

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

Civ. No. 11-cv-574 (MJD/FLN)

v.

JASON BO-ALAN BECKMAN, et al.,

Defendants,

R.J. ZAYED,

Receiver.

**MEMORANDUM OF LAW IN SUPPORT OF NONPARTY EVEREST
INDEMNITY INSURANCE COMPANY'S RENEWED MOTION TO LIFT
ASSET FREEZE TO PERMIT PAYMENT OF DEFENSE COSTS**

INTRODUCTION

Nonparty Everest Indemnity Insurance Company (“Everest”) is contractually obligated to pay Claim Expenses, including the costs of defense counsel, on behalf of certain Insureds who submitted notices of Claims under an Everest excess insurance policy that Everest issued to Western International Securities, Inc. (“Western”) for the period of March 1, 2009 to March 1, 2010.

Everest has received invoices for costs incurred by various defense counsel on behalf of Everest Insureds under the Policy in the amount of \$234,055.74. To date, however, Everest has been barred from making such payments pursuant to this Court’s Order dated August 16, 2012, in which this Court denied Everest’s motion to lift the asset freeze to permit payment of defense costs. (*ECF Doc. 319.*) In opposition to that motion, the appointed Receiver in this matter argued that paying defense counsel, which

will erode the Policy Limits, would deplete a Receivership asset because the Receiver anticipated he would be able to recover Policy proceeds through claims he intended to pursue against Western.

Since the Court's August 16, 2012 Order, the Receiver did in fact pursue, and has resolved, his damage claim against Western, and also settled a pre-existing dispute regarding Policy proceeds paid out pursuant to a settlement between certain FINRA claimants and Western. (*ECF Docs. 251, 290.*) The resolution of these claims included a broad release of further claims against Western and its insurer, Everest. Accordingly, the Receiver's arguments in opposition to Everest's original motion to lift the asset freeze to permit payment of defense costs no longer apply because the Receiver will be unable to recover additional Policy proceeds.

Thus, at this stage in the proceedings, continued enforcement of the Freeze Order as to the Everest Policy will not yield additional Policy payouts for the Receiver and aggrieved investors. Moreover, lifting the asset freeze will permit Everest to compensate unpaid defense counsel who performed legal work months, and in some cases, years ago, on behalf of Everest Insureds. Given the changed circumstances, Everest hereby renews its motion and respectfully requests that the Court grant its motion for relief from the asset freeze to permit Everest to pay defense costs.

STATEMENT OF FACTS

I. Relevant Procedural History.

This Court issued an Order freezing the assets of Beckman and the other defendants in the above entitled matter on March 8, 2011. (*ECF Doc. 9.*) This "Freeze

Order” froze several categories of assets, including insurance policies for which any of the defendants is a covered person or beneficiary. (*Id.* at 9.) The Freeze Order was intended, in part, to maintain the status quo while the Receiver executed this Court’s mandate to identify and collect assets for distribution to aggrieved investors. (*ECF Doc. 243* at 2.) This Court issued the Freeze Order based upon its finding of “good cause to believe that investor funds and assets which could be subject to an Order of disgorgement will be dissipated, concealed or transferred from the jurisdiction of this Court.” (*ECF Doc. 9* at 2.) The Court ordered that the assets would remain frozen “until otherwise ordered by this Court.” (*Id.*)

In a motion filed on September 6, 2011 (*ECF Doc. 182*), Everest asked the Court to temporarily lift the asset freeze to permit it to pay legal fees to counsel who had undertaken the defense of certain Everest Insureds, explaining that Everest is contractually obligated to pay such defense costs pursuant to the terms of an Excess Insurance Policy (Policy No. FL5 EE0006-0091 (“Everest Policy”)) that it issued to Western for the period of March 1, 2009 to March 1, 2010. (*ECF Doc. 186.*)

The Receiver contested Everest’s motion, arguing that Everest’s payment of defense costs would deplete an asset, i.e., proceeds of the Everest Policy, which the Receiver intended to appropriate for the defrauded investor class. (*ECF Doc. 243* at 2.) The Receiver further argued that “[t]he status quo should be maintained while the Receiver completes his efforts to marshal and collect Receivership assets.” (*Id.*) In particular, the Receiver expressed his intent to pursue a damage claim against Western, which he argued would implicate the Policy, and specifically requested that “the Everest

Policy should remain frozen pending the Receiver's lawsuit against Western." (*Id.* at 6.)
The Court denied Everest's motion on August 16, 2012. (*ECF Doc. 319.*)

Subsequently, the Receiver in fact pursued, and resolved, his damage claim against Western. (*ECF Doc. 251.*) In addition, the Receiver resolved a dispute that pre-existed Everest's original motion, in which the Receiver sought to enjoin distribution of the proceeds of a settlement that certain FINRA claimants had reached with Western. (*ECF Doc. 290.*) The Receiver asserted no other claims against Western or its insurer, Everest. (*ECF Doc. 248-2* at 6-7.)

II. The Everest Policy and Its Insureds.

Everest seeks to pay defense costs which it is obligated to pay pursuant to the terms and conditions of the Everest Policy. These defense costs have been incurred in connection with the representation of the following individuals and entities: Erik Erickson, Paul Wood, Donald Bizub, Adam Edenborg, Jason Bo-Alan Beckman, Oxford Private Client Group, LLC ("Oxford PCG") and Western (collectively the "Everest Insureds"¹).

The terms of the Everest Policy are set forth in detail in Everest's memorandum of law supporting its original motion to lift the asset freeze to permit payment of defense costs. (*ECF Doc. 186* at 8.) Briefly, the Everest Policy provides a maximum Limit of Liability of \$1,000,000 per Claim and \$1,000,000 in the aggregate, and is excess to a

¹ Of the Everest Insureds, only Beckman and Oxford PCG are defendants in this action.

now-exhausted primary policy issued by Certain Underwriters at Lloyd's, London ("Underwriters"). (Photis Aff. Ex. A at A.1.)

The Everest Policy requires Everest to defend the Everest Insureds against covered claims. (*Id.* at A.3.) The Limit of Liability is eroded by the payment of Claim Expenses, meaning that Claim Expenses are part of, and not in addition to, the aggregate Limit of Liability. (*Id.* at A.1, A.3.) Claim Expenses include, among other things, the payment of expenses to defend against the allegations in the lawsuits and arbitrations and to respond to the subpoenas in connection with SEC and FBI investigations. (*Id.* at A.3.)

III. The Everest Insureds' Claims.

Each of the Everest Insureds provided Everest with notices of claims under the Everest Policy, requesting that Everest reimburse their Claim Expenses, including defense costs, and, in some cases, damages. (Photis Aff. ¶ 5.) Specifically, they provided notice to Everest of the following matters for which they are seeking coverage:

- A. *United States Securities and Exchange Commission v. Jason Bo-Alan Beckman, et al.*, Case No. 11-cv-574 (MJD/FLN) filed in United States District Court, District of Minnesota ("SEC Action") (Photis Aff. Ex. B);
- B. *Howard and Sharon Phillips, et al. v. Trevor Cook et al.*, Case No. 09-CV-1732 filed in the United States District Court, District of Minnesota ("Phillips Action") (Photis Aff. Ex. C);
- C. *In the Matter of Arbitration of John and Lisa Sos and Western International Securities, Inc., Jason Bo-Beckman & NRP Financial, Inc.*, FINRA No. 09-05297 ("Sos Arbitration") (Photis Aff. Ex. D);
- D. *In the Matter of the Arbitration of Dale and Ann Woodbeck, et al. v. Jason Bo Beckman, NRP Financial, Inc. and Western International Securities, Inc.* ("Woodbeck Arbitration") (Photis Aff. Ex. E);

- E. *In the Matter of Arbitration of Anne E. Quiggle, et al. v. Jason Bo Beckman, et al.* (“*Quiggle Arbitration*”) (Photis Aff. Ex. F);
- F. *In the Matter of Arbitration of Ralph R. Abrahamson v. Western International Securities, et al.* (“*Abrahamson Arbitration*”) (Photis Aff. Ex. G);
- G. September 13, 2010 email from Matthew Boos, counsel for Paul Wood, advising of a claim or potential claim by Ronald Stolpman (“*Stolpman Claim*”) (Photis Aff. Ex. H);
- H. SEC subpoenas issued to a) Beckman dated June 21, 2010; b) Oxford c/o Jason Beckman dated June 23, 2009 and c) Oxford Global Advisors c/o Jason Beckman dated June 22, 2009 (“*Beckman Subpoenas*”) (Photis Aff. Ex. I);
- I. SEC subpoena issued to Adam Edenborg (“*Edenborg Subpoena*”) (Photis Aff. Ex. J);
- J. FBI investigation including an interview of Paul Wood (“*FBI Investigation*”) (Photis Aff. Ex. K);
- K. *Gunvant Bhatt v. Western International Services, Inc., NRP Financial, Inc. and Eric Erickson*, FINRA No. 11-01754 (“*Bhatt Arbitration*”) (Photis Aff. Ex. L).

Everest reviewed the notices it received and advised the Everest Insureds that, subject to certain reservations of rights,² the Everest Insureds are entitled to coverage for Claim Expenses under the Everest Policy for the above enumerated lawsuits, arbitrations and investigations. (Photis Aff. ¶ 6.)

The Everest Insureds and their counsel have submitted invoices to Everest for Claim Expenses (defense costs and expenses) requesting payment in the total amount of \$234,055.74. (*Id.* at ¶ 8, Ex. O.)

² Everest has since notified Beckman that his criminal conviction on or about June 13, 2012 triggered certain Policy exclusions that preclude further coverage to him. (Photis Aff. ¶ 7.)

LEGAL ANALYSIS

I. Releasing the Everest Policy from the Freeze Order Is Warranted Because the Freeze Will Yield No New Proceeds and Has the Disadvantageous Effect of Preventing Payments Owing to Defense Counsel.

A district court has the authority to enter an asset freeze order in an SEC enforcement action, and likewise has the “corollary authority to release frozen personal assets, or lower the amount frozen.” *U.S. S.E.C. v. Petters*, 09-1750 ADM/JSM, 2009 WL 3379954, at *5 (D. Minn. Oct. 20, 2009) (citing *S.E.C. v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1105-06 (2d Cir. 1972); *S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 429 (S.D.N.Y. 2001)). “While the primary purpose of freezing assets is to facilitate compensation of defrauded investors in the event a violation is established at trial, ‘the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief.’” *S.E.C. v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d at 429 (quoting *Manor Nursing Centers*, 458 F.2d 1082, 1105 (2d Cir. 1972)).

Although this Court denied Everest’s previous motion to lift the Freeze Order to permit payment of defense counsel, Everest is confident that due to the subsequent developments in this litigation, namely, the resolution of the Receiver’s claims against Western, the time is now ripe for renewal of this motion. Specifically, the Receiver’s previous arguments for enforcing the Freeze Order as to the Everest Policy no longer apply, and the Receiver will not be able to recover additional Policy proceeds even if the asset freeze is enforced. Thus, there is no advantage to be gained by continuing to freeze the Everest Policy. Conversely, if the freeze is lifted, Everest will be able to fulfill its

contractual obligation to compensate its Insureds' defense attorneys. Therefore, this Court should grant relief from the Freeze Order as to the Everest Policy to permit Everest to meet its contractual obligations to compensate defense attorneys for their work in defending Everest Insureds. Everest seeks this relief pursuant to Federal Rule of Civil Procedure 71, which provides that the procedure for enforcing an order for or against a nonparty is the same as for a party.

A. Releasing the Everest Policy from the Freeze Will Permit Everest to Meet Its Contractual Obligation to Compensate Defense Attorneys for Work They Have Already Performed.

First, by lifting the Freeze Order as to the Everest Policy, this Court will enable Everest to compensate various defense attorneys who have already performed legal work on behalf of the Everest Insureds, and will thereby enable Everest to fulfill its contractual obligations to its Insureds under the Everest Policy.

Under the law of almost all jurisdictions, including Minnesota, analysis of insurance policies is governed by general principles of contract interpretation, and "insurance contracts will be enforced in accordance with their plain language." *In re SRC Holding Corp.*, 545 F.3d 661, 666, 671 (8th Cir. 2008). Under Minnesota law, an insurer's obligation to defend is contractual. *FACE, Festivals and Concert Events, Inc. v. Scottsdale Ins. Co.*, 632 F.3d 417, 420 (8th Cir. 2011) (citing *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). In determining whether a duty to defend exists, the court looks at the duty as of the time the insured tendered the defense to the insurer. *Id.* at 420 (citing *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166

(Minn. 1986). This duty arises if any part of the cause of action is arguably within the scope of policy coverage. *Id.* (citing *Jostens, Inc.*, 387 N.W.2d at 165).

Here, each Insured has an independent contractual right to claim benefits under the Everest Policy, including the benefit of Claim Expenses, which encompasses legal defense costs. With respect to each Insured, Everest acknowledged an obligation to pay Claim Expenses under the terms and conditions of the Everest Policy to the Everest Insureds in connection with the lawsuits, arbitrations, subpoenas and investigations enumerated above. In addition, defense counsel for the Insureds submitted their invoices to Everest, along with continuing requests that such be paid. (Photis Aff. ¶ 8, Ex. O.)

This Court and the Receiver have consistently taken the position that the Everest Policy is subject to the March 8, 2011 Freeze Order because Beckman is alleged to be among the Insureds under the Everest Policy. (*See ECF Doc. 67* at 16.) To date, therefore, Everest has not paid the outstanding invoices for defense costs.³ If Everest is not permitted to make payment of Claim Expenses pursuant to the terms and conditions of the Everest Policy, the defense counsel who represented the Everest Insureds will remain unpaid for work they already performed, now months, and in some cases, years ago.

³ Notably, the outstanding invoices at issue include amounts that were incurred and invoiced prior to the March 8, 2011 Freeze Order. *See U.S. CFTC v. Cook et al.*, 2010 WL 431595 (D. Minn. Jan. 27, 2010) (holding freeze orders issued in the related *Cook* matter did not apply to fees and costs for legal services rendered and costs incurred prior to the date of the freeze orders, although there, the fees were also received by defense counsel prior to the date of the freeze orders). (*See Photis Aff. Ex. O.*)

B. Lifting the Asset Freeze as to the Everest Policy Is Appropriate Because the Receiver's Arguments for Denying Everest's Original Motion No Longer Apply.

Not only would the continued enforcement of the freeze on the Everest Policy have the disadvantage of preventing defense counsel from being compensated, but in addition, enforcing the Policy freeze will provide no further benefit to the Receiver and the aggrieved class of investors because the Receiver has resolved his claims against Western.

In response to Everest's original motion to lift the asset freeze to permit payment of defense costs, the Receiver argued that Everest's request was "inextricably linked to the Receiver's previously filed Motion to Enjoin Distribution of Settlement Proceeds to the FINRA Claimants. (Doc. No. 65)." (*ECF Doc. 243* at 2 n.1). Specifically, the Receiver's motion sought to enjoin the Woodbeck and Quiggle FINRA claimants from receiving proceeds from a settlement they had reached with Western. (*ECF Doc. 65*.) In support of his motion, the Receiver argued that Western's payments to those FINRA claimants would cut into the Receiver's own claims against Western and thereby deplete a Receivership asset. (*ECF Doc. 67* at 3.) Subsequently, on April 12, 2012, this Court approved a settlement agreement between the Receiver and Woodbeck/Quiggle FINRA claimants, wherein the Receiver and those claimants agreed to split the settlement proceeds from Western. (*ECF Doc. 290*.) Thus, the Receiver's concern was resolved.

In addition, the Receiver argued that Everest Policy proceeds should not be depleted while the Receiver pursued a damage claim against Western. (*See, e.g., ECF Doc. 243*.) Thereafter, on January 20, 2012, this Court approved a settlement agreement

between the Receiver and Western that included a broad release of further claims against Western. (*ECF Docs. 251, 248-2* at 6-7.)

Accordingly, the Receiver's claims against Western are now fully and finally resolved, and the Receiver has exhausted the purposes of the Freeze Order with respect to the Everest Policy. Due to the Receiver's release of Western, the Receiver will be unable to pursue claims against Western going forward, and will therefore be unable recover additional Everest Policy proceeds for distribution to the Ponzi scheme victims.

Where all of the funds in a given asset belong to parties who are not defendants in the Receivership action, and therefore the asset does not contain any investor funds, the Court appropriately releases the asset from the Freeze Order. *See S.E.C. v. Patel*, 2011 WL 1260177, at *2 (D. Minn. Mar. 11, 2011) *report and recommendation adopted* (D. Minn. Apr. 5, 2011) (releasing IRA account from asset freeze where funds in the account originated in non-defendant's 401(k) and therefore the account did not contain any investor funds). Here, relief from the Freeze Order is appropriate because the Everest Policy does not contain any funds that are potentially recoverable by the Receiver. If permitted, Everest's payments to defense counsel will not impact the victims' chance for recovery, even provided these Claim Expenses will erode the limits remaining on the Everest Policy. Accordingly, Everest respectfully requests that the Court release the Everest Policy from the Freeze Order to permit payment of defense costs.

CONCLUSION

For the reasons stated above, Everest Indemnity Insurance Company respectfully requests that the Court grant its motion to lift the asset freeze and permit payment of the defense costs pursuant to the terms of the Everest Policy.

Respectfully submitted,

Dated: December 20, 2013

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