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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re: AMERI-DREAM REALTY, LLC, Debtor. _____ VICTORIA NELSON, In Her Capacity As The Chapter 7 Trustee Of AMERI-DREAM REALTY, LLC, Plaintiff, vs. 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 Chapter 7 Adv. Proceeding No.: 15-01183-LED **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

PLAINTIFF'S REPLY TO DEFENDANTS'
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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

Reply (the "**Reply**") to the opposition (the "**Opposition**") of defendants, XL America, Inc., XL Insurance America, Inc., XL Select Professional, Pearl Insurance Group, LLC, and Greenwich Insurance Company (each a "**Defendant**" and collectively, the "**Defendants**") to the Plaintiff's Motion for Summary Judgement (the "**Motion**")[1] on all claims for relief set forth in that certain adversary complaint (the "**Complaint**") filed on October 29, 2015 in the United States Bankruptcy Court for the District of Nevada, Adversary Proceeding No. 15-01183-LED, and filed in this Court on December 22, 2016. The Trustee respectfully asks this Court for an order granting summary judgment on the grounds there are no genuine material issues of fact in dispute regarding the claims set forth in the Complaint filed by the Trustee against Defendants.

This Reply in support of the Motion is made and based on Rule 56 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, the exhibits attached hereto, filed contemporaneously with the Reply, the pleadings and papers and other records contained in the Court's file, judicial notice of which is hereby requested, and any evidence or oral argument presented at the time of the hearing on this matter. In support of the Reply, the Trustee respectfully states as follows:

Preliminary Statement

1. Ms. Peladas-Brown, a former officer of the Company, embezzled in excess of $1,000,000 of money that was the rental security deposits belonging to hundreds of individuals. That money is now gone and unrecoverable. Fortunately, however, the Company had an error and omissions policy in this instance, to protect the hundreds of individuals against the very acts committed by Ms. Peladas-Brown. Indeed, 931 individual claims were filed in the Company's bankruptcy case, totaling $2,497,635.38. See Case No. 15-10110, Claim Nos. 1 through 931.

[1] Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Motion.

2. The Trustee is now charged with pursuing these claims on behalf on the 931 individuals who lost over $2 million, and the Policy is the only asset the Company owns to potentially allow these claimants to recoup less than half of their losses.

3. Indeed, because an insurance policy is a contract of adhesion, it should be "interpreted broadly, affording the greatest possible coverage to the insured." Farmers Ins. Group v. Stonik By and Through Stonik, 867 P.2d 389, 391 (Nev. 1994). Accordingly, this Court should not adhere to the Defendants' multiple theories and narrow arguments of why coverage is not provided under the Policy. Simply put, as insurance policies are interpreted broadly to afford the greatest possible coverage, the Defendants' arguments fail.

4. Specifically, Defendants narrow construction fails because the Trustee is not an "Insured" under the Policy and does not "step into the shoes" of Ameri-Dream. Indeed, the Trustee is a third-party appointed by the Bankruptcy Court to administer assets and claims on behalf of the Chapter 7 bankruptcy estate of the company. The Trustee is separate and distinct from Ameri-Dream, and Defendants' own cited case law supports the same.

5. Defendants' additional arguments to deny coverage under the Policy are equally uncompelling. As set forth herein, Defendants' attempts to narrowly construe and interpret the Policy in a way to deny coverage, from every possible angle, is not how insurance policies are read and construed by courts.

6. As set forth herein, the Trustee asserts the Innocent Insured provision in the Policy clearly requires coverage, but at a minimum, based on the Defendants' arguments, the Policy is ambiguous in the way Exclusion D and Exclusion C overlap. Accordingly, when an insurance policy is determined to be ambiguous, a court will "construe[] any ambiguities in an

insurance policy in favor of the insured." Cent. Sur. Co. v. Casino W., Inc., 329 P.3d 614, 616 (Nev. 2014); Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009).

7. Therefore, the Plaintiff is entitled to summary judgment on her claims in either scenario; either 1) because the Innocent Insured provision requires coverage; or alternatively 2) because the Policy is ambiguous and under Cent. Sur. Co., ambiguous insurance contracts are to be construed in favor of the Insured to provide coverage.

Argument

A. Standard for Summary Judgment.

8. Fed. R. Civ. P. 56(c) provides for summary judgment on a claim when "the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The substantive law determines which facts are material for purposes of summary judgment, and disputes over facts that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. The non-moving party may not rest on "the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial," i.e., that the evidence is such that a rational trier of fact could return a verdict for the non-moving party. Id. at 248, 251-52.

9. "There is no genuine issue of material fact if the party opposing the motion 'fails to make an adequate showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Taylor, 880 F.2d at 1045, quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Ray, 920 F. Supp at 1097. Issues of material fact must be supported by evidence, and conclusory allegations that are

unsupported cannot defeat a motion for summary judgment. Taylor, at 880 F.2d at 1045; Ray, 920 F. Supp. at 1097.

10. A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

11. In this matter, there are no genuine issues of material fact with respect to all claims set forth in the Complaint. Indeed, "[w]hen the facts are not in dispute, contract interpretation is a question of law." Federal Ins. Co. v. American Hardware Mut. Ins. Co., 124 Nev. 319, 322, 184 P.3d 390,392 (Nev, 2008) (citingGrand Hotel Gif Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992)). Importantly, as set forth herein, the exhibits attached hereto, the accompanying Statement of Undisputed Facts, and the Court's Docket demonstrate that the Trustee is entitled to summary judgment on all claims set forth in the Complaint.

B. Defendants XL America, Inc., XL Insurance America, Inc., XL Select Professional, and Pearl Insurance Group, LLC are in Privity of Contract with Plaintiff.

12. The Opposition first asserts that only Greenwich, as insurer, is in privity of contract with the Plaintiff, and therefore, XL America, Inc., XL Insurance America, Inc., XL Select Professional (collectively, the "**XL Companies**") and Pearl Insurance Group, LLC ("**Pearl**") cannot be held liable for breach of contract.

13. Despite Defendants' contentions, the actual face of the Policy supports the Plaintiff's claims. Specifically, the top of page 1 of the Policy indicates "[t]he company providing insurance afforded by this coverage is indicated above." See Policy, p. 1. Above this

line are two companies, "XL Insurance" and "Greenwich Insurance Company – Members of the XL America Companies." Id. Moreover, the face of the Policy lists the Producer of the Policy as "Pearl Insurance Group." Id. Page 1 of the Policy also requires "Notices to be Sent to:

Report a Claim: XL Select Professional Claims

Material Changes: Pearl Insurance Group, LLC"

See Policy, p. 1, Item 8.

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

15. Finally, the Defendants attached their coverage denial letter to their pending motion to dismiss as Exhibit D, which is signed by Lee Santos, on behalf of XL Select Professional. See Docket No. 16-4. The coverage denial letter also bears the letterhead of XL Group Insurance. Id.

16. Therefore, the face of the Policy indicates that all of the Defendants were involved with the issuance and management of the Policy, and as a result, all are in contractual privity with the Plaintiff.

C. The Trustee is Entitled to Summary Judgment on Count I and Count V of the Complaint Against the Defendants for Breach of Contract and a Declaration that the Defendants are Liable to the Company Under the Policy.

17. The Contract cannot be interpreted in the way Defendants assert and excludes coverage to the Trustee based on the Insured versus Insured provision. The Opposition attempts to muddy the waters and confuse the Court as to the central issues here: (1) the Insured Versus Insured exclusion does not apply because the Chapter 7 trustee represents the bankruptcy estate of the Company, which is wholly separate and apart from the defunct Debtor; (2) exclusion D of the Policy does not preclude coverage; (3) the prior knowledge provision of the Policy does not

apply to preclude coverage; and (4) the Innocent Insured Provision does apply to require coverage.

1. The Insured Versus Insured Exclusion Does Not Apply Because the Chapter 7 Trustee Represents the Bankruptcy Estate of the Company, which is Wholly Separate and Apart from the Defunct Debtor.

18. Defendants' argument in the Opposition is premised on a fundamental misunderstanding of bankruptcy law and the difference between a Chapter 7 trustee and a Chapter 11 debtor-in-possession.

i. A Chapter 7 Trustee Represents the Bankruptcy Estate, Not the Chapter 7 Debtor.

19. Simply put, the Defendants believe the "Insured versus Insured" provision of the Policy precludes coverage because the Trustee "stands in the shoes of Ameri-Dream Realty, and thus the Company can't seek reimbursement from the Company's own insurance Policy. Simply put, however, the Defendants swing and miss with this argument based on one fatal flaw – the Trustee does not "stand in the shoes" of the Company, but rather, represents the "bankruptcy estate" of the Company, and not the Company itself.

20. It is well established that when "an individual files a bankruptcy petition, a separate bankruptcy estate is created which is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case." In re Pegram, 395 B.R. 692, 695 (Bankr. D. Idaho 2008) (internal quotations and citations omitted). Moreover, chapter 7 trustees hold a position that is unique relative to trustees in a Chapter 11 or Chapter 13 case. A Chapter 7 trustee:

> [H]olds all of the rights and responsibility for property of the Estate. The Trustee is the sole representative of the bankruptcy estate. 11 U.S.C. § 323(a). As the representative of the estate, the Chapter 7 trustee's duties include collecting and reducing to money the property of the estate. 11 U.S.C. § 704(a)(1). It is the

> Chapter 7 trustee who disposes of property of the estate in which another person has an interest which is not otherwise disposed of under the Bankruptcy Code. 11 U.S.C. § 725. No provision is made for the Chapter 7 debtor to co-administer property of the estate . . . .

In re Zavala, 444 B.R. 181, 189 (Bankr. E.D. Cal. 2011).

21. Indeed, in a chapter 7 case, the debtor's ability to affect the bankruptcy estate is intentionally limited; specifically, "[d]ebtors may not assert rights of the bankruptcy estate against third-parties, such as the alleged claim for violating the automatic stay as it applies to property of the estate." Id. at 191. Thus, if a claim belongs to the bankruptcy estate, the trustee has sole authority to assert that claim and collect upon it for the benefit of the creditors. Id.

22. In addition to a chapter 7 trustee being distinct from the actual Chapter 7 debtor, the chapter 7 trustee's role is not for the benefit of the debtor, but rather, the chapter 7 trustee's role is to "maximize the estate" for the benefit of the debtor's creditors. In re Henson, 98-51326 ASW, 2006 WL 3861370, at *5 (Bankr. N.D. Cal. Apr. 21, 2006); accord In re Harper, 557 B.R. 171, 176–77 (Bankr. D. Ariz. 2016) (allowing the chapter 7 trustee to pursue claims on behalf on the bankruptcy estate for the benefit of the creditors when the debtor was barred from pursing the same claims).

23. Here, the Trustee is a legal representative of the Chapter 7 bankruptcy estate of Ameri-Dream Realty, not a legal representative of Ameri-Dream Realty itself. Indeed, the Trustee's role in this matter is to administer claims and assets of the bankruptcy estate of the Company, including the prosecution of claims under the Policy, on behalf of nearly 1,000 individuals whose security deposits were stolen. Importantly, 931 individuals filed claims in the Bankruptcy Case. See Case No. 15-10110, Claim Nos. 1 through 931 (collectively, the "**Individual Claims**"). The Trustee is charged for pursuing claims under the Policy for the

benefit of these individuals - hard-working people who lost their security deposits and other funds, losses which are covered by the Policy. The Defendants' arguments to the contrary fail.

ii. The Biltmore Case is Distinguishable.

24. In support of its argument that the Trustee "steps into the shoes" of Ameri-Dream Realty, Greenwich relies heavily on Biltmore Associates, LLC v. Twin City Fire Ins. Co., 572 F.3d 663, 670 (9th Cir. 2009). The fatal miscomprehension of Greenwich's reliance on Biltmore, however, is that Biltmore involved a Chapter 11 debtor-in-possession, where no trustee is appointed, as compared to a Chapter 7 case, where a trustee is appointed and a separate Chapter 7 bankruptcy estate is created.

25. In Biltmore, the debtor company, Visitalk, filed a Chapter 11 bankruptcy petition and remained a debtor-in-possession. Biltmore, 572 F.3d at 666. Pursuant to its Chapter 11 plan, the debtor assigned its claims to a creditor trust, and the trustee for the creditor trust, Biltmore, pursued the insurance claims the debtor had assigned to the creditor trust. Id. at 667 (emphasis added). In determining that the "insured versus insured" exclusion barred suit, the Ninth Circuit stated:

> We conclude that insured versus insured exclusion in the relevant policies bars coverage for Biltmore's claims, because a post-bankruptcy **debtor in possession** acts in the same capacity as the pre-bankruptcy debtor for the purpose of directors and officers liability insurance.

Id. at 668 (emphasis added).

26. In fact, the Ninth Circuit's bankruptcy analysis in Biltmore focused entirely on the debtor's status of a debtor-in-possession in Chapter 11, and concluded that "the prefiling company and the company as debtor in possession in chapter 11 are the same entity." Id. at 671 (emphasis added).

27. Importantly, the Biltmore court also noted that there are several courts, including the Ninth Circuit, that treat a post-bankruptcy entity as different from the debtor when a trustee is appointed. Id. at 670-71, n. 15, citing, e.g. Unified W. Grocers, Inc. v. Twin City Fire Ins. Co., 457 F.3d 1106, 1116-17 (9th Cir. 2006) (bankruptcy trustee of subsidiary different entity than subsidiary itself); Grafenaur v. Mukamal (In re Laminate Kingdom, LLC), 2008 WL 704396 at *3-4 (Bankr. S.D.Fla. Mar. 13, 2008) (Chapter 7 trustee is distinct entity from debtor); Cohen v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA (In re County Seat Stores, Inc.), 280 B.R. 319, 324-26 (Bankr. S.D.N.Y. 2002) (trustee legal distinct entity from debtor, distinguishing trustee from debtor in possession); Rieser v. Baudendistel (In re Buckeye Countrymark, Inc.), 251 B.R. 835, 840-41 (Bankr. S.D. Ohio 2000) (Chapter 7 trustee not the same entity as debtor); Rigby v. Underwriters at Lloyd's, London, 907 So.2d 1187, 1188-89 (Fla.Dist.Ct.App. 2005) (Chapter 7 trustee, listed an insured, still different entity from debtor).

28. Simply put, the Biltmore court's decision was based on a Chapter 11 debtor-in-possession being the same as the pre-filing debtor company. In this matter, and as acknowledged by the Biltmore court, the Company did not filed a Chapter 11 bankruptcy case and remain a debtor-in-possession, but rather, filed a Chapter 7 bankruptcy case where the Trustee was appointed over the bankruptcy estate.

29. Furthermore, in 2015, the United States Supreme Court in Baker Botts L.L.P. v. ASARCO, LLC, recently held that the Bankruptcy Code does not permit bankruptcy courts to award attorney fees to counsel or other professionals employed by the bankruptcy estate for work performed in defending their fee applications. Baker Botts L.L.P. v. ASARCO, LLC, 135 S.Ct. 2158 (2015). While the Baker Botts case primarily stands for the proposition that a bankruptcy

estate should not have to pay for fees attorneys' incur in defending their fee application, it also confirms the central difference between a debtor and a bankruptcy estate. Id.

30. Importantly, the Chapter 7 Trustee here is appointed to liquidate the assets of the debtor, thereby maximizing the value of the bankruptcy estate in order to pay the creditors the maximum value of their claims. The purpose of a chapter 11 debtor-in-possession, on the other hand, is different as the goal is not liquidate assets, but instead, is to reorganize debts to allow the debtor to continue functioning and pay creditors more than they would receive in a Chapter 7 liquidation. Indeed, it is essential to acknowledge the "case law recognizing the legal distinction between a bankruptcy trustee and the defunct Chapter 7 debtor." In re C. Louisiana Grain Co-op., Inc., 467 B.R. 390, 397 (Bankr. W.D. La. 2012).

31. Accordingly, the Insured versus Insured Exclusion I of the Policy does not apply in this instance. The Trustee is a court-appointed Chapter 7 Trustee over the bankruptcy estate of Ameri-Dream, and did not "step into the shoes" of the Company. Consequently, dismissal of the Complaint under Rule 12(b)(6) is not appropriate based on application of the Insured versus Insured Exclusion.

2. Exclusion D of the Policy Does Not Preclude Coverage.

32. Greenwich next argues the Complaint should be dismissed because Exclusion D of the Policy precludes coverage, both defense and indemnity, for any claims "based on or arising out of"

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

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

See Policy, Section IV, D.

33. Importantly, however, and as admitted by the Defendants, under Nevada law, any exclusion must be narrowly tailored so that it "clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered." Griffin v. Old Republic Ins. Co., 133 P.3d 251, 255 (Nev. 2006). To preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the exclusion in "obvious and unambiguous language," (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court. Id. In order for an exclusion in an insurance policy to be effective, the provision purporting to exclude coverage must be drafted in language that unambiguously conveys the insurer's intent to limit its contractual obligation. Benchmark Ins. Co. v. Sparks, 254 P.3d 617, 621 (Nev. 2011).

34. Based on Nevada case law cited above, the Defendants simply state the language of the Policy is written in an obvious and unambiguous manner, and then the Defendants state coverage is not afforded for theft or conversion of security deposits. See Opposition, pp. 17-18. Despite Greenwich's assertions, the language of the policy is not that clear and simple.

35. Specifically, Exclusion C of the Policy also excludes coverage:

> "based on or arising out of any dishonest, intentionally wrongful, fraudulent, criminal or malicious act or omission by the Insured;

See Policy, Section IV, C. As set forth in the Complaint, however, both the Company and Mr. Brown were found to be innocent of the wrongful acts by Ms. Peladas Brown. See Complaint, ¶

32. The Policy, in turn, precludes the denial of coverage under Exclusion C for innocent insureds, as follows:

> D. Innocent Insureds.
>
> If coverage of this policy would not apply because of Exclusion C, or because of noncompliance with Condition B, such Exclusion or Condition will not apply to any Insured who did not commit, participate in, or have knowledge of any of the acts described in Exclusion C and whose conduct did not violate Condition B.

See Policy, Section VI, D.

36. Accordingly, Greenwich does not appear to dispute that it cannot deny coverage based on the clear language of Exclusion C (i.e. the wrongful acts of Ms. Peladas Brown).

37. Greenwich appears to imply, however, that because the claims made against Greenwich could fit inside of Exclusion D, that is sufficient to deny all types of claims for any bad acts (i.e. wrongful, intentional and fraudulent acts). In other words, despite the fact that Exclusion C and the Innocent Insureds provision does not preclude the Trustee's claims based on the wrongful and intentional acts of Ms. Peladas-Brown, Greenwich would have this Court believe that because the wrongful acts relate to money, which could then fit inside Exclusion D, the Trustee cannot recover under the Policy.

38. Greenwich's argument should be rejected for several reasons. First, the Policy is not that clear. Nowhere in the Policy is it stated that if Exclusion D applies, all other claims under the Policy are precluded, regardless of whether they fall inside or outside of Exclusion D.

39. Second, because the conduct of Ms. Peladas-Brown falls under Exclusion C of the Policy, if the Court is also inclined to find that Ms. Peladas-Brown's conduct also falls under Exclusion D of the Policy, then the Policy is ambiguous. An insurance policy is considered ambiguous when "it creates multiple reasonable expectations of coverage as drafted," and "a

seemingly clear policy can be rendered ambiguous when applying the policy to the facts leads to multiple reasonable interpretations." Cent. Sur. Co. v. Casino W., Inc., 329 P.3d 614, 616 (Nev. 2014).

40. Third, the Defendants' reading of Exclusion D is an exclusion that would swallow the entire policy. Simply put, Ameri-Dream Realty was a real estate management company, which safeguarded deposits and collected rents. The Defendants' interpretation of Exclusion D as applying to all acts, whether or not such acts could also fall outside of Exclusion D, would cause coverage under the Policy to be denied in every instance. Indeed, an insurance policy's interpretation should not lead to an absurd or unreasonable result." Cent. Sur. Co. v. Casino W., Inc., 329 P.3d 614, 616 (Nev. 2014) (quotations and citations omitted).

41. Simply put, the language of Exclusion D, coupled with the language of Exclusion C, and applied to the facts of this matter, makes the application of Exclusion D ambiguous. When an insurance policy is determined to be ambiguous "[a] court will interpret the policy to effectuate the insured's reasonable expectations," and a court will "construe[] any ambiguities in an insurance policy in favor of the insured." Cent. Sur. Co. v. Casino W., Inc., 329 P.3d 614, 616 (Nev. 2014); Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009). The courts goal when interpreting an ambiguous policy is to give effect to every word, and to "not interpret a contract so as to make meaningless its provisions." Bielar v. Washoe Health Sys., Inc., 306 P.3d 360, 364 (Nev. 2013).

42. Finally, because an insurance policy is a contract of adhesion, is should be "interpreted broadly, affording the greatest possible coverage to the insured." Farmers Ins. Group v. Stonik By and Through Stonik, 867 P.2d 389, 391 (Nev. 1994). Accordingly, the Complaint cannot be dismissed under Exclusion D if it fails to meet any of the required elements

of the Griffin case, that is, (i) it is not drafted in obvious and unambiguous language; (ii) Greenwich has not demonstrated that the only reasonable interpretation of Exclusion D would be to preclude all of the Trustee's claims under the Policy; and (iii) Greenwich failed to establish that the exclusion plainly applies to the facts at hand.

3. The Prior Knowledge Provision of the Policy Does Not Apply to Preclude Coverage.

43. Next, the Defendants attempt to defeat summary judgment because the period of coverage under the Policy ran from June 14, 2013, to June 14, 2014. As the wrongful acts of Ms. Peladas-Brown began as early as February 2013, Greenwich argues there was no coverage prior to June 14, 2013, and therefore, coverage must be denied under the prior knowledge provision of the Policy.

44. Simply put, Greenwich appears to forget that it issued an identical policy to the Company for the policy period of June 14, 2012, through June 14, 2013, Policy No. PEG914932-5. A copy of this Policy is attached to the Trustee's statement of undisputed facts in support of her motion for summary judgment, Docket No. 13-1.[2] Accordingly, the Defendants' "prior knowledge" argument is not sufficient to dismiss the Complaint, as the Defendants' provided insurance coverage at all relevant times.

4. The Innocent Insured Provision Does Apply to Require Coverage.

45. Finally, the Defendants make a last ditch effort to defeat summary judgment under a theory that because the Company and Mr. Brown do not have judgments against them

[2] While the 2012-2013 Policy is not attached to the Complaint, the Complaint asserts that the Company had insurance coverage under the time periods at issue. Moreover, the 2012-2013 Policy is now filed with the Court at Docket No. 13-1, for which this Court may take judicial notice. Wensley v. First Nat. Bank of Nevada, 874 F.Supp.2d 95 (D. Nev. 2012) ("A court may, however, consider certain materials – documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment.").

for Ms. Peladas-Brown's actions, they are parties that were never "legally obligated to pay" and as a result, the duty to provide coverage is not triggered. See Motion, pp. 16-17. In essence, the Defendants argue that unless all possible insureds under the policy become legally obligated to pay, the Defendants do not have to provide coverage. Once again, Defendants' argument is without merit.

46. Specifically, Section A (Coverage) of the Insuring Agreements section of the Policy reads as follows:

> The Company will pay on behalf of the Insured all sums in excess of the deductible that the Insured becomes legally obligated to pay as damages and claims expenses by reason of an act or omission including personal injury in the performance of real estate services by the Insured…

See Policy, Section I, A.

47. In turn, the definition of "Insured" under the Policy includes "any present or former partner, member, officer, director or employee for real estate services performed on behalf of the Named Insured." See Policy, Section III, Definitions.

48. Accordingly, under the terms of the Policy, Ameri-Dream Realty, Ms. Peladas-Brown and Mr. Brown each fall under the definition of "Insured." While each of the aforementioned parties may fall under the "Insured" definition, the Defendants' reading of the coverage section of the Policy that Ameri-Dream Realty and Mr. Brown must also become "legally obligated to pay" is without merit.

49. First, the Insuring Agreements section simply states that the "Insured" must become legally obligated to pay. It does not state that "every possible Insured" or "all Insureds" must become legally obligated to pay, it simply uses the word "Insured."

50. Second, the Defendants' interpretation of the Insuring Agreements section flies in the face of the "Innocent Insured" provision of the Policy, which provides for coverage even

though some of the Insureds may be innocent. Indeed, one cannot be an "Innocent Insured" but then always become "legally obligated to pay" to trigger coverage under the Policy. Such a reading of the Policy would make the "Innocent Insured" provision meaningless. The court's goal when interpreting an ambiguous policy is to give effect to every word, and to "not interpret a contract so as to make meaningless its provisions." Bielar v. Washoe Health Sys., Inc., 306 P.3d 360, 364 (Nev. 2013). In other words, the Defendants' reading of the Innocent Insureds provision would make certain it could never be triggered.

51. As set forth above, to the extent the Policy is ambiguous by failing to make clear all "Insureds" must become legally obligated to pay to trigger the Policy, the Court should construe any ambiguities in favor of the insured. Cent. Sur. Co., 329 P.3d at 616; Allstate Ins. Co., 206 P.3d at 575.

52. Greenwich's argument also fails because insurance policies are contracts of adhesion, which should be "interpreted broadly, affording the greatest possible coverage to the insured." Farmers Ins. Group, 867 P.2d at 391.

53. Finally, to the extent the Court finds the Insuring Agreements provision of the Policy to require Ameri-Dream to be legally obligated to pay, there are 931 claims in the Bankruptcy Case, totally $2,497,635.38.

54. Under 11 U.S.C. § 502, a proof of claim filed in a bankruptcy proceeding is deemed allowed unless a party in interest objects. Gran v. Internal Revenue Serv., 964 F.2d 822, 827 (8th Cir. 1992). Under Federal Rule of Bankruptcy Procedure 3001(f), a proof of claim executed and filed in accordance with the bankruptcy rules shall constitute prima facie evidence of the validity and amount of the claim. In other words, as of the date hereof, Ameri-Dream is

legally obligated under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to pay $2,497,635.38 for the failures of its real estate related services.

55. Importantly, there are no current objections pending to these claims, and as a result, each claim is currently deemed allowed (the Chapter 7 Trustee is planning to object to certain duplicate and overstated claims in the Bankruptcy Case). Accordingly, Ameri-Dream is currently obligated to pay these Individual Claims, thereby triggering coverage under the Innocent Insured provision of the Policy. Therefore, the Defendants' Opposition fails.

D. The Trustee is Entitled to Summary Judgment on Count II of the Complaint Against the Defendants for Breach of Implied Covenant of Good Faith and Fair Dealing.

56. The Defendants brief response to Count II of the Complaint for Breach of Implied Covenant of Good Faith and Fair Dealing is that they denied coverage of the Policy, and had a valid reason to do so. Simply put, the Defendants put all their eggs in one basket with this argument. Indeed, as this Court should find that the Defendants breached the Policy by denying coverage, this Court should also find they breached the implied covenant of good faith and fair dealing.

57. Indeed, where a defendant deliberately countervenes the intention and spirit of the contract, the defendant can incur liability for the beach of implied covenant of good faith and fair dealing. Morris v. Bank of America Nevada, 886 P.2d 454 (Nev. 1994). Importantly, in this matter, the Trustee and 931 individual claimants detrimentally relied on the representations that Defendants, pursuant to the terms of the Policy, would reimburse the Company for valid claims, and there is no dispute there are over $1,000,000 of validly missing Security Deposits. Indeed, in this matter, the Defendants purposefully denied the claim under the Policy and purposefully did not reimburse the Company for the loss of Security Deposits.

58. As a result, the Defendants deliberately countervened the intention and spirit of the Policy and breached the implied covenant of good faith and fair dealing. According, the Trustee should be granted summary judgment on Count II of her Complaint.

E. The Trustee is Entitled to Summary Judgment on Count III of the Complaint against the Defendants for Breach of Fiduciary Duty.

59. Under Nevada law, an insurer's duty as a policyholder is akin to a fiduciary relationship. Powers v. U.S. Auto Ass'n, 962 P.2d 596, 602 (Nev. 1998). Indeed, if this Court finds that Defendants breached the Policy and breached the implied covenant of good faith and fair dealing, then this Court must also find that Defendants' deliberate actions in denying coverage under the Policy results in a breach of fiduciary duty to the Company, the Trustee and the 931 claimants who lost their security deposits, losses which the Policy was designed to protect.

60. Indeed, the Defendants sold the Policy to the Company and by entering into the fiduciary relationship, the Defendants' owed the Company fiduciary duties of the utmost good faith and fair dealing. Unfortunately, the Defendants' dealings with the claims made by the Company and the Trustee were anything but fair. Simply put, the Defendants breached their fiduciary duties to the Company and the Trustee should be granted summary judgment on Count III of her Complaint.

F. The Trustee is Entitled to Summary Judgment on Count IV of the Complaint Against the Defendants for Violations of NRS 686A.310.

61. Finally, the Defendants are correct that the Trustee argues the Defendants violated NRS 686A.310 by: (1) failing to promptly respond to claim communications; (2) failing to adopt and implement standards for investigation and processing of claims; (3) failing to effectuate prompt settlement of claims in which liability has become clear; (4) failure to defend the underlying lawsuit; and (5) compelling insureds to instigate litigation.

62. In response to these allegations, Defendants now argue because the Trustee is a "third-party" to the Policy, she has no private right of action under NRS 686A.310. See Opposition, p. 25. Ironically, pp. 11-13 of the Defendants' Opposition argues the Policy is a "third party liability policy" and distinguishes the Policy from typical first party policies.

63. Simply put, the Defendants cannot have their cake and eat it too. They cannot argue the Policy is a third-party policy, this precluding coverage under the "Insured versus Insured" provision, then argue there cannot be any claims for bad faith because only first parties can assert such claims.

64. Importantly, the Gunny case relied on by the Defendants denied coverage based on a first party insurance policy of the claimant's father. Gunny v. Allstate Ins. Co., 830 P.2d 1335 (Nev. 1992). Indeed, this Court actually distinguished Gunny and held that a third-party claimant who is a specific intended beneficiary of an insurance policy might have a contractual relationship to support a bad faith claim. Bergerud v. Progressive Cas. Ins., 453 F.Supp.2d 1241, 1246-47 (D. Nev. 2006) (holding third-party had sufficient contractual relationship with the insurer to assert bad faith claim).

65. Simply put, Gunny is not applicable to this matter because it involved a first party insurance policy. Here, the Defenants already admit the Policy is a third-party policy, and thus, the Trustee and the 931 individuals who asserted claims in the Company's bankruptcy case are all intended third-party beneficiaries under the Policy. Accordingly, the Trustee may maintain a cause of action for bad faith and NRS 686A.310 applies to this matter.

66. As the Defendants do not appear to dispute or present any evidence to counter the Trustee's allegations under NRS 686A.310, the Trustee should be granted summary judgment on Count IV of her Complaint.

Conclusion

67. For the reasons stated herein, the Trustee is entitled to Summary Judgment on all claims for relief set forth in her Complaint.

Dated this 31st day of January, 2017.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent electronically on January 31, 2017, to the following:

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