

CAUSE NO. D-1-GV-12-001713

|   |   |                          |
|---|---|--------------------------|
| THE STATE OF TEXAS,<br>Plaintiff,         | § | IN THE DISTRICT COURT OF |
|   | § |                          |
| V.  | § | TRAVIS COUNTY, TEXAS     |
|   | § |                          |
| GRAMERCY INSURANCE COMPANY,<br>Defendants | § | 53RD JUDICIAL DISTRICT   |

**KEMPER COST MANAGEMENT, INC.’S SUPPLEMENTAL MOTION AND  
OBJECTION IN RESPONSE TO COMPANION PROPERTY AND CASUALTY  
INSURANCE COMPANY’S MOTION FOR THE RELEASE OF RESTRAINED THIRD  
PARTY TRUST FUNDS**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Kemper Cost Management, Inc. (“Kemper”), a party-in-interest, submits its Supplemental Motion and Objection in Response to Companion Property and Casualty Insurance Company’s (“Companion”) Amended Motion for the Release of Third Party Trust Funds, and in support thereof, would show this Court as follows:

**I. Introduction and Factual Background**

1. Kemper contracted with Gramercy to serve as the Administrator of service and equipment maintenance plans for solar panels and wind turbines that were covered by insurance provided by Gramercy. Companion’s Ex. 4, p. 4. The commissions that Kemper had earned in relation to these maintenance plans still have not been paid to Kemper by Gramercy (or by Companion).
2. In the Court’s Agreed Order filed on December 4, 2012, this Court “vested [in the Rehabilitator] by operation of law ... title to all of [Gramercy’s] property as defined in TEX. INS. CODE § 443.004(a)(2).” The Order specified that “[s]uch property shall include property of any kind or nature . . . including but not limited to money, funds, cash, stock, bonds, account deposits . . . funds held in shared, escrow or *trust accounts*” and that “the Rehabilitator shall be directed to

take possession and control of [Gramercy's] property, wherever located.” Agreed Order, p. 3, ¶¶ 2.4, 2.5 (emphasis added). The Order also “enjoin[ed] financial institutions or depositories from taking any actions in connection with [Gramercy's] property, except as directed by the Rehabilitator or his designees” and ordered that “an automatic stay is in effect with respect to actions against [Gramercy] or its property, effective on the commencement of this proceeding.” Agreed Order, p. 4, ¶¶ 2.8, 2.9.

3. On June 18, 2013, Companion filed a Motion for the Release of Third Party Trust Funds and argued that the assets held in the Bank New York Mellon, NA (“BNYM”) reinsurance trust are not Gramercy's property and are therefore outside the scope of the Agreed Order. Companion's Original Motion, p. 5–8. In response, Kemper filed on August 9, 2013 its Motion and Objection in Response to Companion Property and Casualty Insurance Company's Motion for the Release of Restrained Third Party Trust Funds. Kemper argued that the trust agreement between Gramercy and Companion (the “Trust Agreement”), TEX. INS. CODE §§ 443.004(20)(A) and 443.008(c)(3), and Texas case law require that the trust and its assets remain under the receivership because: (1) Companion had not demonstrated that it sought to withdraw assets from the trust for the withdrawal purposes specified in the Trust Agreement; (2) Gramercy, the trust's grantor, retained interests in the trust and its assets—the rights of termination and collection of the assets—and these rights became the Receivership's rights as “property of the insurer;” and (3) Companion is attempting to gain possession or control of Gramercy's property, and under the Texas Insurance Code, such attempts were stayed by the commencement of the State's delinquency proceedings against Gramercy.

4. About three months later, On October 14, 2013, Companion filed an Amended Motion for the Release of Third Party Trust Funds, requesting that “the Court [] enter[s] an order clarifying that the trust funds are not Gramercy property and are not subject to the injunction in the Liquidation Order, and

expressly stating that the order does not prevent Companion from receiving the trust funds held in BNYM Account #10593011840. . . .” Companion Am. Motion, p. 3 ¶ 9. Kemper notes that Companion failed to serve Kemper with its Amended Motion, even though Kemper had previously served Companion when Kemper filed its own Objection. Kemper now responds by supplementing its original Objection and further objecting to Companion’s Amended Motion.

5. In addition to the reasons included in Kemper’s original Objection, Kemper objects to Companion’s Amended Motion because Companion still has not substantiated its claim that it is entitled to withdraw the entirety of the Trust funds and that such withdrawal relates to the purposes of the Trust. To this effect, case law cited by Companion does not negate, but rather supports the arguments made in Kemper’s original objection.

## **II. Arguments and Authorities**

### ***Companion Still Has Not Substantiated with Competent Evidence that it is Entitled to Withdraw the Trust Funds.***

6. Kemper hereby incorporates, adopts and reasserts by reference its Motion and Objection in Response to Companion Property and Casualty Insurance Company’s Motion for the Release of Restrained Third Party Funds as if fully set forth herein.

7. Kemper reasserts its argument that Companion has not demonstrated with any evidence that its attempts to withdraw from the Trust relate to purposes of the Trust or that it is owed the full sum it seeks to withdraw. The purposes of the Trust include reimbursement for “losses and allocated loss expenses paid by [Companion] but not recovered from [Gramercy] or for unearned premiums due [Companion]...” and even to pay Gramercy “any amounts held in the Trust Account that exceed 102 percent of the actual amount required to fund [Gramercy’s] entire Obligations,” “Obligations” being defined as relating to losses and allocated loss expenses. Companion Am. Motion Ex. 3, p. 4 ¶ 3 (d)(1, 2) and p. 5 ¶ 3(d)(i-v). The only somewhat relevant

evidence Companion provides is a self-serving unilateral affidavit by an interested party, Companion's chief actuary, Jeri Boysia, who states in conclusory fashion that Companion is owed \$15,867,015, \$14,431,443 which is "unearned premium reserves." Companion Am. Motion Ex. 9. This simple statement is not enough to demonstrate what part of the Trust assets are in fact owed to Companion, and Companion attaches no competent evidence to the Boysia affidavit to support the conclusions contained in such affidavit.

8. Relatedly, New York case law cited by Companion states that "to the extent the trust property *exceeds the purposes for which the trust was established*, it will be returned to LARSA [a debtor in bankruptcy], the settlor of the trust." *In re Ocana*, 151 B.R. 670, 673 (S.D.N.Y. 1993). Further, the portion of a trust that remains after the trust's obligations are satisfied is reversionary and returns to the settlor. *Id.* at 673–74. These propositions are in accordance with Kemper's objections that Companion has substantiated neither that the purposes of the Trust have been met nor that Companion is entitled to the entire amount held by the Trust as Companion claims.

9. Companion concedes as much in its Amended Motion by stating, "Under the Trust agreement, Gramercy had a contingent contractual right whereby, upon final satisfaction of all obligations and liabilities under the Policies and Program, Companion (not BNYM) would authorize payment to Gramercy of any amount Gramercy overfunded into the Trust Account for the period that Gramercy provided reinsurance to Companion." Companion Am. Motion, p. 9 ¶ 26. Companion acknowledges the possibility that part of the Trust funds may be owed to Gramercy, yet Companion still has not provided a sound accounting by way of competent evidence that explains why it is due the full Trust amount in accordance with the Trust's stated purposes.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, party-in-interest Kemper Cost Management, Inc. respectfully requests that upon final hearing, the Court deny Companion Property and Casualty Insurance Company's Amended Motion for the Release of Restrained Trust Funds and grant party in interest Kemper Cost Management, Inc. such other and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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