

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**FIRST SPECIALTY INSURANCE
CORPORATION,**

Plaintiff

v.

**WARD NORTH AMERICA HOLDING,
INC. d/b/a WARD NORTH AMERICA,
INC.,**

Case No. 04-2359-JWL

and

**CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, a.k.a. UNDERWRITERS AT
LLOYD'S, a.k.a. LLOYD'S**

and

**ST. PAUL TRAVELERS SYNDICATE
MANAGEMENT, LTD., f/k/a ST. PAUL'S
SYNDICATE MANAGEMENT, LTD.**

and

ELLISTON, LLC,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the court on the Fed. R. Civ. Pro. 12(b)(6) motion to dismiss filed by defendant St. Paul Travelers Syndicate Management, Ltd. (St. Paul Travelers) . The facts of the case are not relevant at this stage of the litigation because St. Paul Travelers's brief

for its motion to dismiss substantially relies on materials outside the face of the complaint, particularly the affidavit by Mr. Raymond Tytler. This precludes the court from deciding this motion to dismiss without giving both sides the opportunity to present additional evidence and advancing to the summary judgment stage.

Indeed, it is well-established that “[a] motion to dismiss for failure to state a claim upon which relief can be granted must be converted into a motion for summary judgment whenever the district court considers matters outside the pleadings.” *Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir.1998); *see also Burnham v. Humphrey Hospitality Reit Trust, Inc.*, 403 F.3d 709, 713 (10th Cir. 2005). It is reversible error “if the district court considers matters outside the pleadings but fails to convert the motion to dismiss into a motion for summary judgment.” *Id.* More importantly, upon converting the motion to one for summary judgment, the court “must provide the parties with notice so that all factual allegations may be met with countervailing evidence.” *Burnham*, 403 F.3d at 713. Thus, the court will deny St. Paul Travelers’s motion to dismiss and permit it to file a proper motion for summary judgment should it so desire.

IT IS THEREFORE ORDERED BY THE COURT that St. Paul Travelers’s motion to dismiss (doc. 111) is hereby denied without prejudice to raising the same issues by motion for summary judgment.

IT IS SO ORDERED this 15th day of December, 2005.

s/ John W. Lungstrum

John W. Lungstrum

United States District Judge