-Brown. This argument fails for two reasons: (1) the innocent insured provision of the  
24 Greenwich Policy only applies where coverage is precluded pursuant to Exclusion C or Condition D  
25 of the Policy, which are not at issue here; and (2) no claims were ever brought against Mr. Brown  
26 and/or Ameri-Dream therefore there “innocent insured” status provides no protection.

27 Last, because the Greenwich third-party liability policy never provided coverage, either  
28 defense or indemnity, for the Peladas-Brown Adversary Action or resulting judgment, summary

1 judgment is unwarranted on the Trustee's claims of breach of contract, breach of the covenant of  
2 good faith and fair dealing, and violations of NRS 686A.310.

3 **II. FACTUAL BACKGROUND**

4 **A. Ameri-Dream Realty, LLC**

5 Ameri-Dream Realty managed residential rental properties in which it received and held  
6 rental security deposits on behalf of customers' tenants. SOF at ¶10.<sup>1</sup> Ameri-Dream Realty was  
7 managed by John Brown ("Mr. Brown") and his former wife Elsie Peladas-Brown. SOF at ¶9.

8 **B. The Greenwich Policy**

9 Greenwich issued a claims made and reported third party real estate agent errors and  
10 omissions policy to Named Insured Ameri-Dream Realty, LLC, numbered PEG9145932-6 and  
11 effective from June 14, 2013 through June 14, 2014 (the "Greenwich Policy"). DSOF at ¶1<sup>2</sup>.

12 The Insuring Agreement of the Policy agrees to "pay on behalf of the **Insured** all sums in  
13 excess of the deductible that the **Insured** becomes legally obligated to pay as **damages** and **claims**  
14 **expenses** by reason of an act or omission including **personal injury** in the performance of **real**  
15 **estate services** by the **Insured**, provided that:"

- 16 1. The **claim** arising out of the act or omission must first be made against the  
17 **Insured** during the **policy period** or any applicable **extended reporting**  
18 **period**;  
19 2. The **claim** must be reported in writing to the **Company** during the **policy**  
20 **period** or within 60 days after the end of the **policy period** unless an  
21 **extended reporting period applies**;  
22 3. Such act or omission was committed on or subsequent to the **retroactive date**  
23 specified in the Declarations; and  
24 4. Prior to the inception date of this policy, no **Insured** had a basis to believe  
25 that such act or omission, or any related act or omission, might reasonably be  
26 expected to by the basis of a **claim**.

23 Except as provided in Section V.D., below, **claims expenses** are in addition to the  
24 limit of liability.

25 DSOF at ¶2.

26 The Greenwich Policy defines "**Claim**" as "a demand for money or services naming the  
27 **Insured** by reason of an act or omission in the performance of **real estate services**." DSOF at ¶3.

28 <sup>1</sup> "SOF" refers to Trustee's Statement of Undisputed Facts

<sup>2</sup> "DSOF" stands for Defendants' Statement of Facts.

1 The Greenwich Policy is also subject to several exclusions including the following applicable  
2 exclusion:

3 D. based on or arising out of:

4 1. the conversion, commingling, defalcation, misappropriation or improper use  
5 of funds or other property;

6 2. the gaining of any personal profit or advantage to which the **Insured** is not  
7 legally entitled; or

8 3. the inability or failure to pay, collect or safeguard funds held for others, unless  
9 the **insured** is acting in the capacity of a **short term escrow agent**.

10 .....  
11 I. by or on behalf of any **Insured** against any other **Insured**.

12 DSOF at ¶4.

13 The Policy also contains Condition D “Innocent Insureds” which provides “If coverage of  
14 this policy would not apply because of Exclusion C or because of noncompliance with Condition B,  
15 such Exclusion or Condition will not apply to any **Insured** who did not commit, participate in, or  
16 have knowledge of any of the acts described in Exclusion C. and whose conduct did not violate  
17 Condition B.” DSOF at ¶5.

18 **C. The Peladas-Brown Adversary Complaint**

19 On May 21, 2015, the Trustee, in her capacity as Chapter 7 Trustee for Ameri-Dream Realty  
20 initiated an adversary proceeding against Ms. Peladas-Brown in the United States Bankruptcy Court  
21 for the District of Nevada, Adversary Case No. 15-01087-LED (the “Peladas-Brown Adversary  
22 Complaint”). DSOF at ¶B. The Peladas-Brown Adversary Complaint did not name Mr. Brown or  
23 Ameri-Dream Realty as defendants. DSOF at ¶6. However, the Peladas-Brown Complaint did  
24 contain a request for a declaratory judgment that Ameri-Dream Realty and Mr. Brown were innocent  
25 and had no knowledge of Ms. Peladas-Brown’s wrongdoings. DSOF at ¶6. On October 27,  
26 2015, the Bankruptcy Court entered an order granting summary judgment on all claims the Trustee  
27 had brought against Peladas-Brown, with findings of fact and conclusions of law. DSOF at ¶7. The  
28

1 Bankruptcy Court made several conclusions of law in the Peladas-Brown Adversary Action  
2 including the following:

- 3 5. Through improper action or wrongful conduct and without privilege, the  
4 Defendant (Ms. Peladas-Brown) breached her fiduciary duties to the  
5 Company.
- 6 6. The Defendant had knowledge she was breaching her fiduciary duties, and  
7 acted purposely and with malice and intent to injure the Company.
- 8 7. The tortious conduct of the Defendant proximately caused the damage to the  
9 Company, because the Security Deposits were transferred for no  
10 consideration, and the Defendant knew it.
- 11 8. The Defendant had a duty to the Company to use ordinary care when  
12 representing the reasons for transferring the Security Deposits.
- 13 9. The Defendant breached her duty of care to the Company by falsely  
14 representing the transfer of the Security Deposits was an appropriate  
15 transaction for the Company to undertake.
- 16 10. Under Nevada law, the Defendant is required to safeguard the Security  
17 Deposits on behalf of the tenants.
- 18 11. As a result of the Defendant's false representations of the appropriateness of  
19 the wire transfers of the Security Deposits, the Company transferred the  
20 Security Deposits for no consideration.
- 21 12. The Company suffered damages as a result of the transfer of the Security  
22 Deposits, and those damages were caused by the Defendant's  
23 misrepresentations.
- 24 13. The tenants managed by the Company relied on the representations of the  
25 Defendant that the Security Deposits were safe. As a result of those false  
26 representations of the safety of the Security Deposits, nearly 1,000 tenants  
27 transferred their money to the Company, even though the Defendant knew or  
28 should have known that those payments would never be repaid, given the  
29 Defendant's plan to abscond with the money.
- 30 14. The Company suffered damages as a result of the transfer of the Security  
31 Deposits and those damages were proximately caused by the Defendant's  
32 misrepresentations regarding the safety of the Security Deposits.
- 33 15. The Company was unaware at all times relevant to the Complaint that the  
34 Defendant conspired to abscond with the Security Deposits to the Philippines.
- 35 16. Mr. Brown was unaware at all times relevant to the Complaint that the  
36 Defendant conspired to abscond with the Security Deposits to the Philippines.
- 37 17. The Company and Mr. Brown are innocent of all claims asserted in the  
38 Complaint against the Defendant.

DSOF at ¶8.



1           **D.     Ameri-Dream Realty’s Notice of Claim to Greenwich**

2           Prior to the institution of the Peladas-Brown Adversary matter, on April 9, 2014 counsel for  
3 Ameri-Dream and Mr. Brown sent a Notice of Claim letter to XL America regarding the actions of  
4 Ms. Peladas-Brown. DSOF at ¶9. On April 10, 2014, counsel for Ameri-Dream submitted a claim  
5 report form under the Greenwich Policy providing additional notice of a claim. SOF at ¶29.  
6 Greenwich denied coverage under the Greenwich Policy for the Peladas-Brown Adversary matter.  
7 DSOF at ¶11. After the initiation of the Adversary Proceeding on May 27, 2015, a Notice of Claim  
8 was once again provided under the Greenwich Policy. DSOF at ¶10. In correspondence dated May  
9 28, 2015 and June 1, 2015, Greenwich reiterated its coverage denial for the Peladas-Brown  
10 Adversary matter. DSOF at ¶11.

11           It is important to note that Pearl Insurance Group, LLC (“Pearl”) was not a party to the Real  
12 Estate Errors & Omissions Policy issued to Ameri-Dream Realty, LLC. DSOF at ¶12. Pearl never  
13 entered into any contract directly with Ameri-Dream, LLC. DSOF at ¶13.

14           Pearl did not make any coverage decisions, including but not limited to accepting or denying  
15 any claim, under the Greenwich Policy. DSOF at ¶14. Specifically, the Policy states that if coverage  
16 is afforded, only Greenwich “agreed to pay for claims” under the Policy. DSOF at ¶17.

17           Similarly, XL America, Inc., XL Insurance America, Inc. and XL Select Professional  
18 (collectively referred to as the “XL Entities”) are not parties to the Greenwich Policy issued to  
19 Ameri-Dream Realty. DSOF at ¶15. The XL Entities never entered into any contract directly with  
20 Ameri-Dream, LLC. The XL Entities did not make any coverage decisions, including but not  
21 limited to accepting or denying any claims under the Greenwich Policy. DSOF at ¶16.

22           **E.     The Adversary Complaint Against Greenwich**

23           The Chapter 7 Trustee has brought claims against Greenwich asserting claims for: (1) breach  
24 of contract; (2) breach of implied covenant of good faith and fair dealing; (3) breach of fiduciary  
25 duty; (4) violations of NRS 686A.310; and (5) declaratory judgment. The Adversary Action against  
26 Greenwich is premised on the false presumption that coverage was denied to Ameri-Dream Realty  
27 and Mr. Brown pursuant to Exclusion C of the Policy and because Mr. Brown and Ameri-Dream  
28 Realty were “innocent insureds”, such denial was improper.

### 1 **III. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT**

2 The court must grant summary judgment to a moving party "if the pleadings, depositions,  
3 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that  
4 there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a  
5 matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not  
6 simply deny generally the pleadings of the movant; the adverse party must designate "specific facts  
7 showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477  
8 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Simply put, "a summary judgment motion  
9 cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor*  
10 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere  
11 "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S.  
12 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Only disputes over facts that might affect the  
13 outcome of the suit under the governing law will properly preclude the entry of summary judgment.  
14 Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby,*  
15 *Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (citing generally 10A C. Wright, A.  
16 Miller, & M. Kane, *Federal Practice and Procedure* § 2725, pp. 93-95 (1983)).

17 The party moving for summary judgment bears the initial burden of showing the absence of a  
18 genuine issue of material fact. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.  
19 2000). The burden then shifts to the non-moving party to go beyond the pleadings and set forth  
20 specific facts demonstrating a genuine issue for trial. *Allstate Ins. Co. v. Sanders*, 495 F. Supp. 2d  
21 1104, 1106-1107 (D. Nev. 2007); *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).  
22 When the moving party has carried its burden under Rule 56(c), its opponent must do more than  
23 simply show that there is some metaphysical doubt as to the material facts. A party opposing a  
24 properly supported motion for summary judgment "may not rest upon the mere allegations or  
25 denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for  
26 trial." *Anderson*, citing FRCP 56(c). Rule 56(c) provides that the trial judge shall then grant  
27 summary judgment if there is no genuine issue as to any material fact and if the moving party is  
28 entitled to judgment as a matter of law.



1 **IV. ARGUMENT**

2 This Court must decide whether under Nevada law, Greenwich had a duty to defend the  
3 Peladas-Brown Adversary Action and subsequently indemnify Ms. Peladas-Brown for the judgment  
4 of \$1,174,373.63 entered against her in the Peladas-Brown Adversary Action. As a matter of law,  
5 however, the Greenwich Policy: (1) precluded coverage, both defense and indemnity, for the claims  
6 brought against Ms. Peladas-Brown by the Trustee in the Peladas-Brown Adversary Action; (2) the  
7 Insuring Agreement of the Greenwich Policy was never triggered as to Mr. Brown and Ameri-  
8 Dream because no claims were ever made against Mr. Brown and Ameri-Dream and neither Mr.  
9 Brown nor Ameri-Dream were ever “legally obligated to pay” anything because they were expressly  
10 adjudicated to have had no liability; and (3) even if the Insuring Agreement was triggered,  
11 Exclusions D and I of the Policy were triggered by the Peladas-Brown Adversary Complaint and the  
12 Innocent Insured provision of the Policy is inapplicable to those exclusions.

13 Because coverage was properly denied under the Greenwich Policy as a matter of law,  
14 summary judgment on the Trustees claims of (1) breach of contract; (2) breach of implied covenant  
15 of good faith and fair dealing; (3) breach of fiduciary duty; (4) violations of NRS 686A.310; and (5)  
16 declaratory judgment are unwarranted.

17  
18 **A. Judgment in Favor of the Trustee On Count I Breach of Contract and Count V  
19 Declaratory Judgment Count Is Unwarranted Because the Law Establishes That  
20 Greenwich Had No Duty to Defend or Indemnify Ms. Peladas-Brown, Mr. Brown or  
21 Ameri-Dream Realty.**

22 Count V of the Trustee’s Complaint seeks a declaratory judgment against Greenwich, and the  
23 other defendants, that the Greenwich Policy “requires Defendants to reimburse the Company for the  
24 actions of Ms. Peladas-Brown and the loss of the Security Deposits.” Summary judgment in favor of  
25 the Trustee is unwarranted because no coverage is afforded to Ms. Peladas-Brown for the Peladas-  
26 Brown Adversary Action. Moreover, Mr. Brown and Ameri-Dream’s status as “innocent insureds”  
is irrelevant to the claims asserted solely against Ms. Peladas-Brown.

27 Under Nevada law, the interpretation of an insurance contract is a question of law for the  
28 court. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 14, 252 P.3d 668, 672 (2011). “An insurance

1 policy should be read as a whole, and its language should be analyzed from the perspective of one  
2 untrained in law or in the insurance business. Policy terms should be viewed in their plain, ordinary  
3 and popular connotations.” *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev.  
4 2011) (quotation omitted). “[A]ny ambiguity or uncertainty in an insurance policy must be construed  
5 against the insurer and in favor of the insured.” *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 621  
6 (Nev. 2011) (quotation omitted). “A provision in an insurance policy is ambiguous if it is reasonably  
7 susceptible to more than one interpretation.” *Id.* (quotation omitted). “Ultimately, a court should  
8 interpret an insurance policy to effectuate the reasonable expectations of the insured.” *Powell*, 252  
9 P.3d at 672 (quotation omitted).

10 Notwithstanding an insured’s reasonable expectations, the Supreme Court of Nevada has  
11 acknowledged that a court’s “equitable powers to not extend so far as to permit [the court] to  
12 disregard the fundamental principles of the law of contracts, or arbitrarily to force upon parties  
13 contractual obligations, terms or conditions which they have not voluntarily assumed.” *McCall v.*  
14 *Carlson*, 63 Nev. 390, 172 P.2d 171, 187 (1946). It is not within the province or power of a court to  
15 alter, revise, modify, extend, rewrite or remake an agreement. *Senteny v. Fire Ins. Exch.*, 101 Nev.  
16 654, 707 P.2d 1149 (1985).

17 Furthermore, under Nevada law, if there is no ambiguity, words will be given their usual and  
18 ordinary meaning. *Siggelkow v. Phoenix Ins. Co.*, 846 P.2d 303, 304 (Nev. 1993); *Dickenson v.*  
19 *Nevada*, 977 P.2d 1059, 1061 (Nev. 1982), cited in *INA v. Hilton Hotels U.S.A., Inc.*, 908 F.Supp.  
20 809 (D. Nev. 1995). An insurance policy must be considered as a whole to determine what was  
21 meant to be covered. *National Union Fire Ins. Co. v. Reno’s Executive Air*, 682 P.2d 1380, 1383  
22 (Nev. 1984). A policy will be deemed ambiguous only if it is reasonably susceptible of two contrary  
23 interpretations. *Farmers Ins. Exchange v. Young*, 832 P.2d 376, 379 (Nev. 1992). However, Nevada  
24 courts will not look to extrinsic sources of intent to find ambiguity. *Id.* However, if the policy is  
25 ambiguous, a court should look to the intent of the parties, the subject matter of the policy and the  
26 circumstances surrounding its issuance before resolving the claimed ambiguity. *National Union*  
27 *Fire Ins. Co. v. Caesar’s Palace Hotel & Casino*, 792 P.2d 1129, 1130 (Nev. 1990); *Reno’s*  
28 *Executive Air*, 682 P.2d at 1383.

1 Finally, while ambiguities will generally be resolved in favor of the insured, Nevada courts  
2 will not rely on the rule of *contra proferentum* to create coverage where it is beyond the reasonable  
3 expectations of the insured. *Montana Refining Co. v. National Union Fire Ins. Co. of Pittsburgh*,  
4 918 F.Supp. 1395 (D. Nev. 1996). In this case, a number of exclusions and policy provisions serve  
5 to preclude coverage for the Adversary Action.

6 **1. *The XL and Pearl Entities Have No Insurance Obligations, Contractual or***  
7 ***Otherwise, to Ameri-Dream and Therefore Summary Judgment Against Them***  
8 ***Should Be Denied.***

9 A review of the Trustees' own statement of facts reveals that the only parties to the insurance  
10 contract at issue are Greenwich Insurance Company and Ameri-Dream, as the Named Insured under  
11 the Policy, and Mr. Brown, as a defined "Insured" under the Policy. There are no facts establishing  
12 that Defendants XL America, Inc., XL Insurance America, Inc., XL Select Professional and Pearl  
13 Insurance were parties to the insurance contract at issue. The only defendant that was a party to the  
14 contract at issue is Greenwich Insurance Company. As a result, summary judgment against  
15 Defendants XL America, Inc., XL Insurance America, Inc., XL Select Professional and Pearl  
16 Insurance is unwarranted.

17 **2. *The Greenwich Policy Is a Third-Party Policy and Only Provides Defense***  
18 ***and Indemnity Where There is a Covered Claim Against an Insured.***

19 The Greenwich Policy is a "third party liability policy"; that is, a policy that provides  
20 coverage for the insured's liability to third parties. Such policies provide broader coverage than  
21 typical first party property insurance policies, such as homeowners' policies, in which the insurer  
22 "promises to pay money to the insured upon the happening of an event, the risk of which has been  
23 insured against." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 663, 42 Cal.Rptr.2d  
24 324, 913 P.2d 878 (1995). In third party liability policies, by contrast, the carrier "assumes a  
25 contractual duty to pay judgments the insured becomes legally obligated to pay as damages because  
26 of bodily injury or property damage caused by the insured." *Id.*

27 Whereas first party insurance coverage is typically triggered by certain enumerated perils,  
28 e.g., physical and fortuitous events, the "right to coverage in the third party liability insurance  
context draws on traditional tort concepts of fault, proximate cause and duty.... [B]y insuring for

1 personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to  
2 cover the insured for a broader spectrum of risks [than in first-party insurance policies].” *Id.* at 664,  
3 42 Cal.Rptr.2d 324, 913 P.2d 878 (emphasis omitted).

4 In first party insurance, the contract between the insurer and the insured is designed to  
5 indemnify the insured for a loss suffered directly by the insured.” Jerry, *Understanding Insurance*  
6 *Law* 49 at § 13A(e) (3d ed.). In contrast, liability insurance is described as third-party insurance  
7 “because the interests protected by the contract are ultimately those of third-parties injured by the  
8 insured’s conduct.” *Id.*

9 The distinction between first-party and third-party claims has similarly been described as  
10 follows: A first-party claim is made by an insured against an insurer for damage to property or  
11 person. If the loss is one that is covered by the policy and occurred during the policy period, the  
12 insurer must pay the loss. On the other hand a third-party claim is made by a claimant against the  
13 insured for damages allegedly caused by the insured. Liability insurers only pay the claim after a  
14 settlement is reached between the claimant or when the insured is found liable by means of a  
15 judgment. *California Liability Insurance Practice: Claims and Litigation* § 1.3 (1991); *see also*  
16 *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 663–65, 42 Cal. Rptr. 2d 324, 913  
17 P.2d 878 (1995), as modified on denial of reh’g, (Aug. 31, 1995) (discussing the difference between  
18 first party and third party insurance); *World Trade Center Properties, L.L.C. v. Hartford Fire Ins.*  
19 *Co.*, 345 F.3d 154, 188 (2d Cir. 2003) (same); *Port Authority of New York and New Jersey v.*  
20 *Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3rd Cir. 2002) (same). Third-party insurance is often  
21 referred to as “litigation insurance” as it provides a defense to claims against the insured and  
22 indemnity in case of a judgment or settlement with the third party.

23 The Chapter 7 Trustee in this matter appears to misunderstand the practical difference  
24 between first party insurance and third party insurance. The Chapter 7 Trustee, who stands in the  
25 shoes of Ameri-Dream, is seeking a payment from Greenwich directly to Ameri-Dream. Third party  
26 insurance policies provide no such coverage. The claims against Ms. Peladas-Brown were  
27 unquestionably brought on behalf of Ameri-Dream for loss to Ameri-Dream. Each count of the  
28 Peladas-Brown Adversary Complaint expressly states that “[Ameri-Dream] suffered damages” as a

1 result of the conduct of Ms. Peladas-Brown. *See e.g.* Exhibit B at ¶¶21, 27 and 31. Therefore,  
 2 Ameri-Dream cannot directly recover insurance proceeds from the Greenwich third-party errors and  
 3 omissions policy.<sup>3</sup>

4 **3. *Exclusion I, the Insured Versus Insured Exclusion, Precludes Any Coverage***  
 5 ***for Claims Asserted in the Peladas-Brown Adversary Action.***

6 Not only does the very nature of the Greenwich Policy preclude payment of first party  
 7 claims, Exclusion I of the Policy specifically precludes claims by one insured against another.  
 8 Exclusion I of the Policy expressly states that Greenwich will not defend or pay any claim “by or on  
 9 behalf of any **Insured** against any other **Insured.**” The Greenwich Policy defines “**Insured**” as  
 10 follows:

11 Insured means:

- 12 1. the Named Insured;
- 13 2. any present or former partner, member, officer, director or employee for real  
 14 estate services performed on behalf of the Named Insured;
- 15 3. any present or former independent contractor and their employees for real  
 16 estate services performed on behalf of the Named Insured, but only if, prior to  
 the date a claim is made, the Named Insured had agreed to provide insurance  
 for the independent contractor's real estate services;
- 17 4. *the estate, heirs, executors, administrators, assigns and legal representatives*  
 18 *of an Insured in the event of such Insured's death, incapacity, insolvency or*  
 19 *bankruptcy, but only for liability arising out of real estate services*  
 20 *performed by or on behalf of the Named Insured prior to such Insured's*  
 21 *death, incapacity, insolvency or bankruptcy; or*
- 22 5. any real estate franchise corporation of which the Named Insured is a  
 23 franchisee, but only as respects the real estate franchise corporation's liability  
 24 for acts or omissions committed by an Insured on behalf of the Named  
 25 Insured.
- 26 6. the lawful spouse or qualifying domestic partner of any present or former  
 27 partner, member, officer, director, employee, or independent contractor, but  
 28 only for liability arising out of real estate services actually or allegedly  
 performed by such present or former partner, member, officer, director,  
 employee, or independent contractor on behalf of the Named Insured. The  
 Company will have no obligation to pay damages or claim expenses for any  
 claim arising from any act or service actually or allegedly provided by the

<sup>3</sup> The insurance market offers several products that could have provided the “reimbursement” the Trustee seeks such as first-party fidelity bond policies, employee theft policies, etc. However, the Greenwich Real Estate Errors & Omissions Policy is a third-party policy that simply does not provide the first party coverage the Trustee seeks.

1 spouse or domestic partner of any individual to whom this policy otherwise  
2 provides coverage.

3 (emphasis added).

4 Pursuant to Paragraph 4 of the Greenwich Policy's definition of "Insured", the Chapter 7  
5 Trustee of Ameri-Dream is an "**Insured**" under the Greenwich Policy. The Chapter 7 Trustee is a  
6 legal representative of Ameri-Dream as a result of its bankruptcy. Specifically, Paragraph 1 of the  
7 Complaint in this action states that "Ameri-Dream Realty, LLC (the "Company") was a real estate  
8 sales and property management company based in Las Vegas, Nevada prior to filing for relief under  
9 Chapter 7 of the United States Bankruptcy Code." Paragraph 3 of the Complaint further states that  
10 "The Plaintiff is the Court-appointed Chapter 7 Trustee over the Company in Case No. 15-10110-  
11 LED, United States Bankruptcy Court for the District of Nevada."

12 Courts have held that risks such as collusion and moral hazard are much greater for claims by  
13 one insured against another insured on the same policy, than they are for claims by strangers;  
14 therefore, liability policies typically exclude them from coverage. *Biltmore Associates, LLC v. Twin*  
15 *City Fire Ins. Co.*, 572 F.3d 663, 670 (9th Cir. 2009). Allowing such claims would turn liability  
16 insurance into casualty insurance, because the company, acting through its officers and directors,  
17 would be able to collect from the insurance company for its own mistakes. *Id.* The exclusion protects  
18 against collusion, and also against the risk of selling liability insurance for what amounts to a fidelity  
19 bond. *Id.* If the exclusion were ignored, then those companies who only want to pay for protection  
20 against third party claims they cannot control would have to bear the additional financial burden of  
21 paying for claims over which companies have more control. *Id.* This is exactly what the Chapter 7  
22 Trustee is attempting to do in the case at bar. The Chapter 7 Trustee is attempting to recover directly  
23 for Ameri-Dream Realty for its officer's own theft, i.e. converting a third-party liability policy into a  
24 fidelity bond policy.

25 In *Biltmore*, a trustee hired by assignee of the insured brought an action challenging the  
26 insurer's denial of coverage. *Biltmore*, 572 F.3d 663. The district court dismissed the coverage  
27 action for failure to state a claim under Rule 12(b)(6). The Ninth Circuit, under a *de novo* review of  
28 the dismissal, affirmed the district court's ruling, but on different grounds. The Ninth Circuit found  
that the proper basis for dismissal was the application of the insured versus insured exclusion. The



1 *Biltmore* court found that a post-bankruptcy debtor in possession acts in the same capacity as the  
2 pre-bankruptcy debtor for the purpose of directors and officers liability insurance. *Id.* at 668. In so  
3 holding, the Ninth Circuit looked at two issues: (1) what the insured versus insured exclusion means,  
4 and (2) how bankruptcy law affects its application. *Id.*

5 In interpreting the insured v. insured exclusion in *Biltmore*, the Ninth Circuit concluded that  
6 the “only question before us on the language of the exclusion is whether the underlying suit was  
7 ‘brought or maintained on behalf of an Insured in any capacity.’” *Id.* at 669. First, the Ninth Circuit  
8 noted that the underlying lawsuit alleged breach of fiduciary and statutory duties by the officers and  
9 directors of the insured company. The Ninth Circuit further noted that “coverage is excluded if [the  
10 Named Insured] sues them, and it did.” The Ninth Circuit was not swayed by arguments that  
11 ultimately the money would go to creditors, what mattered to the analysis was who was the plaintiff.  
12 *Id.* Similar to *Biltmore*, the claims in this matter were brought on behalf of Ameri-Dream for losses  
13 to Ameri-Dream, as established by the Peladas-Brown Complaint.

14 Next, the Ninth Circuit in *Biltmore* looked to whether the claim was instigated and continued  
15 by the Insured. Unlike the Ameri-Dream Chapter 7 Trustee, *Biltmore* was not a designated insured  
16 under the policy at issue. Nevertheless, the Ninth Circuit found that “*Biltmore* cannot jump into the  
17 insureds’ shoes to bring the lawsuit, out of their shoes to claim not to be suing as though it were the  
18 insureds and then back into their shoes to get compensatory and punitive damages for the insurers’  
19 failure to cover their liabilities.” *Id.* at 670. To allow this matter to go forward in light of Exclusion  
20 I would allow the Chapter 7 Trustee to take the same inconsistent position.

21 Furthermore, the Ninth Circuit in *Biltmore* concluded that the pre-filing company and the  
22 company as debtor after bankruptcy filing are the same entity. Therefore, the Ameri-Dream Chapter  
23 7 Trustee cannot avoid the insured versus insured exclusion by asserting it holds some ubiquitous  
24 role as a trustee. Accordingly, summary judgment on behalf of the Trustee and against Greenwich is  
25 inappropriate based on the application of Exclusion I, the insured versus insured exclusion.  
26 Therefore, because of the application of Exclusion I, summary judgment in favor of the Trustee for  
27 insurance coverage must be denied.

1                   **4. *Regardless of the Application of Exclusion I, Greenwich Had No Defense or***  
 2                   ***Indemnity Obligations for the Peladas-Brown Adversary Action***

3                   The only Insured against which a claim was asserted was Ms. Peladas-Brown. Denial of a  
 4                   defense and indemnity to Ms. Peladas-Brown was warranted under Exclusion D of the Policy and  
 5                   the Prior Knowledge Provision of the Insuring Agreement. Thus, because of the application of these  
 6                   policy provisions, summary judgment in favor of the Trustee should be denied.

7                                   **(a)     Exclusion D of the Policy Precluded a Defense and Indemnity to**  
 8                                   **Ms. Peladas-Brown for the Adversary Complaint**

9                   As admitted by the Trustee, the only “Insured” sued in the Peladas-Brown Adversary Action  
 10                  was Ms. Peladas-Brown. As set forth in the Trustee’s Statement of Facts, the Peladas-Brown  
 11                  Adversary Action asserted that Ameri-Dream Realty, as part of its business, received and held rental  
 12                  security deposits of its customers’ tenants. At the time of the conversion by Ms. Peladas-Brown,  
 13                  Ameri-Dream allegedly held in excess of \$1,200,000 of security deposit monies.

14                  The Trustee states in its Statement of Facts that in March of 2014, Ameri-Dream discovered  
 15                  that significant funds were missing from the bank account designated to hold tenant security  
 16                  deposits. At the time of the theft, the Company held security deposits for more than 1,000 tenants.  
 17                  The Trustee’s Statement of Facts sets forth that Ms. Peladas-Brown orchestrated various  
 18                  unauthorized transactions, unbeknownst to Ameri-Dream or her co-manager and husband, John M.  
 19                  Brown, which transactions included the wire transfers of the majority of the security deposits to the  
 20                  Philippines. The Trustee’s Statement of Facts further establishes that the security deposits were  
 21                  disbursed to friends and family in need after the damage caused by Typhoon Haiyan in November of  
 22                  2013.

23                  Based on these material facts, Exclusion D of the Greenwich Policy, to which the Innocent  
 24                  Insured Provision does not apply, precludes coverage, both defense and indemnity, to Ms. Peladas-  
 25                  Brown. Exclusion D bars coverage, both defense and indemnity, for any claims “based on or arising  
 26                  out of”:

- 27                   1.     the conversion, commingling, defalcation, misappropriation or improper use  
 28                   of funds or other property;
2.     the gaining of any personal profit or advantage to which the **Insured** is not  
 legally entitled; or

1           3.     the inability or failure to pay, collect or safeguard funds held for others, unless  
2     the **insured** is acting in the capacity of a **short term escrow agent**.

3           Ms. Peladas-Brown converted and misappropriated \$1.2 million in security deposits that  
4     Ameri-Dream was holding for its clients' tenants. The Bankruptcy Court entered Findings of Fact  
5     and Conclusions of Law in the Peladas-Brown Adversary Action which expressly found that Ms.  
6     Peladas-Brown used the converted security deposits for her own personal profit and was not legally  
7     entitled to do so. Specifically, the Bankruptcy Court found, "Under Nevada law, [Ms. Peladas-  
8     Brown] is required to safeguard the Security Deposits on behalf of tenants." Ex. C at ¶10. "The  
9     tortious conduct of [Ms. Peladas-Brown] proximately caused the damage to the Company, because  
10    the Security Deposits were transferred for no consideration, and [Ms. Peladas-Brown] knew it." Ex.  
11    C at ¶7.

12           Under Nevada law, any exclusion must be narrowly tailored so that it "clearly and distinctly  
13    communicates to the insured the nature of the limitation, and specifically delineates what is and is  
14    not covered." *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 485, 133 P.3d 251, 255 (2006)  
15    (internal quotation marks omitted). To preclude coverage under an insurance policy's exclusion  
16    provision, an insurer must (1) draft the exclusion in "obvious and unambiguous language," (2)  
17    demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the  
18    exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case  
19    before the court. *Powell*, 127 Nev. 252 P.3d at 674 (2011).

20           Exclusion D of the Greenwich Policy is written in an obvious and unambiguous manner. The  
21    only reasonable interpretation of Exclusion D is that no coverage is afforded for theft or conversion  
22    of security deposits. The entire Peladas-Brown Adversary Complaint is based on and arising out of  
23    Ms. Peladas-Brown's misappropriation of security deposits. Moreover, Condition D of the Policy,  
24    "Innocent Insureds" expressly does not apply to Exclusion D.

25           The damage for which this Complaint seeks recovery is the judgment entered in the Peladas-  
26    Brown Adversary Action. The Peladas-Brown Adversary Action named only Ms. Peladas-Brown as  
27    a defendant. Nevertheless, to the extent the Chapter 7 Trustee attempts to assert that recovery is  
28    required for the theft of security deposits, such coverage would be expressly precluded by Exclusion

1 D of the Policy, even if Mr. Brown and/or Ameri-Dream were named as defendants in a subsequent  
2 adversary action.

3 Exclusion D is clear and unambiguous. The only reasonable interpretation of Exclusion D is  
4 that no coverage is afforded for theft or conversion of security deposits. Furthermore, no coverage is  
5 afforded for any claim “based on or arising out of” “misappropriation or improper use of funds” or  
6 “the inability to ... safeguard funds held for others.” Moreover, for the reasons outline herein,  
7 Condition D of the Policy, “Innocent Insureds”, has no application to Exclusion D. Therefore, based  
8 on the confirmed and entered Findings of Fact and Conclusions of Law, there are no claims against  
9 Mr. Brown or Ameri-Dream Realty related to the \$1.2 million loss of security deposits that would  
10 fall outside the ambit of Exclusion D.

11 **(b) Coverage for the Peladas-Brown Adversary Action Is Precluded**  
12 **By the Prior Knowledge Provision of the Insuring Agreement.**

13 The Greenwich Policy is a claims made and reported policy, which provides coverage for  
14 claims “first made” against the Insured and reported in writing to Greenwich during the period of  
15 insurance or extended reporting period. Accordingly, “a predicate to claims-made coverage is that  
16 the insured neither knew of a claim nor could have reasonably foreseen that a known circumstance,  
17 act or omission might reasonably be expected to be the basis of a claim or suit.” Ronald E. Mallen  
18 & Jeffrey M. Smith, *Legal Malpractice*, § 35:14, at 84 (2008 ed.) (“Mallen”). This is the express and  
19 unambiguous intent of subparagraph 4 of the Insuring Agreement of the Greenwich Policy.

20 It is well-settled that an insurer issuing a claims made policy, such as the one at issue here,  
21 acts reasonably in excluding from coverage, losses which are known at the time the policy incepts or  
22 which are so “probable or imminent” that they are “not proper subjects of insurance.” Leo R. Russ,  
23 *Couch on Insurance* § 102:8 (3d ed. 2009). *See also Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d  
24 787, 791 (7th Cir. 1992) (use of prior knowledge exclusions in claims made policies is common and  
25 “uncontroversially proper”). Here, the Prior Knowledge Provision of the Insuring Agreement  
26 provides coverage only if “prior to the inception date of this policy, no **Insured** had a basis to  
27 believe that such act or omission, or any related act or omission, might reasonably be expected to be  
28 the basis of a **claim.**”

1 Courts repeatedly have held that the language of the prior knowledge provision is  
2 unambiguous, proper and applies an objective standard. For example, the United States Court of  
3 Appeals for the Ninth Circuit, applying California law and interpreting nearly identical policy  
4 language, adopted an objective reasonable person standard for evaluating whether an insured was  
5 aware of acts that might be expected to be the basis of a claim. *Weddington v. United National*  
6 *Insurance Co.*, 2009 WL 3028237, at \*1-2 (“[T]he use of the phrase ‘or could have reasonably  
7 foreseen’ indicates that coverage is excluded where a claim was foreseeable from a reasonable,  
8 objective viewpoint”).

9 The Peladas-Brown Adversary Action specifically established that Ms. Peladas-Brown’s first  
10 conversion of security deposits occurred on February 27, 2013, four months before the Greenwich  
11 Policy incepted. In addition, the Findings of Facts and Conclusions of Law establish that six  
12 conversions of security deposits totaling \$245,793 were carried out by Ms. Peladas-Brown prior to  
13 the inception of the Greenwich Policy on June 14, 2013. Ms. Peladas-Brown is an Insured under the  
14 Policy. Ms. Peladas-Brown was aware of her conversion of security deposits prior to June 14, 2013  
15 as established by the Chapter 7 Trustee in the Peladas-Brown Adversary Action.

16 Specifically, the Findings of Fact and Conclusions of Law entered in the Peladas-Brown  
17 Adversary Action state that Ms. Peladas-Brown “knew or should have know that those payments  
18 would never be repaid, given [Ms. Peladas-Brown]’s plan to abscond with the money.” Ex. C at ¶13.  
19 The Bankruptcy Court further expressly found that Ms. Peladas-Brown had knowledge of her  
20 wrongful conduct and found that “Defendant had knowledge she was breaching her fiduciary duties,  
21 and acted purposefully and with malice and intent to injure the Company.” Ex. C at ¶6. As a result,  
22 no coverage, either defense or indemnity, is afforded for the Peladas-Brown Adversary Action.  
23 Moreover, a clear and plain reading of Condition D of the Policy expressly establishes that the  
24 Innocent Insured condition is not applicable to the Insuring Agreement of the Policy.

25 Therefore, no coverage is afforded for the Peladas-Brown Adversary Action based on the  
26 application of the prior knowledge provision of the Greenwich Policy found in the Insuring  
27 Agreement of the Policy. As a result, summary judgment in favor of the Trustee finding insurance  
28 coverage under the Greenwich Policy should be denied.

1 (c) **The “Innocent Insured” Provision of the Policy Does Not Apply to**  
2 **Greenwich’s Coverage Position.**

3 The Trustee argues that even though Mr. Brown and Ameri-Dream were never named as  
4 Defendants in the Peladas-Brown Adversary Action and no judgment was ever entered against them  
5 (nor could a judgment ever be entered against in light of the adjudication of their innocence),  
6 Greenwich is nevertheless obligated to reimburse Ameri-Dream \$1 million for the judgment against  
7 Ms. Peladas-Brown in the Adversary Action. Again, this argument shows a lack of understanding of  
8 the operation of a third-party insurance policy. Simply put, Mr. Brown and Ameri-Dream’s innocent  
9 insured status is irrelevant where no claims were ever brought against them and no judgment or  
10 potential judgment was ever entered against them.

11 In addition to being inapplicable where Mr. Brown and Ameri-Dream are not defendants,  
12 even if the innocent insured provision of the Greenwich Policy could be applied, the innocent  
13 insured provision would not protect Mr. Brown and Ameri-Dream where the Greenwich Policy  
14 precludes coverage based on Exclusion D and the Prior Knowledge Provision of the Insuring  
15 Agreement.

16 Condition D of the Greenwich Policy, the “Innocent Insureds” provision, provides “If  
17 coverage of this policy would not apply because of Exclusion C or because of noncompliance with  
18 Condition B, such Exclusion or Condition will not apply to any **Insured** who did not commit,  
19 participate in, or have knowledge of any of the acts described in Exclusion C. and whose conduct did  
20 not violate Condition B.” As discussed above, the conduct of Ms. Peladas-Brown as alleged and  
21 adjudicated in the Peladas-Brown Adversary Action is precluded from coverage, both for defense  
22 and indemnity, under the Greenwich Policy based on the application of Exclusion I, Exclusion D and  
23 the Prior Knowledge Provision, as well as Exclusion C. Therefore, the innocent insured provision  
24 would not provide to the coverage issues raised in connection with the Peladas-Brown Adversary  
25 Action. Thus, summary judgment on Count V should be denied.

26 ///

27 ///

28 ///



1                   5. *Even If Mr. Brown and Ameri-Dream's Innocent Insureds Status Overrode the*  
2                   *Application of the Exclusions Discussed Herein, Neither Mr. Brown nor Ameri-*  
3                   *Dream are "Legally Obligated to Pay" the Judgment At Issue and Therefore*  
4                   *The Insuring Agreement of the Greenwich Policy Is Not Triggered.*

5                   The Greenwich Policy is a third party policy that provides defense and indemnity coverage  
6                   for covered third-party "claims" brought against an Insured. The Insuring Agreement of the Policy  
7                   makes clear that Greenwich will only pay claims that "the Insured becomes legally obligated to pay  
8                   as damages and claims expenses by reason of an act or omission ... in the performance of real estate  
9                   services by the Insured." The Insuring Agreement further requires that the **claim** "first be made  
10                  against the Insured during the policy period..." The Policy defines "**Claim**" as:

11                                   a demand for money or services naming the **Insured** by reason of an act or  
12                                   omission in the performance of **real estate services**. A claim also includes  
13                                   the service of suit or the institution of an arbitration proceeding against the  
14                                   **Insured**.

15                  The only claim brought by the Chapter 7 Trustee is the adversary action brought solely against  
16                  Ms. Peladas-Brown. An objective reading of the Peladas-Brown Adversary Action demonstrates  
17                  that no claim was made or judgment entered against Mr. Brown or Ameri-Dream Realty.

18                  By virtue of the Findings of Fact and Conclusions of Law entered in the Peladas-Brown  
19                  Action, it is evident that not only were Mr. Brown and Ameri-Dream Realty not sued by the Chapter  
20                  7 Trustee, Mr. Brown and Ameri-Dream Realty are not and cannot be "legally obligated to pay  
21                  damages" for Ms. Peladas-Brown's activities, which is required to trigger coverage under the  
22                  Greenwich Policy. Specifically, the Bankruptcy Court made the following findings:

- 23                   • The Company was unaware at all times relevant to the Complaint that the Defendant  
24                   conspired to abscond with the Security Deposits to the Philippines. Conclusions of Law  
25                   Exhibit C at ¶15.
- 26                   • Mr. Brown was unaware at all times relevant to the Complaint that the Defendant  
27                   conspired to abscond with the Security Deposits to the Philippines. Conclusions of Law  
28                   Exhibit C at ¶16.
- The Company and Mr. Brown are innocent of all claims asserted in the Complaint against  
                    the Defendant. Conclusions of Law Exhibit C at ¶17.

1 By virtue of the Findings of Facts and Conclusions of Law requested by the Chapter 7  
2 Trustee and entered by the Bankruptcy Court, neither Ameri-Dream Realty and/or Mr. Brown are  
3 “legally obligated to pay” the approximate \$1.2 million in funds converted by Ms. Peladas-Brown.  
4 In addition, the Bankruptcy Court concluded and held that the divorce decree between Ms. Peladas-  
5 Brown and Mr. Brown requires Ms. Peladas-Brown to indemnify Mr. Brown and Ameri-Dream  
6 Realty against any claims relating to the loss of the Security Deposits. Exhibit C at ¶14. Therefore,  
7 because Mr. Brown and Ameri-Dream are not and could not be “legally obligated to pay” the  
8 judgment in the Peladas-Brown Adversary Action, the Insuring Agreements of the Greenwich Policy  
9 is not triggered.

10 **B. Summary Judgment on the Trustee’s Purported Bad Faith Counts is Unwarranted.**

11 The Trustee seeks summary judgment on her claims of (1) breach of implied covenant of  
12 good faith and fair dealing; (2) breach of fiduciary duty; and (3) violations of NRS 686A.310 against  
13 defendants. Essentially, all four of these claims are claims for bad faith against the defendants for  
14 the alleged wrongful refusal to reimburse Ameri-Dream Realty for the \$1 million in security deposits  
15 Ms. Peladas-Brown took from her company Ameri-Dream Realty. The Defendants are not liable for  
16 the bad faith claims because: (1) Greenwich’s coverage position was correct and no coverage, either  
17 defense or indemnity, was afforded to Ms. Peladas-Brown, Mr. Brown or Ameri-Dream Realty, LLC  
18 for the Trustees’ claims and Adversary Complaint; and (2) even if this Court should find coverage,  
19 Greenwich’s position was justifiable and therefore not in bad faith as a matter of law.

20 ***1. Greenwich, and the Other Defendants, Did Not Breach of the Covenant of***  
21 ***Good Faith and Fair Dealing by Denying Coverage for the Peladas-Brown***  
22 ***Adversary Complaint (Count II)***

23 “It is well settled in Nevada that every contract imposes upon the contracting parties the duty  
24 of good faith and fair dealing.” *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev.  
25 1043, 1046, 862 P.2d 1207, 1209 (1993). In order for the Trustee to establish a prima facie case of  
26 the breach of the covenant of good faith and fair dealing, she must establish that: (1) Greenwich had  
27 no reasonable basis for disputing coverage, and (2) the insurer knew or recklessly disregarded the  
28 fact that there was no reasonable basis for disputing coverage. *Powers v. United Servs. Auto. Ass’n*,

1 114 Nev. 690, 702–703, 962 P.2d 596, 604 (1998); *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d  
2 888 (1991).

3 The Trustee has presented no evidence to support either element of her claim for the breach  
4 of the covenant of good faith and fair dealing. Count II of the Complaint alleges that Greenwich,  
5 and the other defendants, breached the covenant of good faith and fair dealing in the Greenwich  
6 Policy by “denying the Company’s claims.” Compl. at Par. 52. As discussed at length above,  
7 Greenwich had a valid and correct basis for denying coverage for the Peladas-Brown Adversary  
8 Complaint, both defense and indemnity. Simply put, and as explained in detail above, the  
9 Greenwich Policy does not provide defense or indemnity coverage to Ms. Peladas-Brown based on  
10 Exclusions I, D, C and the Prior Knowledge Provision of the Insuring Agreement. Moreover,  
11 because no claim was ever brought against Mr. Brown and Ameri-Dream, Greenwich had no  
12 obligation (or opportunity or need) to defend them in connection with the Peladas-Brown Adversary  
13 Action. Furthermore, a judgment was never entered against Mr. Brown or Ameri-Dream and  
14 therefore Greenwich had no obligation to indemnify Mr. Brown and Ameri-Dream with respect to a  
15 judgment that was not entered against them. As such, the Trustee cannot establish that Greenwich’s  
16 coverage position was not reasonable.

17 Similarly, the Trustee cannot establish that Greenwich, or any other defendant, acted with the  
18 requisite knowledge or reckless disregard regarding a purported baseless coverage position. Aside  
19 from the fact that Greenwich’s position was not baseless, the Statement of Facts does not establish  
20 any knowledge on the part of Greenwich. Moreover, no discovery has taken place from which such  
21 fact could be determined. As such, summary judgment in the favor of the Trustee on Count II  
22 should be denied.

23 **2. *The Trustee’s Claims for Breach Their Fiduciary Duty by Denying***  
24 ***Insurance Coverage Fail (Count III)***

25 First and foremost, Nevada courts do not recognize a fiduciary relationship between insured  
26 and insurer. *Martin v. State Farm Mutual Auto. Ins. Co.*, 960 F. Supp. 233 (D. Nev. 1997) (holding  
27 “Since the interests of the insurer and insured can possibly conflict, Nevada courts have never gone  
28 so far as to classify the relationship between an insurer and insured as a fiduciary duty. For these

1 reasons, this Court finds that under Nevada law a fiduciary duty between an insurer and insured does  
2 not exist.”) Because Nevada courts do not recognize a fiduciary relationship between insured and  
3 insurer, the Trustee’s claims as asserted in Count III fail.

4 Nevertheless, even if this Court were to recognize a fiduciary relationship between  
5 Greenwich and Ameri-Dream, the undisputed material facts establish that Greenwich, and the other  
6 defendants, did not breach their duty. The Trustee asserts that Greenwich breached its purported  
7 fiduciary duty to Ameri-Dream by “failing to reimburse the Company for the loss of the Security  
8 Deposits and failing to pay any monies to the Company under the terms of the Policy.” *See* Motion  
9 for Summary Judgment at Par. 56. As set forth at length above, no monies were ever due and owing  
10 under the “terms of the Policy” for the Peladas-Brown Adversary Action.

11 Greenwich’s obligations under the Insuring Agreement are to “pay on behalf of the **Insured**  
12 all sums in excess of the deductible that the **Insured** becomes legally obligated to pay as **damages**  
13 and **claims expenses** by reason of an act or omission including **personal injury** in the performance  
14 of **real estate services** by the **Insured.**” The Adversary Complaint brought solely against Ms.  
15 Peladas-Brown was precluded from coverage under Exclusions C, D and I as well as the Prior  
16 Knowledge Provision of the Insuring Agreement. In addition, in terms of obligations to Mr. Brown  
17 and Ameri-Dream, no claims were ever brought against those “Insureds” and therefore those  
18 “Insureds” never became “legally obligated to pay as damages or claims expenses” any sums.

19 For the foregoing reasons, summary judgment as to Count III should be denied.

20  
21 **3. *Greenwich, and the Other Defendants, Did Not Violate NRS 686A.310***  
22 ***(Count IV)***

23 A cause of action for bad faith was first recognized by the Nevada Supreme Court in *USF&G*  
24 *v. Peterson*, 540 P.2d 1070 (Nev. 1975). In the same year, the legislature enacted N.R.S. Sec.  
25 686A.310 to govern Unfair Trade Practices in the insurance industry. However, a violation of the  
26 Act does not establish common law bad faith per se. In *Hart v. Prudential Property & Cas. Ins. Co.*,  
27 No. CV-S-93-307 (D. Nev. April 11, 1994), the District Court distinguished common law and  
28 statutory claims for bad faith, holding that a single violation of the Act did not establish common law  
bad faith without proof that the insurer intended harm.

1 Under Nevada law, an insurer acts in bad faith when it denies a claim without any reasonable  
2 basis. *American Excess Ins. Co. v. MGM*, 102 Nev. 601, 729 P.2d 1352 (1986). An insurer does not  
3 act in bad faith in denying the insured's claim where it had a reasonable basis for doing so even if its  
4 interpretation of the policy was ultimately deemed to be wrong. *Pioneer Chlor Alkali Co. v.*  
5 *National Union Fire Ins. Co.*, 863 F.Supp. 1237 (D. Nev. 1994). The District Court noted that  
6 Nevada's unfair claims statute did not require proof that the insurer knew that it lacked a reasonable  
7 basis for disputing coverage, whereas this scienter element is a part of the common law tort of bad  
8 faith.

9 The Trustee argues that Greenwich, and the other Defendants, violated NRS 686A.310 in the  
10 following ways: (1) failing to promptly respond to claim communications; (2) failing to adopt and  
11 implement standards for investigation and processing of claims; (3) failing to effectuate prompt  
12 settlement of claims in which liability has become clear; (4) failure to defend the underlying lawsuit;  
13 and (5) compelling insureds to instigate litigation.

14 In *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346 830 P.2d 1335 (1992), the Court expressly  
15 said that a third-party "has no private right of action as a third-party claimant under NRS 686A.310."  
16 Thus, if the Trustee is a third party and therefore not subject to the insured v. insured exclusion of  
17 the Greenwich Policy, Exclusion I, then the Trustee has no right of action under NRS 686A.310.  
18 Therefore, as a purported third party to the insurance contract between Greenwich and Ameri-  
19 Dream, the Trustee's claims are barred.

20 To the extent the Trustee argues that it is a party to the Greenwich Policy by virtue of  
21 standing in the shoes of Ameri-Dream, NRS 686A.310, the violations she claims did not occur and  
22 are not actionable.

## 23 **V. CONCLUSION**

24 WHEREFORE, Defendants XL America, Inc., XL Insurance America, Inc., XL Select  
25 Professional, Pearl Insurance Group, LLC and Greenwich Insurance Company respectfully request  
26 that this Court deny the Trustee's Motion for Summary Judgment and award any and all other relief  
27  
28

1 this Court deems just and proper.

2 DATED this 17<sup>th</sup> day of January, 2017.

3 WILSON ELSER MOSKOWITZ  
4 EDELMAN & DICKER LLP

5   
6 JENNIFER WILLIS ARLEDGE  
7 Nevada Bar No. 8729

8 WILSON, ELSER, MOSKOWITZ,  
9 EDELMAN & DICKER LLP

10 300 South 4th Street, 11th Floor  
11 Las Vegas, NV 89101-6014

12 (702) 727-1400; Fax (702) 727-1401  
13 [jennifer.arledge@wilsonelser.com](mailto:jennifer.arledge@wilsonelser.com)

14 Attorneys for Defendants

15 XL AMERICA, INC., XL INSURANCE  
16 AMERICA, INC., XL SELECT

17 PROFESSIONAL, PEARL INSURANCE  
18 GROUP, LLC, GREENWICH INSURANCE  
19 GROUP  
20  
21  
22  
23  
24  
25  
26  
27  
28



**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 17<sup>th</sup> day of January, 2017, I served a true and correct copy of the foregoing DEFENDANTS XL AMERICA, INC., XL INSURANCE AMERICA, INC., XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC, AND GREENWICH INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT as follows:

by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

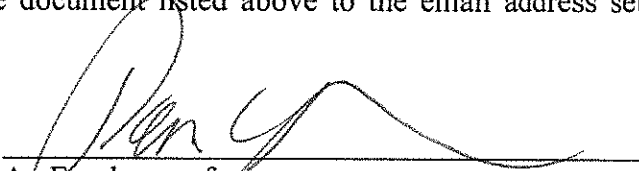
Samuel A. Schwartz, Esq.  
Schwartz Flansburg PLLC  
Email: sam@nvfirm.com  
Attorney for Chapter 7 Trustee, Victoria L. Nelson

via hand-delivery to the addressees listed below;

via facsimile;

by transmitting via email the document listed above to the email address set forth below on this date:

BY:

  
An Employee of  
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28