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SUPERIOR COURT CLERK
SEATTLE, WA.

THE HONORABLE BRUCE HELLER
HEARING: AUGUST 27, 2008, 4:00 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EQUITY RESIDENTIAL, Maryland real estate investment trust,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY, a foreign insurance company; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign insurance company; ILLINOIS NATIONAL INSURANCE COMPANY, a foreign insurance company; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a foreign insurance company; ADMIRAL INSURANCE COMPANY, a foreign insurance company; NATIONAL SURETY COMPANY, a foreign insurance company; UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign insurance company,

Defendants.

Cause No.: 08-2-15092-5 SEA

DEFENDANT ACE AMERICAN INSURANCE COMPANY'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: NATIONAL SURETY'S AND ADMIRAL'S DUTY TO DEFEND

I. INTRODUCTION and RELIEF REQUESTED

As a threshold matter, ACE American Insurance Company ("ACE") has affirmatively defended that the Court lacks personal jurisdiction over ACE and that the Court should decline to exercise subject matter jurisdiction over ACE per the doctrine of *forum non conveniens*. In

**ACE'S RESPONSE TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 1**

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1 this memorandum, ACE assumes *arguendo* that Plaintiff's litigation against ACE will proceed
2 in this Court. However, these proceedings just recently commenced, and ACE is still develop-
3 ing those defenses. Nothing in this memorandum should be construed to waive those defenses
4 or any other affirmative defenses, and ACE reserves its right to assert and litigate those de-
5 fenses later in the proceedings.

6 Second, ACE is not the subject of Plaintiff's Motion for Partial Summary Judgment re:
7 National Surety's and Admiral's Duty to Defend ("Plaintiff's motion"), and ACE takes no po-
8 sition on whether the Court should ultimately grant or deny Plaintiff's motion. That said,
9 Plaintiff's motion addresses certain issues that could later become relevant *vis-à-vis* Plaintiff's
10 First Amended Complaint ("Complaint") against ACE. Furthermore, ACE is not presently in a
11 position to fully brief those issues for the Court. Therefore, the Court should limit its order to
12 the specific relief that Plaintiff has requested against the specific non-moving defendants that
13 are the subjects of Plaintiff's motion. The Court should not enter an order that expressly or
14 implicitly binds or prejudices ACE.

15 Third, although ACE is not the subject of Plaintiff's motion, and although ACE is not
16 in a position to fully brief the issues for the Court, there are certain facts and issues that ACE
17 wishes to bring to the Court's attention. ACE therefore submits this memorandum in response
18 to Plaintiff's motion. ACE reserves its right to brief those issues more fully later in the pro-
19 ceedings.

20 **II. STATEMENT OF FACTS**

21 1. Plaintiff is affiliated with a number of other business entities. *See, e.g., Plaintiff's mo-*
22 *tion* at 4:1-8; *Athas Decl.* at ¶¶ 3-7. In the Underlying Lawsuits, two plaintiffs in two separate
23 lawsuits allege that Plaintiff and its affiliates have played the "corporate shell game" by im-
24 properly conveying assets from one company to another, and by using one entity as a front
25 company to protect and benefit another. *See, e.g., Athas Decl., Ex. C* at ¶¶ 73, 39(e), 42(e),
26 46(i), 60, 79(c)-(j), *Ex. D* at ¶¶ 79, 32(e), 37(e), 41(h), 47, 56(k)-(l), 85.

**ACE'S RESPONSE TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 2**

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1 2. In its Complaint and motion, Plaintiff alleges that it “was known as” Equity Residen-
2 tial Properties Trust before May 2002. *Plaintiff’s Complaint* at ¶ 1; *Plaintiff’s motion* at 7:2-3.
3 At this early stage of the proceedings, ACE has been unable to investigate that allegation.

4 3. In its Complaint, Plaintiff does not allege that it is a successor in interest to insurance
5 policies that were issued to Equity Residential Properties Trust. Likewise, in its motion, Plain-
6 tiff neither alleges nor establishes that it is a successor in interest to insurance policies that
7 were issued to Equity Residential Properties Trust.

8 4. In its motion, citing Exhibits N and O to the Declaration of James Athas, Plaintiff al-
9 leges that it is a Named Insured under Admiral Insurance Company’s and National Surety
10 Company’s respective insurance policies. However, those exhibits do not identify Plaintiff as
11 a Named Insured. Rather, those exhibits identify Equity Residential Properties Trust as the
12 Named Insured. Moreover, in its motion, Plaintiff neither specifically argues nor establishes
13 that it is entitled to seek benefits under insurance policies that were issued to Equity Residen-
14 tial Properties Trust.

15 5. In the Underlying Lawsuits, each underlying plaintiff repeatedly and unambiguously
16 alleges that Plaintiff owned and sold the properties that are the subject of the Underlying Law-
17 suits (“the properties” or “the subject properties”). *See, e.g., Athas Decl.*, Ex. A at ¶¶ 2, 5, 7,
18 18, 31, 46; Ex. B at ¶¶ 2, 5, 7, 18, 31, 46; Ex. C at ¶¶ 3, 6, 19, 25, 35, 36, 39, 46, 57, 60, 63, 64,
19 77, 79(c); Ex. D at ¶¶ 3, 4, 5, 6, 11, 17, 18, 28, 29, 33, 37, 41, 51, 56, 61. Importantly, each
20 underlying plaintiff is a condominium association that is comprised of individuals who *bought*
21 the condominiums – and who surely know who *sold* them the condominiums. *See, e.g., Athas*
22 *Decl.*, Ex. A–D. Furthermore, consistent with the underlying plaintiffs’ allegations, when
23 Plaintiff applied for insurance with ACE, Plaintiff produced documents through its insurance
24 broker that suggest that Plaintiff owned and/or sold the subject properties. *Wellman Decl.*;
25 *Glantz Decl.*

1 6. Nevertheless, in its motion, Plaintiff repeatedly and emphatically alleges that it neither
2 owned nor sold the subject properties. *Plaintiff's motion* at 2:8-9, 2:19-20, 4:9-12, 11:9-10,
3 17:10, 17:14-17, 18:1-3, 21:11-15, 22:14. It has offered a self-serving declaration to support
4 that allegation. *Athas Decl.* at ¶ 8.

5 7. In its motion, Plaintiff does not allege that Equity Residential Properties Trust neither
6 owned nor sold the subject properties. Likewise, Plaintiff has not offered any evidence that
7 Equity Residential Properties Trust neither owned nor sold the properties.

8 **III. EVIDENCE RELIED UPON**

9 ACE relies upon the pleadings in the Court file, the attached Declaration of James
10 Wellman with exhibits thereto, and the attached Declaration of Elliot Glantz.

11 **IV. AUTHORITY AND ARGUMENT**

12 *A. Plaintiff has not demonstrated that it is entitled to seek benefits under insurance*
13 *policies that were issued to Equity Residential Properties Trust.*

14 Plaintiff's motion rests upon a fundamental assumption that Plaintiff has neither pled
15 nor supported -- namely, that Plaintiff is entitled to seek benefits under insurance policies that
16 were issued to Equity Residential Properties Trust. This issue is of interest to ACE, because
17 ACE also issued insurance policies to Equity Residential Properties Trust. Moreover, this is-
18 sue is of concern to ACE in light of the underlying plaintiffs' allegations about Plaintiff's pro-
19 pensity to play the "corporate shell game."

20 In its motion, Plaintiff alleges that it "was known as" Equity Residential Properties
21 Trust before May 2002. *Plaintiff's motion* at 7:2-3; *Plaintiff's Complaint* at ¶ 1. Discovery has
22 just commenced, so ACE has not had an opportunity to investigate that allegation. However,
23 even assuming the truth of that allegation, Plaintiff has neither specifically pled nor specifi-
24 cally demonstrated that it is a successor in interest to insurance policies that were issued to Eq-
25 uity Residential Properties Trust, and/or that it is entitled to seek benefits under insurance poli-
26 cies that were issued to Equity Residential Properties Trust.

1 At this early stage of the proceedings, ACE is unwilling to assume or concede that
2 Plaintiff is entitled to seek benefits under the insurance policies that ACE issued to Equity
3 Residential Properties Trust. Indeed, in light of the underlying plaintiffs' allegations about
4 Plaintiff's propensity to play the "corporate shell game," and in light of the conflicting evi-
5 dence that ACE has received about the ownership and sale of the subject properties, ACE re-
6 serves its rights to investigate this issue, to hold Plaintiff to its burden of proof, and to brief
7 this issue later in the proceedings.

8 **B. Choice of Law**

9 Plaintiff's motion also rests upon another fundamental assumption – namely, that
10 Washington law governs the substantive legal issues in this litigation. ACE is not in a position
11 to evaluate whether Washington law governs Plaintiff's disputes with Admiral Insurance
12 Company and National Surety Company. However, ACE maintains that Illinois law governs
13 Plaintiff's dispute with ACE. ACE has affirmatively defended that a foreign jurisdiction's law
14 might apply, and ACE is in the process of developing that defense. For now, in light of the
15 early timing of Plaintiff's motion, ACE generally and informally outlines its position for the
16 Court:

17 If there is an actual conflict between Washington law and the law of another jurisdic-
18 tion, a Washington court will engage in a choice-of-law analysis. *Burnside v. Simpson Paper*
19 *Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 937 (1994). There is an "actual conflict" if the result of
20 any legal issue would differ under the laws of the two states. *Seizer v. Sessions*, 132 Wn.2d
21 642, 648, 940 P.2d 261 (1997). If there is an actual conflict, a Washington court will apply the
22 factors set forth in the Restatement (Second) of Conflict of Laws (1971) to determine which
23 state has "the most significant relationship." *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145
24 Wn.2d 137, 149, 34 P.3d 137 (2001).

25 First, ACE expects to demonstrate that there is a material conflict between Illinois law
26 and Washington law. For instance, in its motion, Plaintiff argues, "[I]t is well-settled in Wash-

1 ington that defective construction constitutes ‘an occurrence’ for purposes of a CGL policy.”
2 *Plaintiff’s motion* at 17:2-3. However, Illinois courts have reached precisely the opposite con-
3 clusion. *See, e.g., Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 277 Ill. App. 3d 697, 702-706,
4 661 N.E.2d 451, 214 Ill. Dec. 597 (1996) (property damage to structure arising from defective
5 construction does not constitute an occurrence as defined in a CGL policy). Likewise, al-
6 though it is not directly relevant to Plaintiff’s motion, ACE expects to demonstrate that Illinois
7 law differs materially from Washington law with respect to claim-handling standards, and with
8 respect to whether alleged claim-handling violations can give rise to a private cause of action.
9 *See, e.g., ILL. ADMIN. CODE § 919.20(b)* (“The purpose of this Part is to set forth minimum
10 standards for the investigation and disposition of claims arising under contracts and certificates
11 issued to residents of Illinois”); *ILL. ADMIN. CODE § 919.50* (“Required Practices for all Insur-
12 ance Companies”); *ILL. INS. CODE § 154.6*; *Bageanis v. Am. Bankers Life Assur. Co. of Fla.*,
13 783 F. Supp. 1141, 1149 (N.D. Ill. 1992) (it is well recognized in Illinois that alleged claim
14 handling violations do not give rise to private cause of action or remedy).

15 Second, ACE expects to demonstrate that Illinois has the most significant relationship
16 to ACE’s contract with Plaintiff. For instance, without limitation, ACE expects to demonstrate
17 the following:

- 18 • At all relevant times, Plaintiff’s principal place of business was in Illinois.
- 19 • At all relevant times, Plaintiff’s insurance broker’s principal place of business
20 was in Illinois.
- 21 • Plaintiff and its insurance broker negotiated Policy No. XSLG22079311 in Illi-
22 nois.
- 23 • At all times relevant to Policy No. XSLG22079311, ACE’s underwriters’ prin-
24 cipal place of business was in Illinois.
- 25 • ACE’s underwriters negotiated Policy No. XSLG22079311 on ACE’s behalf in
26 Illinois.

- 1 • The underwriters of Policy No. XSLG22079311 identified the location of the
2 risk as being in Illinois.
- 3 • If Plaintiff can satisfy its burden of proving that ACE owes any duty to indem-
4 nify Plaintiff in the Underlying Lawsuits under Policy No. XSLG22079311, the
5 policy provides that ACE will pay “the insured....” Moreover, “the insured’s”
6 principal place of business is in Illinois, so ACE would necessarily need to per-
7 form any contractual obligation to indemnify Plaintiff by paying Plaintiff in Il-
8 linois.

9 In contrast, ACE does not anticipate that Plaintiff will be able to establish that its con-
10 tract with ACE has any material or meaningful relationship with Washington State. Plaintiff
11 apparently assumes that Washington law applies because the subject properties are located in
12 Washington State. However, in its motion, Plaintiff repeatedly and emphatically maintains
13 that it has never owned any of those properties. *Plaintiff’s motion* at 4:9-12, 10:17-18, 11:9-10,
14 17:14-17, 18:1-3, 21:11-12, 22:13-14; *Athas Decl.* at ¶ 8. Moreover, if Plaintiff has never
15 owned any of those properties, one wonders how the locations of those properties could suffice
16 to establish that Washington State has *any* relationship to the parties’ contract, let alone “the
17 most significant” relationship to the parties’ contract.

18 Third, as discussed above, Plaintiff has neither pled nor established that it is entitled to
19 seek benefits under insurance policies that ACE issued to Equity Residential Properties Trust.
20 That said, assuming *arguendo* that Plaintiff can establish that it is entitled to seek such bene-
21 fits, ACE also expects to demonstrate that Illinois has the most significant relationship to
22 ACE’s contracts with Equity Residential Properties Trust. In contrast, ACE does not antici-
23 pate that Plaintiff would be able to establish that ACE’s contracts with Equity Residential
24 Properties Trust have any material or meaningful relationship with Washington State.

1 Fourth, although it is not directly relevant to Plaintiff's motion, ACE expects to dem-
2 onstrate that Illinois has the most significant relationship to ACE's handling of Plaintiff's in-
3 surance claims relating to the Underlying Lawsuits.

4 ACE is in the process of compiling additional evidence that might be directly relevant
5 to these choice-of-law issues, and ACE reserves its right to brief these issues for the Court later
6 in the proceedings.

7 ***C. ACE reserves its right to dispute Plaintiff's analysis under Washington law.***

8 As discussed above, ACE maintains that Illinois law governs Plaintiff's dispute with
9 ACE. Therefore, ACE also necessarily maintains that Plaintiff's analysis under Washington
10 law is irrelevant.

11 That said, ACE also disagrees with Plaintiff's analysis under Washington law. In the
12 unlikely event that the Court determines that Washington law governs Plaintiff's contract with
13 ACE, ACE reserves its right to brief these issues under Washington law later in the proceed-
14 ings.

15 ***D. Owned Property Exclusion and Alienated Premises Exclusion***

16 ACE has a number of observations about Plaintiff's arguments pertaining to the owned
17 property exclusion and alienated premises exclusion.

18 1. The Court should limit the scope of its order to address only whether Plaintiff has satis-
19 fied its burden of proving that the non-moving defendants owe a duty to defend.

20 In the caption, Section I, Section III, Section V.A, Section V.B, and Section VI of
21 Plaintiff's motion, Plaintiff states that it is seeking an order declaring that non-moving defen-
22 dants Admiral Insurance Company and National Surety Company owe a duty to *defend* Plain-
23 tiff in the Underlying Lawsuits. Furthermore, as Plaintiff correctly observes in Section V.A,
24 an insurer's duty to defend is separate from and broader than an insurer's duty to indemnify.¹

25
26 ¹ Notably, Illinois courts likewise hold that an insurer's duty to defend is broader than its duty to indemnify.

1 In contrast, Section V.C of Plaintiff's motion is titled, "THE 'OWNED PROPERTY'
2 AND 'ALIENATED PREMISES' EXCLUSIONS DO NOT APPLY TO EQUITY RESI-
3 DENTIAL" (underscores supplied). Read in isolation, the title of this section suggests that
4 Plaintiff is seeking a relatively broad ruling or finding that the owned property and alienated
5 premises exclusions do not apply *vis-à-vis* Admiral Insurance Company's and National Surety
6 Company's alleged duties to *indemnify*. This issue is of interest to ACE, because Plaintiff's
7 contract with ACE has a similar exclusion.

8 That said, in the Underlying Lawsuits, each underlying plaintiff repeatedly alleges that
9 Plaintiff owned and sold the subject properties. *See e.g., Athas Decl.*, Ex. A at ¶¶ 2, 5, 7, 18,
10 31, 46; Ex. B at ¶¶ 2, 5, 7, 18, 31, 46; Ex. C at ¶¶ 3, 6, 19, 25, 35, 36, 39, 46, 57, 60, 63, 64, 77,
11 79(c); Ex. D at ¶¶ 3, 4, 5, 6, 11, 17, 18, 28, 29, 33, 37, 41, 51, 56, 61. Furthermore, each un-
12 derlying plaintiff is a condominium association that is comprised of individuals who bought
13 the condominiums, and who presumably have personal, first-hand knowledge of who sold
14 them the condominiums. In light of the underlying plaintiffs' clear and unambiguous allega-
15 tions, at this early stage of the proceedings, the Court should not make a ruling or finding *vis-*
16 *à-vis* how the owned property exclusion and/or alienated premises exclusion affects any in-
17 surer's alleged duty to indemnify. Rather, the Court should strictly limit its ruling to address
18 only whether Plaintiff has satisfied its burden of proving that Admiral Insurance Company
19 and/or National Surety Company owe a duty to defend Plaintiff in the Underlying Lawsuits.

20 Discovery has just commenced, and ACE specifically reserves its right to investigate
21 the underlying plaintiffs' allegations.

22 2. Plaintiff has not offered any evidence suggesting that **Equity Residential Properties**
23 **Trust never owned nor sold the properties.**

24 In its motion and supporting documents, Plaintiff alleges only that Equity Residential
25 never owned nor sold the properties that are the subject of the Underlying Lawsuits. *Plaintiff's*
26 *motion* at 2:8-9, 2:19-20, 4:9-12, 11:9-10, 17:10, 17:14-17, 18:1-3, 21:11-15, 22:14; *Athas*

1 Decl. at ¶ 8. However, Plaintiff has not offered any evidence that Equity Residential Proper-
2 ties Trust never owned nor sold the properties. Moreover, as discussed above, Equity Resi-
3 dential Properties Trust is the Named Insured on the policies at issue in Plaintiff's motion.
4 *Athas Decl.* at Ex. N-O.

5 Again, this issue is of interest to ACE, because ACE also issued insurance policies to
6 Equity Residential Properties Trust. Moreover, this issue is of concern to ACE in light of the
7 underlying plaintiffs' allegations about Plaintiff's propensity to play the "corporate shell
8 game." ACE therefore reserves its rights to investigate this issue and brief this issue later in
9 the proceedings.

10 3. ACE possesses evidence that creates a genuine issue of material fact *vis-à-vis* whether
11 Plaintiff owned and/or sold the properties.

12 When Plaintiff applied for insurance with ACE, Plaintiff's broker produced a number
13 of documents to support Plaintiff's application. Some of those documents strongly suggest
14 that Plaintiff owned and/or sold the subject properties. *Wellman Decl.*, Ex. A- B; *Glantz Decl.*
15 Those documents suffice to create a genuine issue of material fact *vis-à-vis* whether the owned
16 property and alienated premises exclusions in ACE's policy apply. In light of the existence of
17 those documents, ACE reserves its right to investigate these issues.

18 4. ACE possesses evidence that creates a genuine issue of material fact *vis-à-vis* whether
19 Equity Residential Properties Trust owned and/or sold the properties.

20 As discussed above, Plaintiff has not produced any evidence that Equity Residential
21 Properties Trust never owned nor sold the properties. Nevertheless, if Plaintiff ever offers any
22 such evidence, ACE also possesses documents that strongly suggest that Equity Residential
23 Properties Trust owned and/or sold the subject properties. ACE reserves its right to produce
24 those documents. Furthermore, in light of the existence of those documents, ACE reserves its
25 right to investigate these issues.

1 5. Plaintiff need not have owned the properties to “sell” the properties.

2 In pertinent part, in its motion, Plaintiff suggests that that it could not have *sold* the
3 subject properties because it allegedly never *owned* those properties. *See, e.g., Plaintiff’s mo-*
4 *tion* at 17:15-16 (“Equity Residential did not own [and thus did not sell] the properties when
5 they were apartments”). For the reasons discussed below, Plaintiff’s conclusion is misplaced.

6 The insurance policies at issue in Plaintiff’s motion do not define “sell.” As Plaintiff
7 correctly states in its motion, Washington courts consult standard English dictionaries in an
8 effort to discern an undefined term’s ordinary and popular meaning. *Plaintiff’s motion* at
9 13:10. Illinois courts do the same. *See, e.g., Fremont Cas. Ins. Co. v. Ace-Chicago Great*
10 *Dane Corp.*, 317 Ill. App. 3d 67, 74, 739 N.E.2d 85, 250 Ill. Dec. 624 (Ill. App. Ct. 2000).
11 Furthermore, in pertinent part, Webster’s Third New International Dictionary defines “sell” as
12 follows:

13 2 a (1): to give up (property) to another for money or other valuable consideration:
14 hand over or transfer title to (as goods or real estate) for a price (*sold* his books) (*sold*
15 his house) (*sold* his stock)—opposed to buy. (2) to offer for sale: deal in as an article of
16 sale (~home appliances) (~insurance).

17 3 a: to deliver into slavery for money b: to give into the power of another <*sold* his soul
18 to the devil> c: to deliver the personal services of for money

19 * * *

20 7 a: to cause or promote the sale of <using television advertising to *sell* cereal> b: to
21 make or attempt to make sales to c: to influence or induce to make a purchase

22 8: to achieve a sale of <*sold* a million copies>

23 Webster’s Third New International Dictionary 2061 (Merriam-Webster, Inc. 1993).

24 As the excerpts above reveal, one need not own property to sell property. Indeed, this
25 conclusion is consistent with common experience in Western capitalism: Most products are
26 sold by individuals who do not actually own those products, and most real estate is sold by in-
dividuals who do not actually own the real estate (e.g., agents). So, even if Plaintiff can con-
clusively establish that it never owned the subject properties, that does not compel the conclu-
sion that it did not “sell” the properties for purposes of the alienated premises exclusion.


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V. CONCLUSION

Again, Plaintiff's motion does not seek relief against ACE, and the Court's order should neither bind nor affect ACE. Nevertheless, because Plaintiff's motion raises issues that could become relevant with respect to Plaintiff's litigation against ACE, ACE wished to bring the aforementioned issues to the Court's attention. ACE reserves its right to investigate those issues and brief those issues later in the proceedings. Likewise, ACE reserves its right to seek dismissal of Plaintiff's Complaint against ACE because the Court lacks personal jurisdiction over ACE and/or because the Court should decline to exercise subject matter jurisdiction over ACE per the doctrine of *forum non conveniens*.

DATED this 14th day of August, 2008.

COZEN O'CONNOR



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