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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In Re American West Development, Inc., Debtor.	Case No. BK-S-12-12349-MKN Chapter 11 **AMERICAN WEST DEVELOPMENT, INC.'S OPPOSITION TO MOTION OF ZURICH AMERICAN INSURANCE COMPANY AND ITS AFFILIATE INSURERS TO DETERMINE AND DECLARE THAT THE DEBTOR'S DISCHARGE DOES NOT EXTEND TO CERTAIN IDENTIFIED NON-DEBTORS, OR, IN THE ALTERNATIVE, TO MODIFY DISCHARGE INJUNCTION** Hearing date: July 8, 2015 Hearing time: 9:30 A.M. Place: Bankruptcy Courtroom No. 2

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I. Introduction

As set forth herein, American West Development, Inc. ("AWDI" or "Reorganized Debtor") opposes the Motion of Zurich American Insurance Company and Its Affiliate Insurers (collectively, "Zurich") to Determine and Declare that the Debtor's Discharge Does Not Extend to Certain Identified Non-Debtors, or, in the Alternative, to Modify Discharge Injunction [dkt. # 1056] (the "Motion").

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II. Pertinent Procedural Background

A. The Bankruptcy Proceedings

An Order Confirming Debtor's First Amended Chapter 11 Plan of Reorganization was entered on February 14, 2013 [dkt. # 853] (the "Confirmation Order"). The First Amended Chapter 11 Plan [dkt. # 714] (as corrected with an Errata [dkt. # 784]) ("First Amended Plan") was approved at a confirmation hearing on January 15, 2013.

Zurich did not oppose confirmation of the First Amended Plan once the Confirmation Order was modified to contain the following specific provisions revisions dealing with Zurich in paragraph 8 thereof:

> 8. Insurance Matters. The following matters previously agreed by and between Debtor, on the one hand, and Zurich American Insurance Company, Steadfast Insurance Company, and their affiliate insurers (collectively, "Zurich"), on the other hand, shall remain in full force and effect with respect to the Plan: (a) no debt or obligation owed to Zurich by any non-debtor, including but not limited to obligations owed to Zurich by American West Homes, Inc., shall impair, decrease, or otherwise affect any insurance policy or proceeds payable under such policy; (c) Zurich shall not assert that the Construction Defect Trust, the Debtor, the Reorganized Debtor, or the Estate is liable or responsible for debts owed to Zurich by non-debtor American West Homes, Inc. or any other non-debtor; (d) Zurich shall not assert that any non-debtor is liable or responsible for debts owed to Zurich by Debtor; and (e) Zurich agrees not to assert that the Construction Defect Trust, the Debtor, the Reorganized Debtor, or the Estate are jointly-and-severally liable for amounts owed by American West Homes, Inc. or any other non-debtor.

Zurich was an active participant in AWDI's Chapter 11 proceedings. On September 21, 2012, Zurich objected to confirmation of the AWDI's original proposed Plan of Reorganization [dkt. # 263] (as modified by the original Plan's supplement [dkt. #643]). *See* Objection of [Zurich] to Debtor's Plan Supplement and Confirmation of Debtor's Plan of Reorganization [dkt. # 668] (the "Zurich Objection"). The Zurich Objection dealt primarily with: so-called "insurance neutral" language, purported limitations of Zurich's rights to litigate claims and the transfer of rights to the Construction Defect Trust, and the allegation that among other things AWDI's original plan modified the self-insured retention ("SIR") obligations under governing policies.

The Zurich Objection did not concern, mention, or attach the Zurich Policy, which is the sole subject of the Motion. Rather, it attached and solely related to one of the so-called "AWD

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Policies." Zurich specifically states that the "AWD Policies" are not at issue in its Motion. *Compare* Motion at 3:19-3:22 and Zurich Objection at 2, FNs 2 and 3 (identifying seven policy numbers, none of which is the Zurich Policy, which Zurich refers to as "the relevant AW Homes Policy" in the Motion at 4:8-9).

After Zurich filed its objection, AWDI and Zurich worked through and resolved Zurich's issues. The result was the above-cited compromise language in paragraph 8 of the Confirmation Order. Accordingly, Zurich did not further oppose the First Amended Plan nor did its counsel make an appearance at the confirmation hearing in January 2013.[1] Indeed, Zurich did not vote on AWDI's First Amended Plan. *See* declaration of Jeffrey S. Stein of Garden City Group, Inc., containing the results of voting on the First Amended Plan [dkt. #871].

Zurich failed to request or secure the relief it now seeks in the Motion in connection with confirmation of the First Amended Plan and entry of the Confirmation Order. Paragraph 8 of the Confirmation Order, which AWDI and Zurich specifically negotiated in response to Zurich's concerns, does not contain language specifically authorizing Zurich to pursue non-debtors or stating that the discharge objection does or does not prohibit Zurich's proposed actions against various non-debtors.

On September 5, 2013, the Court entered its Order Entering Final Decree [dkt. # 1039] (the "Case Closure Order"). The Case Closure Order states that:

> It appearing that this Court's continuing jurisdiction is no longer necessary and that the case has been fully administered, IT IS HEREBY ORDERED that a Final Decree is entered closing this case without prejudice to the reopening of this case for further administration.

No one, including Zurich, has moved to reopen the proceedings.

Zurich waited to file the Motion until nearly 28 months after the Confirmation Order was entered, from February 2013 to June 2015, and nearly 21 months after the Case Closure Order

[1] Local Rule 3020 requires parties opposing confirmation of a Chapter 11 plan to file declarations in opposition to confirmation seven days or more before confirmation hearing. The confirmation hearing in this matter occurred on January 15, 2013.

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was entered.[2] In its Motion, Zurich fails to explain why it failed to raise the issues set forth in the Motion in connection with confirmation of the First Amended Plan or before the entry of the Case Closure Order. While Zurich's Motion contains vague and unsupported statements about how AWDI "has asserted that its confirmed chapter 11 plan discharges debts owed to Zurich by certain non-debtor entities" (Motion at 1:24-25), the accompanying declaration of Nancy Dow does not discuss AWDI's alleged statements, including who made them or when they were made. More importantly, Zurich fails to identify why it did not seek the requested relief in 2012 or 2013 when plan confirmation proceedings were occurring. This is even more puzzling based on Zurich's representations about when the underlying losses were reported to it as the insurer: January 1, 2001 for one claim and January 2, 2001 for the other four claims, each more than 14 years ago. *See* Motion at 5-8 and at Exhibit B (Dow declaration) at ¶¶ 4-8. Indeed, Zurich asserts that all but one of the "Due Date[s] of SIR" for the claims were well before the Confirmation Order was entered: December 20, 2010, February 5, 2012 (two claims), June 2, 2011, and January 3, 2014. *Id.*[3]

B. The Underlying Claims Relating to the AWDI and the Zurich Policy

Zurich's descriptions of the five claims in its Motion are cursory and uninformative. Zurich fails to provide any meaningful detail or crucial facts about the claims, such as who were the named defendants in the underlying litigation, where the actions were filed, or case numbers. The only information Zurich provides is the alleged "Date Loss Reported" (itself an unclear, undefined term), the Zurich Policy number (which is the same for all five alleged claims according to Zurich and which Zurich identifies as the "relevant AW Homes Policy"), the amount of Zurich's alleged payments, the amount of alleged SIR due, the alleged due date of the

[2] In August 2013, six months after plan confirmation, Zurich's counsel sent a letter to counsel for the AWDI about Zurich's claims. Counsel thereafter discussed Zurich delaying its pursuit of the subject of its Motion until the August 12, 2013 adversary complaint between the Office of the United States Trustee for Region 17 and the AWDI was resolved.

[3] How Zurich determines the "Due Date of SIR" for purposes of the Motion is unclear and AWDI does not concede either that any SIR is or was due or when any such SIR would have been due. Reorganized Debtor further does not concede any other facts in relation to the claims discussed in the Motion, including when the date of loss was reported, the applicable policy or policy number, what payment(s) Zurich made, to whom Zurich made payments, or who is obligated or liable to pay any particular SIR.

SIR, and identical lists of the 25 Named Insureds from the Zurich Policy (omitting only AWDI, another "Named Insured", as discussed more below).

The Reorganized Debtor has limited information about the claims and litigation. It has discerned the following details about three of the claims:

Claim	Case Number	Date Complaint Filed
Backman Claim	EJDC[4] A633888	January 24, 2011
Stacy Spring Claim	EJDC A575959	March 11, 2009[5]
Medina Claim	EJDC A558243	March 3, 2008

American West Homes and AWDI were named as defendants in all of these actions. Conversely, none of the so-called "non-debtor SIR Obligors" were named as defendants in any of the actions. Importantly, each of the complaints was filed well before the confirmation proceedings.

AWDI is unaware of the details of the so-called "Classic Development Claim" identified on page 6 of the Motion and the "DJ Claim" identified on page 8 of the Motion. Zurich's counsel has not responded to requests for additional information about the claims.[6]

III. ARGUMENT

A. Zurich's Motion is Procedurally Flawed and Factually Inaccurate

1. Zurich's Motion is Delinquent And Should be Denied

Zurich's Motion asks the Court either to interpret or modify the discharge provisions of the Confirmation Order and its resulting injunction, but Zurich provides no procedural basis for its Motion. Zurich cites only substantive bases in support of its request that the Court interpret or modify the Confirmation Order. This notable omission has a likely explanation: whatever

[4] EJDC refers to the Eighth Judicial District Court of the State of Nevada in and for County Clark.

[5] American West Homes, Inc. was named as a defendant in the original November 18, 2008 complaint. AWDI was added as a defendant in the amended complaint, filed on March 11, 2009.

[6] Edward Lubbers, an attorney who represents the Reorganized Debtor, requested on June 16, 2015 that Zurich's attorney Ann Marie Hansen provide the date Zurich received each claim or notice of claim, the date or dates alleged in each claim, and if lawsuits were filed, the court case numbers. *See* Declaration of Edward Lubbers, filed concurrently herewith ("Lubbers Declaration"). Mr. Lubbers also mentioned that the Reorganized Debtor is unaware of the "DJ" claim discussed in the Motion. *Id*. As of the preparation of this response, Ms. Hansen had not replied to Mr. Lubbers' request. *Id*.

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procedural basis Zurich could potentially choose to rely upon (whether, Federal Rules of Bankruptcy Procedure ("FRBP") 5010 or 9024, Federal Rule of Civil Procedure ("FRCP") 60, or 11 U.S.C. § 1144 or 350), the Motion is fatally flawed. Each possible procedural basis is discussed and rejected in turn below.

Zurich's Motion seeks either a partial revocation or amendment of the Confirmation Order. The Motion is, however, filed well after the expiration deadline to revoke an order confirming a plan, and is unreasonably late under the standard for general motions for relief from orders.

FRBP 9024 governs motions for relief from orders and judgments:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

11 U.S.C. §1144 in turn provides that:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall-
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
> (2) revoke the discharge of the debtor.

Because the Confirmation Order was entered on February 12, 2013, Zurich's deadline to seek an order revoking the Confirmation Order was August 12, 2013. There is no dispute that Zurich failed to seek such relief by August 12, 2013. Moreover, no procurement of the Confirmation Order by fraud is even alleged by Zurich.

The Motion is untimely under FRCP 60. FRCP 60 contains two main categories of relief from orders/judgments and enumerates various subcategories. Generally speaking, a Court may always correct a "clerical mistake or a mistake arising from oversight or omission whenever one

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is found in a judgment, order, or other part of the record" at any time. FRCP 60(a). Courts may enter such relief with or without a motion and with or without notice. While there is apparently no deadline for such motions, Zurich does not argue that there has been a clerical mistake or an oversight or omission and accordingly FRCP 60(a) is inapplicable.

FRCP 60(b) permits a court to relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Motions under FRCP 60(b) must be made "within a reasonable time", and motions under FRCP 60(1), (2), and (3) must be brought no more than one year after entry of the judgment/order. FRCP 60(c).[7]

Zurich fails to specify which provision of FRCP 60(b) might theoretically apply to its Motion. Zurich likewise fails to supply any evidence (or argument, for that matter) in support of any of the bases for relief from the Confirmation Order under FRCP 60(b). Regardless, if considered a request under any of FRCP 60(b)'s subparts, the Motion is untimely because it is not brought within a reasonable time.

As noted above, the Confirmation Order was entered in February 2013, following multiple iterations of the plan. Zurich participated in revisions to AWDI's original plan. The

[7] The Ninth Circuit has held that "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009). All of these factors weight against the relief Zurich seeks, which is presumably why Zurich fails to discuss any of them in its Motion.

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Motion, filed more than two years after the First Amended Plan was confirmed and the Confirmation Order was entered, filed years after complaints were filed in relation to most or all of the underlying claims, and filed *14 ½ years* after Zurich claims the losses were originally reported, cannot be deemed to meet a reasonable time criteria.

Zurich's Motion is also procedurally defective to the extent it seeks to recover professional fees after the applicable claim bar date. Professional fee claims were due by June 15, 2013.[8] Zurich retained counsel to represent AWDI in relation to the underlying claims, and those expenses at least in part make up the SIR. *See, e.g.*, letter from Susan Gummow to Edward Lubbers, attached to the Lubbers Declaration as Exhibit 1 (including "legal fees and other expenses" under the list of claims relating to the SIR).

In addition, the Motion should be denied under the doctrine of laches. *See, e.g., In re Beaty*, 306 F.3d 914, 924 (9th Cir. 2002) (holding that laches applies to FRBP 5010 and 9024/FRCP 60(b) actions). "The affirmative defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id*. at 926. As discussed above, Zurich fails to explain the considerable delay in bringing this issue to the Court's attention. AWDI is prejudiced by the need to respond to this Motion and the potential adverse implications of a modification of the discharge injunction, among other things.

Finally, as noted above, AWDI's chapter 11 case was closed on September 5, 2013. Zurich has not filed a motion to reopen these proceedings under Federal Rule of Bankruptcy Procedure 5010 ("A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code), Local Rule 5010[9], or 11 U.S.C. § 350(b) ("A case may be

[8] *See* First Amended Plan [dkt. # 714] at 4 (paragraph 2.2(a)(3)(A) , which provides that applications for professional fee claims were due within 90 days of the Effective Date. The Effective Date of the First Amended Plan was March 15, 2013. *See* Notice of: (I) Effective Date, of Debtor's First Amended Chapter 11 Plan of Reorganization (Dated October 15, 2012); and (II) Deadline for Filing Requests for Payment of Administrative Claims [dkt. # 868].

[9] LR 5010 requires anyone seeking to reopen a matter to make a disclosure about fees owed in the underlying matter and in some cases requires the party seeking to reopen the matter to pay certain fees. Zurich neither moved to reopen AWDI's Chapter 11 proceedings nor did it make the requisite fee disclosure.

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reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause"). "Procedure requires that a motion be filed" for a bankruptcy court to reopen a closed matter even if the bankruptcy court had jurisdiction to hear a specific motion. *In re Elias*, 215 B.R. 600, 604 (B.A.P. 9th Cir. 1997) *aff'd.* 188 F.3d 1160 (9th Cir. 1999).

While the Ninth Circuit has held that reopening a case is "typically ministerial and presents only a narrow range of issues", including whether further administration appears to be warranted (*In re Lopez*, 283 B.R. 22, 26 (B.A.P. 9th Cir. 2002)), motions to reopen are not granted as a matter of right. *See In re Elias*, 215 B.R. at 604 (the Court's decision to reopen is entirely within its sound discretion, based on the circumstances of each case). A party seeking to reopen a bankruptcy case must present prima facie proof that the estate has not been fully administered. *Id*. at 27. Zurich has failed to present such proof. Reopening the AWDI case is a threshold prerequisite to the Court considering Zurich's Motion. Because Zurich failed to move to reopen AWDI's case, it has failed to establish that, *inter alia*, it is a "party in interest" or whether it meets any of the criteria of section 350(b).[10] Therefore, regardless of whether Zurich's Motion falls under FRCP 60, FRBP 5024[11], or 11 U.S.C. §1144, Zurich has failed to satisfy a condition precedent for the Court's consideration of its request.

2. <u>Zurich's Attempts to Extend the Deadline to Seek Modification of the Court's Order is Improper</u>

Zurich cites 11 U.S.C. § 105, 28 U.S.C. § 2201 (the Declaratory Judgment Act), and "this Court's inherent authority to interpret its own orders" as supporting the Court's authority to resolve this "dispute." While the Court may possess authority to issue declaratory relief in some circumstances (and usually in the context of an adversary proceeding, see *infra*), requests for declaratory relief may not be used to circumvent other deadlines or to obviate the Motion's other procedural defects.

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[10] AWDI preemptively objects to any attempt Zurich may make to discuss these issues for the first time in its reply brief.

[11] As noted above, FRBP 5024 provides that motions to reopen bankruptcy matters need not be brought within the one-year deadline for certain FRCP 60 motions. Because Zurich failed to move to reopen AWDI's Chapter 11 proceedings, this provision is inapplicable.

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11 U.S.C. § 105(a) grants bankruptcy courts the authority to:

> Issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The Motion does not seek to "enforce or implement" this Court's Confirmation Order or to carry out the provisions of the Bankruptcy Code. The Motion instead seeks to modify the Confirmation Order. Accordingly, section 105 is inapplicable.

Even if the Motion did fall within the scope of section 105, courts frown upon attempts to use declaratory relief actions as a means to extend deadlines which have expired. For example, in *Willms v. Sanderson*, 723 F. 3d 1094, 1102 (9th Cir. 2013), the Ninth Circuit rejected a party's attempts to treat a motion under Rule 4004 as arising under Rule 4007(c) through the exercise of equitable powers under 11 U.S.C. § 105, noting that "[section] 105(a) is not a 'roving commission to do equity.'" Zurich cannot obtain an extension of time to seek relief from the Confirmation Order by framing its Motion as one for declaratory relief.

3. Zurich's Motion Should Be Denied Because It Must Bring an Adversary Complaint to Seek its Requested Relief

Finally, and perhaps most importantly, Zurich's Motion is an improper attempt to evade the requirement that it file an adversary complaint. Bankruptcy Rule 7001 defines what types of actions are adversary proceedings. Subparts 5, 6, and 9 of Bankruptcy Rule 7001 all arguably relate to Zurich's requested relief:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
> . . .
> (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
>
> (6) a proceeding to determine the dischargeability of a debt;
> . . .
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing.

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Zurich's Motion seeks either an order declaring that the discharge does not extend to certain non-debtors, or an order modifying the discharge injunction. These requests both seek to at least implicitly (and partially) revoke the Confirmation Order and to determine the dischargeability of a debt. If any one of those subparts of Rule 7001 apply, and the Reorganized Debtor submits that both apply, then Zurich's request for declaratory judgment relating to them must be brought as an adversary proceeding.

Zurich chose to file the Motion instead of instituting an adversary action. By doing so, Zurich made a procedural error. "A motion procedure cannot be used to circumvent the requirement of an adversary proceeding." *In re Loloee*, 241 B.R. 655, 660 (B.A.P. 9th Cir. 1999). By filing a motion instead of initiating an adversary proceeding, Zurich has, among other things, deprived the Reorganized Debtor of the 30 day period to respond to adversary complaints under FRBP 7012(a).[12] It has also deprived the Reorganized Debtor (and potentially the "non-Debtor SIR Obligors", none of whom were served with the Motion) the opportunity to perform discovery.

B. Zurich's Theory of Liability Renders the Motion Self-Defeating

Zurich's Motion is self-defeating based on the plain language of the Confirmation Order. Zurich asserts that all of the "Named Insureds" under the AW Homes Policies fall within the scope of the terms "you" and "your" in the Zurich Policy and therefore that each of the "Named Insured" is jointly and severally liable for the SIR. Motion at 4, FN 5. Zurich defines 25 of these "Named Insureds" as "SIR Obligors" under each of the five claims mentioned in the Motion.

Zurich's argument undercuts itself. AWDI is a "Named Insured" on the so-called "AW Homes Policies."[13] *See* Exhibit A to Motion at page 6 of 72.[14] Zurich repeatedly uses the phrase

[12] While some Courts have found that a bankruptcy court's ruling on a motion that should have been brought as an adversary proceeding is non-reversible error, such error is only excused when "the record has been adequately developed." *In re Laskin*, 222 B.R. 872, 874 (B.A.P. 9th Cir. 1998). As noted herein, the record is not fully developed as Zurich has failed to provide critical information about the underlying claims, among other things.

[13] The use of the self-serving phrase "AW Homes Policies" in the Motion is misleading and therefore disputed because AWDI is identified as a "Named Insured" in the Zurich Policy.

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"non-debtor SIR Obligors" in an attempt to construct a fiction whereby AWDI is removed from the list of parties liable for the SIR. This is done most obviously because AWDI has been discharged. Perhaps Zurich recognizes that AWDI's inclusion on the "Named Insureds" list, combined with the Confirmation Order's language in paragraph 8(d), precludes it from pursuing the other 25 "Named Insureds" under a theory of joint and several liability regardless of whether those "Named Insureds" had anything to do with the underlying claim.

The Reorganized Debtor disputes that the "Named Insureds" on the Zurich Policy are jointly and severally liable for the SIRs, but that issue is beyond the scope of this Motion and the Court should refrain from ruling on it (see *infra*). The other "Named Insureds" presumably also dispute liability. Zurich's concealment of AWDI as a "Named Insured" appears to be deliberately intended to circumvent a contextual argument which undermines Zurich's arguments based on Zurich's theory of joint and several liability. As noted above, paragraph 8(d) of the Confirmation Order provides that "Zurich shall not assert that any non-debtor is liable or responsible for debts owed to Zurich by Debtor." Under Zurich's theory that all of the "Named Insureds" are jointly and severally liable for the SIR, it would necessarily assert that AWDI owes a debt to Zurich for the SIR. Merely omitting AWDI from an otherwise faithful recitation of every other person and entity listed as a "Named Insured" in the Zurich Policy does not alter the fact or rectify the issue.

Paragraph 8(d) would be rendered moot if Zurich could simply exclude AWDI from an analysis of whether a debt is owed by both AWDI and non-debtors. [15]

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[14] Curiously, Zurich's recitation of the "Named Insureds" on pages 4-5 of its Motion omits reference to AWDI.

[15] While outside of the scope of the Motion and this response, it is worth noting that holding 25 individuals and entities liable for SIRs relating to actions in which the 25 were not even parties and were not even arguably related to the underlying dispute would be highly inequitable. There is also no indication that any of the 25 "Named Insureds" other than American West Homes agreed to be bound by the Zurich policies.

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C. The Court Should Refrain From Ruling on Insurance-Specific Substantive Issues

The Court should refrain from entering any substantive rulings on the underlying insurance issues, including whether or not any non-debtors are liable for the alleged SIRs.

1. This Court Did Not Retain Jurisdiction to Rule on the Substance of the Zurich Policy or the Liability of Non-Debtors As Against Third Parties

Paragraph 26 of the Confirmation Order ("Retention of Jurisdiction") states that "the Court shall retain jurisdiction as provided in Article XI the Plan. Without limiting the generality of the foregoing, the Court shall retain jurisdiction to enter appropriate orders in aid of implementation of the Plan pursuant to Bankruptcy Code section 1142." Confirmation Order at 23.

Article XI of the First Amended Plan, specifically subsection 11.1 and its 21 subparts, describe the types of disputes and issues for which the Court retained jurisdiction. None of those subcategories relate to the adjudication of the liabilities of non-debtors to other third parties. An exhaustive recitation of each of the categories under subsection 11.1 is unnecessary and impractical in the context of this Opposition, and it is unclear whether Zurich even contends that this Court would possess jurisdiction over actions initiated by it against the non-debtors identified in its Motion. Suffice it to say that the Court never reserved jurisdiction over matters such as Zurich's proposed actions against non-debtors. To the extent Zurich asserts in a reply that this Court possesses such jurisdiction, the Reorganized Debtor will seek leave to file a sur-reply.

2. The Court has Limited Post-Confirmation Jurisdiction

Buttressing that the Court did not expressly retain jurisdiction over insurance disputes involving non-debtors and third parties is the fact that bankruptcy courts possess limited jurisdiction following the confirmation of a plan. The Ninth Circuit has held that a bankruptcy court's post-confirmation jurisdiction is limited to "matters affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan [which] will typically have the requisite close nexus to the bankruptcy plan or proceeding." *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193 (9th Cir. 2005) (adopting the Third Circuit's standard after

noting that "post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction").

In re Washington Mutual (Washington Mutual v. XL Specialty Insurance), Bankr. D. Del., case no. 08-12229, Oct. 4, 2012, is instructive.[16] The court held that a declaratory judgment action brought by the reorganized debtor (and later the liquidating trust that substituted in for the debtor) to determine insurance coverage on a pre-petition state court claim would, at best, implicate a bankruptcy court's pre-confirmation jurisdiction over matters "related to" chapter 11 proceedings. The court then held that, similar to the Ninth Circuit's view in *In re Pegagus Gold Corp.*, that:

> After confirmation of a chapter 11 plan, however, the scope of the bankruptcy court's 'related to' jurisdiction diminishes." *Astropower Liquidating Trust v. Xantrex Tech, Inc. (In re AstroPower Liquidating Trust)*, 335 B.R. 309, 323 (Bankr. D. Del. 2005). Post-confirmation, a bankruptcy court only has jurisdiction over a claim that has "a close nexus to the bankruptcy plan or proceeding" such as one which "affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement." *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 168-69 (3d Cir. 2004). *See also EXDS, Inc. v. Richard Ellis, Inc. (In re EXDS, Inc.)*, 352 B.R. 731, 735 (Bankr. D. Del. 2006); *AstroPower*, 335 B.R. at 323.

Id. at 6-7.

Zurich's hypothetical claims against 25 non-debtors lack any substantial nexus to AWDI's confirmed plan of reorganization or AWDI's pre-confirmation proceedings. Zurich itself is at pains to repeatedly state in its Motion that it does not seek to pursue the AWDI, and is only interested in addressing its potential claims against non-debtors.

3. Ruling On Hypothetical Claims Between Zurich and Non-Debtors Would Constitute an Improper Advisory Opinion

It is well-established that "federal courts . . . are prohibited from rendering advisory opinions." *In re Elias*, 215 B.R. at 604 (citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *American State Bank v. Marks (In re MacNeil)*, 907 F.2d 903, 904 (9th Cir.1990)). *See also In re Family Services*, 130 B.R. 314, 317 (B.A.P. 9th. Cir. 1991) (noting that "[t]he oldest and most

[16] A copy of the decision is attached hereto as Exhibit A.

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consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions", including when a "dispute" has not been properly framed and requires further proceedings).

Were this Court to attempt to rule on the merits of the underlying hypothetical insurance claims, it would be impermissibly dabbling in the realm of advisory opinions. Further proceedings are required, including discovery about, *inter alia*: (1) whether the "Named Insureds" agreed to be bound by the terms of the Zurich Policy; (2) whether the "Named Insureds" can be held jointly and severally liable for the SIRs regardless of their level of involvement in the underlying disputes, if any; among (3) what other legal and equitable defenses the "Named Insureds" would have in response to a claim by Zurich for the SIRs, and the facts relating thereto. Zurich's apparent theory of liability – that by being identified as a "Named Insured" on an insurance policy one becomes liable for the entire amount of every SIR that accrues under that policy – is a tenuous and doubtful proposition which the "Named Insureds" are sure to vigorously dispute.

This is neither the time nor the place to adjudicate these and the other issues which Zurich's hypothetical claim against the "Named Insureds" would raise. It would constitute an impermissible advisory opinion for the Court to enter an order which includes any language even suggesting that the "Named Insureds", or any of them, may be potentially liable for the SIRs discussed in Zurich's Motion.

Dated this 24th day of June, 2015

FOX ROTHSCHILD LLP

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
WASHINGTON MUTUAL, INC., et al.,	)	Case No. 08-12229 (MFW)
	)	
Debtors.	)	Jointly Administered
	)	
WASHINGTON MUTUAL, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 12-50422 (MFW)
	)	
XL SPECIALTY INSURANCE COMPANY, et al.,[1]	)	
	)	
Defendants.	)	

MEMORANDUM OPINION[2]

Before the Court is the Defendants' Motion to Dismiss the Complaint filed by the WMI Liquidating Trust (the "Trust"), as successor in interest to Washington Mutual, Inc. (the "WMI"). For the reasons set forth below, the Court will grant the Motion.

[1] The Defendants include XL Specialty Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Columbia Casualty Company, Axis Insurance Company, ACE American Insurance Company, Arch Insurance Company, RSUI Indemnity Company, Chartis Property Casualty Company, formerly known as "AIG Casualty Company," London, Subscribing to Policy No. B0509QA027908, also known as "Lloyd's Underwriter Syndicate No. 2488 AGM London," Allied World Assurance Company Ltd., and Scottsdale Indemnity Company. Because Allied World Assurance Company Ltd. was not served, it did not participate in the submission of the Motion to Dismiss.

[2] The Court is not required to state findings of fact or conclusions of law pursuant to Rule 7052(a)(3) of the Federal Rules of Bankruptcy Procedure.

I. BACKGROUND

WMI is a bank holding company that formerly owned Washington Mutual Bank ("WMB"). In early 2008, WMI purchased from the Defendants $250 million of coverage under twelve insurance policies (the "2008-09 Policies") to provide coverage to WMI and its directors and officers for claims made from May 1, 2008, to May 1, 2009.

As a result of a downgrade in WMI's and WMB's credit ratings and the global credit crisis, a bank run ensued resulting in more than $16 billion in deposits being withdrawn from WMB in a ten-day period beginning on September 15, 2008. On September 25, 2008, the Office of Thrift Supervision (the "OTS") seized WMB and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver. On the same day, the FDIC sold substantially all of WMB's assets to JPMorgan Chase ("JPMC").

On September 26, 2008, WMI and WMI Investment Corp. (collectively, the "Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code. After the commencement of the case, the Official Committee of Unsecured Creditors (the "Committee") investigated a downstream capital contribution of $500 million made by WMI to WMB shortly before the seizure of WMB by the OTS (the "September 2008 Downstream"). On October 13, 2011, WMI and the Committee sent a demand letter to the directors and officers of WMI (collectively, the "D&Os"), asserting claims

related to the September 2008 Downstream. (Adv. D.I. 25 at Ex. L.)[3] In response to the demand letter, several of the D&Os and WMI sought coverage for the asserted claim under the 2008-09 Policies. On December 22, 2011, XL Speciality denied coverage. (Adv. D.I. 35 at Ex. 3.)

In its Seventh Amended Plan of Reorganization (the "Plan"), WMI agreed to establish a contingent reserve of $65 million for the D&Os. (D.I. 9178.) Of the $65 million reserved for the D&O claims, $55 million was set aside for defense costs associated with the September 2008 Downstream claims. The Plan was confirmed on February 24, 2012. (D.I. 9759.)

On March 15, 2012, the Trust filed a Complaint against the issuers of the 2008-09 Policies (the "Defendants") for (1) breach of contract, (2) tortious breach of the duty of good faith and fair dealing, (3) a declaratory judgment that the Defendants are not subrogated to the indemnity claims of the D&Os, and (4) equitable subordination of any subrogated claims the Defendants may have.

On May 7, 2012, the Defendants filed a Motion to Dismiss the Trust's Complaint on several grounds. First, the Defendants argue that with respect to the breach of contract and breach of fiduciary duties counts, the Complaint fails to state a claim

[3] Citations to pleadings in the bankruptcy case are "D.I. #" and to pleadings in the adversary proceeding are "Adv. D.I. #."

over which this Court has subject matter jurisdiction or upon which relief can be granted. In addition, the Defendants argue that there is no "case or controversy" between WMI and the Defendants on any of the counts.

II. JURISDICTION

This Court has jurisdiction to determine whether it has subject matter jurisdiction over this adversary proceeding. BWI Liquidating Corp. v. City of Rialto (In re BWI Liquidating Corp.), 437 B.R. 160, 163 (Bankr. D. Del. 2010) (citing Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376-77 (1940) (holding that a federal court has authority to determine whether it has subject matter jurisdiction over a dispute)).

III. DISCUSSION

A. Breach of Contract and of Fiduciary Duty

The Defendants seek dismissal of the breach of contract and breach of fiduciary duty counts for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(1); Fed. R. Bank. P. 7012.

A bankruptcy court may exercise jurisdiction over four categories of matters: "(1) cases under title 11, (2) proceedings arising under title 11, (3) proceedings arising in a case under

title 11, and (4) proceedings related to a case under title 11." In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991).

In this case, the Trust concedes that the only category under which the Trust's claims may fall is "related to" jurisdiction.[4] (Adv. D.I. 50 at 12.) The majority of bankruptcy courts to address this issue agree. See, e.g., Allied Prod. Corp. v. Hartford Accident & Indem. Co., 02 C 8436, 2003 WL 503805, at *2 (N.D. Ill. Feb. 24, 2003) (withdrawing the reference in an adversary proceeding for determination of insurance coverage, stating that "[t]he court fails to see how the insurance dispute at the heart of the adversary proceeding arises under or is in any way related to the Bankruptcy Code"); In re Ramex Int'l, Inc., 91 B.R. 313, 315 (E.D. Pa. 1988)

[4] The Bankruptcy Court may not enter a final order in a "related to" matter and instead is required to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1). The Court may, however, hear and enter interlocutory orders, such as on motions to dismiss. See, e.g., In re Trinsum Grp., Inc., 467 B.R. 734, 739 (Bankr. S.D.N.Y. 2012) ("After Stern v. Marshall, [related] the ability of bankruptcy judges to enter interlocutory orders in proceedings . . . has been reaffirmed . . . ."); Boyd v. King Par, LLC, Case No. 11-CV-1106, 2011 WL 5509873, at *5 (W.D. Mich. Nov. 10, 2011) ("[U]ncertainty regarding the bankruptcy court's ability to enter a final judgment . . . does not deprive the bankruptcy court of the power to entertain all pretrial proceedings, including summary judgment motions.").

(finding that trustee's action for declaratory judgment on coverage under insurance policy issued pre-petition was only "related to" the bankruptcy case); In re PRS Ins. Grp., Inc., 445 B.R. 402, 405 (Bankr. D. Del. 2011) (holding that declaratory judgment action involving breach of two reinsurance agreements arose under state law and was "related to" case); G-I Holdings, Inc. v. Hartford Accident & Idem. Co. (In re G-I Holdings, Inc.), 278 B.R. 376, 380 (Bankr. D. N.J. 2002) (same).

A declaratory judgment action to determine insurance coverage on a pre-petition state law contract does not involve the bankruptcy petition itself or any steps or sub-action within the bankruptcy case and therefore is not a case under title 11, a proceeding arising under title 11, or a proceeding arising in a case under title 11. The breach of contract and breach of fiduciary duty claims are ordinary state law causes of action of the type that are brought in state courts across the country with no connection to the Bankruptcy Code or a bankruptcy case. Therefore, the Court concludes that it has, at most, "related to" jurisdiction over those counts.

"After confirmation of a chapter 11 plan, however, the scope of the bankruptcy court's 'related to' jurisdiction diminishes." Astropower Liquidating Trust v. Xantrex Tech, Inc. (In re AstroPower Liquidating Trust), 335 B.R. 309, 323 (Bankr. D. Del. 2005). Post-confirmation, a bankruptcy court only has

jurisdiction over a claim that has "a close nexus to the bankruptcy plan or proceeding" such as one which "affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement." Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 168-69 (3d Cir. 2004). See also EXDS, Inc. v. Richard Ellis, Inc. (In re EXDS, Inc.), 352 B.R. 731, 735 (Bankr. D. Del. 2006); AstroPower, 335 B.R. at 323.

In this case, the Trust argues that Counts I and II bear a "close nexus" to the bankruptcy case because (1) the creditors will receive more money sooner from the $55 million held in reserve, (2) the Confirmation Order addresses an important issue in dispute in the adversary proceeding, and (3) the retention of jurisdiction provisions in the Plan include the adversary proceeding.

1. $55 Million Escrow

The Trust contends that creditors will receive more money sooner if the Defendants are required to pay the D&Os' defense costs and the $55 million in reserve is released. The Trust concedes that under Resorts the "mere possibility of a gain or loss of trust assets" is not sufficient to confer post-confirmation bankruptcy jurisdiction over related matters. Nonetheless, the Trust argues that the impact on claims and the existence of the plan reserve are additional contributing factors

that meet the "close nexus" standard.

The Defendants reply that the mere possibility of additional recovery to augment the assets of the Trust is insufficient standing alone to establish the required "close nexus." See, e.g., Resorts, 372 F.3d at 170 ("[T]he potential to increase the assets of the Litigation Trust and its beneficiaries does not necessarily create a close nexus sufficient to confer 'related to' bankruptcy court jurisdiction post-confirmation."); PRS Ins. Grp., 445 B.R. at 405 ("The mere potential to increase the assets of a post-confirmation trust is insufficient to establish the required 'close nexus.'"); BWI Liquidating Corp., 437 B.R. at 166 (finding that "the potential to increase recovery for creditors" is "insufficient to establish a close nexus").

In the case at bar, the Plan called for approximately $7 billion to be distributed to creditors and shareholders. Most notably, the Plan provided payment in full (with interest) to most unsecured creditors. Thus, even in the worse-case scenario where the Trust is forced to pay the D&Os' defense costs without insurance coverage, creditors under the Plan will largely be unaffected. Further, the release of the reserve (even if paid to creditors or shareholders) will provide only a de minimus additional recovery over the almost $7 billion to be distributed under the Plan. Therefore, the Court concludes that the assets of the Trust will not be augmented (or diminished) significantly

by any decision on the extent of coverage of the 2008-09 Policies. As the Third Circuit stated in Resorts, "if the mere possibility of a gain or loss of trust assets sufficed to confer bankruptcy court jurisdiction, any lawsuit involving a continuing trust would fall under the 'related to' grant. Such a result would widen the scope of bankruptcy court jurisdiction beyond what Congress intended . . . ." 372 F.3d at 170.

2. Confirmation Order

The Trust argues, however, that the potential to increase recovery of trust assets is augmented by other contributing factors, namely that the suit is related to the Plan and Confirmation Order. AstroPower, 335 B.R. at 324. See also Lefkowitz v. Mich. Trucking, LLP (In re Gainey Corp.), 447 B.R. 807, 814 (Bankr. W.D. Mich. 2011) ("[P]ostconfirmation subject matter jurisdiction will always exist when a bankruptcy court is called upon to interpret its prior orders."). In the denial of coverage letter, the Defendants state that they may deny coverage based on an "Insured v. Insured exclusion" in the 2008-09 Policies. The Trust notes that the Confirmation Order provided that "the Creditors' Committee was authorized to prosecute claims or causes of action . . . [including the] D&O claims . . . ." (D.I. 9759.) Therefore, the Trust asserts that the Bankruptcy Court must interpret its own Order to conclude that the "Insured v. Insured exclusion" is not applicable.

While the Trust may have a valid claim based on the interpretation of the Plan and Confirmation Order, the Court concludes that that assertion is not the type of plan interpretation sufficient to confer jurisdiction, because the interpretation is not essential to the integrity of the Plan and its implementation. See Resorts, 372 F.3d at 170 (holding that the plan and trust agreement which provided the bare factual context of the state law claims was insufficient to confer jurisdiction and did not require the court to interpret the plan).

Further, the Plan and Confirmation Order can be interpreted by other courts of competent jurisdiction. "[S]tate courts are qualified to interpret the language of bankruptcy plans and orders and routinely engage in such interpretation." In re Kmart Corp., 307 B.R. 586, 596 (Bankr. E.D. Mich. 2004). See also, Icco v. Sunbrite Cleaners, Inc. (In re Sunbrite Cleaners, Inc.), 284 B.R. 336, 342 (N.D.N.Y. 2002) ("Because contract interpretation is an issue of state law . . . the state courts are perfectly well-suited to interpret the First Amended Plan."); In re Landreth Lumber Co., 393 B.R. 200, 205 (Bankr. S.D. Ill. 2008) ("[T]he state court had concurrent jurisdiction to interpret a provision of the confirmed plan as a matter of contract law . . . .").

3. Reservation of Jurisdiction in Plan

The Trust also contends that the Court has jurisdiction because the Plan expressly provides that the Bankruptcy Court would retain jurisdiction "to determine any and all motions, adversary proceedings, applications, and contested or litigated matters that may be pending on the Effective Date . . . ." (D.I. 9178.) The Trust argues that this Plan provision is "more than adequate" to confer jurisdiction over the breach of contract and breach of fiduciary duty claims.

The Defendants respond that "a Plan must specifically describe a cause of action in order to retain related to jurisdiction" over it. (Adv. D.I. 54.) Because the Plan in this case did not specifically identify this adversary proceeding, the Defendants argue that the provision cited by the Trust is insufficient to confer post-confirmation jurisdiction. BWI Liquidating Corp., 437 B.R. at 166.

The Court agrees with the Defendants that the Debtors cannot be permitted to "write [their] own jurisdictional ticket" by merely including a generic retention clause in the Plan. Resorts, 372 F.3d at 161. If including a retention of jurisdiction clause in a Plan was sufficient, the limitation on post-confirmation jurisdiction would be easily eliminated. Rather, to have a sufficiently close nexus to retain post-confirmation jurisdiction, the plan must "specifically describe[]

an action over which the Court had 'related to' jurisdiction pre-confirmation and expressly provide[] for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors. . . ." See AstroPower, 335 B.R. at 325. Such specific language helps ensure that "bankruptcy court jurisdiction would not raise the specter of unending jurisdiction" post-confirmation. Id. See also Resorts, 372 F.3d at 176.

The Trust argues that a specific reference to the claim in the Plan is not necessary for there to be post-confirmation jurisdiction. See, e.g., U.S. Trustee v. Gryphon at Stone Mansion, Inc., 216 B.R. 764, 769 (W.D. Pa. 1997) (holding that "the absence of a provision retaining jurisdiction in a confirmed plan does not deprive the court of jurisdiction."). The Trust contends that where a close nexus exists on independent grounds, it is appropriate to give effect to the Plan's jurisdictional grant.

The Court agrees that even when a plan clearly and unambiguously reserves jurisdiction for a specific cause of action, the Court will not have post-confirmation jurisdiction unless a substantial nexus is established. See, e.g., Resorts, 372 F.3d at 169 (holding that "jurisdictional retention plans cannot confer jurisdiction greater than that granted under 28 U.S.C. § 1334 or 28 U.S.C. § 157"); BWI Liquidating Corp., 437

B.R. at 166 ("Plan provisions that purport to preserve the bankruptcy court's jurisdiction are not alone sufficient to establish post-confirmation jurisdiction; instead the court must determine whether a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan.") (internal citations omitted); Fairchild Liquidating Trust v. New York (In re The Fairchild Corp.), 452 B.R. 525, 532 (Bankr. D. Del. 2011) (holding that general retention of jurisdiction provision was not sufficient to retain jurisdiction over a claim by the liquidating trust).

The Court, however, has found no close nexus here. Therefore, because there is no close nexus to the Plan (and no specific reference in the Plan), the Court concludes that it has no subject matter jurisdiction over the breach of contract and breach of fiduciary duty claims and the motion to dismiss them will be granted.[5]

B. Declaratory Relief

Counts III and IV of the Complaint seek a declaratory judgment that the Defendants are not subrogated to the D&Os' indemnity claim or that, in the event they are subrogated, those claims must be equitably subordinated.

[5] Accordingly, the Defendants' remaining arguments for dismissal of the breach of contract and breach of fiduciary duty claims – that there is no "case or controversy" between WMI and the Defendants and that the Complaint failed to state a claim upon which relief can be granted – need not be addressed.

Pursuant to the Declaratory Judgment Act of 1934, the Court is authorized to "declare the rights and other legal relations of any interested party seeking such declaration" when there is a "case of actual controversy." 28 U.S.C. § 2201(a). Courts have interpreted the remedy to be "limited to cases and controversies in the constitutional sense." Wyatt, V.I., Inc. v. Gov't of the Virgin Islands, 385 F.3d 801, 805 (3d Cir. 2004). For there to be a "case of actual controversy" in the constitutional sense, the controversy must be "definite and concrete, touching the legal relations of parties having adverse legal interests." Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41 (1937). The controversy must also be "real and substantial" as opposed to "advising what the law would be upon a hypothetical state of facts." Id. In order to provide declaratory relief, the controversy must be ripe for judicial intervention. "It cannot be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Wyatt, 385 F.3d at 806 (citing Public Serv. Comm'n v. Wycoff Co., Inc., 344 U.S. 237 (1952)).

In the case at bar, the Defendants cannot currently assert a claim for subrogation because it exists only to the extent of actual payment under those policies, and the Defendants have

refused to pay. (D.I.A. 5 at Ex. A.) See, e.g., In re Darosa, 318 B.R. 871, 878-79 (B.A.P. 9th Cir. 2004) (holding that only when the actual payment of all or part of the claim is made does the right to subrogation become available); Handex of Md., Inc. v. Waste Mgmt. Disposal Serv., 458 F. Supp. 2d 266, 275 (D. Md. 2006) (holding that the right to subrogation arises only after actual payment). Accordingly, the Trust's request for a declaratory judgment for disallowance of the subrogation claim is premature because it requires the assumption of future, hypothetical events that have yet to occur. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 561 (3d Cir. 2002) ("In cases where a plaintiff seeks . . . declaratory relief . . . standing will not lie if adjudication . . . rests upon contingent future events that may not occur as anticipated or indeed may not occur at all.").

Further, the Defendants have not even filed proofs of claim in this case, nor have those claims been allowed. Section 510(c) of the Bankruptcy Code permits equitable subordination of "all or part of an allowed claim . . . or all or part of an allowed interest." 11 U.S.C. § 510(c). "The great weight of authority is that Section 510(c) does not permit subordination absent an allowed claim." In re Dreier LLP, 452 B.R. 391, 451 (Bankr. S.D.N.Y. 2011).

Thus, the Court concludes that the Trust's subrogation and equitable subordination claims are far too hypothetical and speculative to constitute an actual controversy at this stage. Accordingly, Counts III and IV do not allege a "case of actual controversy" and must be dismissed for lack of jurisdiction.

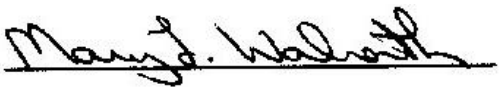
IV. CONCLUSION

For the reasons set forth above, the Court will grant the Defendants' Motion to Dismiss the instant adversary proceeding.

An appropriate order is attached.

Dated: October 4, 2012

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

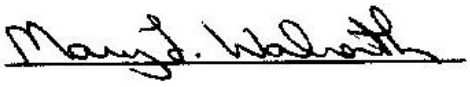
In re:	)	Chapter 11
	)	
WASHINGTON MUTUAL, INC., et al.,	)	Case No. 08-12229 (MFW)
	)	
Debtors.	)	Jointly Administered
	)	
WASHINGTON MUTUAL, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 12-50422 (MFW)
	)	
XL SPECIALTY INSURANCE COMPANY, et al.,	)	
	)	
Defendants.	)	

O R D E R

AND NOW, this **4th** day of **OCTOBER, 2012**, upon consideration of the Motion to Dismiss filed by the Defendants and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion to Dismiss is **GRANTED.**

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Mark D. Olivere, Esquire [6]

[6] Counsel shall distribute a copy of this Order and the accompanying Memorandum Opinion to all interested parties and file a Certificate of Service with the Court.

SERVICE LIST

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