

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GREAT AMERICAN INSURANCE
COMPANY,

Plaintiff,

-against-

ARCH REAL ESTATE HOLDINGS, LLC.
JEFFREY SIMPSON, JARED CHASSEN,
WIGGIN AND DANA LLP, GRIFFIN LLP,
OFFIT KURMAN PA, and JJ Arch LLC

Defendants.

Index No. 653208/2024

(I.A.S. Part 3)

Motion Seq. No. 5

**ARCH REAL ESTATE HOLDINGS, LLC'S MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO CONSOLIDATE RELATED PROCEEDING AND TO AMEND
THE PLEADINGS**

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Plaintiff Arch Real Estate Holdings, LLC (“AREH”) by its attorneys, Olshan Frome Wolosky LLP, submits this memorandum of law in support of its motion (1) pursuant to CPLR 602 to consolidate the instant action for all purposes with a related action commenced by AREH in this Court, styled *Arch Real Estate Holdings, LLC v. Great American Insurance*, Index No. 652914/2024 (Sup Ct. N.Y. Co.) (the “AREH Action”) and realign the parties, and (2) pursuant to CPLR 3025 to amend and supplement AREH’s pleadings to assert additional factual allegations and claims (collectively, the “Motion”).

Preliminary Statement

The parties to this interpleader are embroiled in protracted litigation in several related actions¹ pending before this Court. AREH makes this motion to accomplish three purposes: (1) to consolidate and simplify the insurance litigation, (2) to amend its pleading in this lawsuit to add to Counterclaims against Great American Insurance Company (“GAIC”) allegations previously asserted in the AREH Action, and (3) to amend its pleading to assert a new Counterclaim against GAIC.

AREH commenced the AREH Action on June 7, 2024, seeking a remedy for GAIC’s voluntary payment of JJ Arch LLC’s (“JJ Arch”) attorneys’ fees incurred in the filing of a bad-faith bankruptcy. The AREH Action is inextricably intertwined with this Interpleader Action, which was commenced three weeks later on June 25, 2024. The insurance policy, the litigating parties, the matters in dispute, and the key witnesses all overlap. Consolidation is appropriate in the interest of judicial economy, to avoid the unnecessary duplication of discovery and trials, to

¹ In addition to the instant action and the AREH Action, certain parties to this action are also parties in *Jeffrey Simpson, et al. v. Jared Chassen, et al.*, Index No. 158055/2023 (Sup. Ct. N.Y. Co.) (the “Simpson Action”) and *Jared Chassen et al. v. Jeffrey Simpson, et al.*, Index No. 654928/2024 (Sup. Ct. N.Y. Co.) (the “Chassen Action”).

save unnecessary cost and expense, and to prevent the injustice which would result from divergent and inconsistent decisions.

AREH seeks to be realigned as an Interpleader Defendant and requests leave to assert the claims asserted in the AREH Action as Counterclaims in this Interpleader Action.² AREH also seeks to amend its Counterclaims filed herein³ to assert a new cause of action against GAIC for aiding and abetting Simpson's and JJ Arch's breach of fiduciary duty based upon GAIC financing the bad faith JJ Arch bankruptcy proceeding.

As further set forth below, AREH seeks an order consolidating this action with the AREH Action, allowing AREH to assert its AREH Action claims as Counterclaims against GAIC and allowing amendment of AREH's pleading to add one new Counterclaim against GAIC.

Statement of Facts⁴

This Court is already familiar with the relevant underlying facts, which have been the subject of concurrent litigation before this Court, including in the Simpson Action and the Chassen Action. The following is a brief recitation of the background of this dispute as it relates to the insurance issues.

A. Background

AREH is a limited liability company that manages a large real estate portfolio. AREH is the sole Named Insured on the Policy. AREH has two members, which are companies, one of which is JJ Arch, who was the Managing Member of AREH. [In re JJ Arch LLC., 2024 WL](#)

² The allegations AREH seeks to transfer from the AREH Action are set forth on King Aff. Ex. C in blue text.

³ AREH also proposed amending its Counterclaims to make clear that it seeks payment of costs of defense that have gone unpaid since the filing of the Interpleader in the Simpson Action and related matters, as previously acknowledged by GAIC.

⁴ The relevant facts are taken from the accompanying Affirmation of Kevin Wiener, dated March 3, 2025 ("Wiener Aff."), and the accompanying Affirmation of Jeremy M. King, dated March 4, 2025 ("King Aff.") and the exhibits thereto.

[2933427](#), at *2-3 (*Bankr. S.D.N.Y. June 10, 2024*). JJ Arch itself has two members, who are individuals: Jeffrey Simpson and Jared Chassen.

In August 2023, both Simpson and Chassen each purported to remove the other as a member of JJ Arch, causing disputes to arise as to who rightfully controlled and remained a member of JJ Arch. *Id. at *3*. Corporate governance disputes also arose between JJ Arch and AREH's other member, 608941 NJ Inc. ("Oak"), regarding control over AREH. Subsequently, Simpson and JJ Arch filed the Simpson Action.

Because of Simpson's actions and the impact the turmoil at JJ Arch was having on AREH, Oak subsequently intervened in the Simpson Action and brought an emergency motion for injunctive relief. On November 20, 2023, Your Honor heard oral argument and granted Oak's motion for a preliminary injunction, which among other things, enjoined Simpson and JJ Arch from acting as AREH's managing member, designating Oak to "act in their stead as AREH's sole managing member...." (King Aff. Ex. D) (the "Preliminary Injunction").

B. The JJ Arch Bankruptcy Proceeding

On March 7, 2024, Simpson caused JJ Arch to file for voluntary Chapter 11 bankruptcy in a proceeding styled *In re Arch, LLC*, Case No. 24-10381, in the United States Bankruptcy Court for the Southern District of New York (the "JJ Arch Bankruptcy"). (King Aff. Ex. G). In bringing this unauthorized Bankruptcy Proceeding, Simpson defied Court orders that expressly required Chassen's consent to file a bankruptcy petition. (King Aff. Ex. D). JJ Arch's bankruptcy caused AREH's operations to come to a standstill. (Wiener Aff. ¶ 3). While the JJ Arch Bankruptcy itself did not directly restrict AREH's operations, it created uncertainty regarding AREH's ability to operate and authority to enter into transactions for itself and the subsidiary LLCs it manages. (Wiener Aff. ¶ 6). AREH and its subsidiaries could not consummate deals or resolve outstanding loan obligations as part of efforts to mitigate damages being suffered by the company. (*Id.*).

Simpson made clear that the purpose of bringing the bankruptcy was to prevent AREH from operating under management put in place by this Court. (King Aff. Ex. H, First Day Affidavit of J. Simpson at ¶¶ 34-38 (stating that the purpose of the Chapter 11 Case was halting the disposition of assets managed by AREH)). The Bankruptcy Proceeding was designed to control JJ Arch's consent right to Major Decisions at AREH, effectively giving JJ Arch the management control of AREH that it was stripped of by the Preliminary Injunction.

Additionally, the JJ Arch Voluntary Petition for Non-Individuals Filing for Bankruptcy ("Petition") was based upon untrue statements. The only material debt of JJ Arch listed in the Official Form 204 of the Petition was \$128,353.00 to the law firm Adam Leitman Bailey, P.C. ("ALB"). (King Aff. Ex. G). Yet, on December 12, 2024, ALB filed a petition⁵ to confirm an arbitration award against Simpson personally of \$128,353.25, which attached an engagement letter establishing that the representation was of Simpson. (King Aff. Ex. I).

The Petition's List of Equity Security Holders also misrepresented the membership of the debtor, JJ Arch. Simpson represented that he was the sole member and that: "Mr. Chassen was deemed to have resigned as a member of JJ Arch as of August 5, 2023...." (King Aff. Ex. G). This statement was contrary to this Court's August 21, 2023, Order Regarding Interim Procedures ordering that the "August 2023 instruments sent by Simpson and Chassen to the other purportedly resigning or terminating the other as a member or managing member of JJ Arch are hereby void and of no force or effect." (King Aff. Ex. J (Simpson Action, [NYSCEF Doc. No. 36](#))). That order further stated that "any [JJ Arch] Major Decision, as defined in the JJ Arch Operating Agreement, shall be undertaken only with the prior written consent of Chassen." (*Id.*) The decision to declare bankruptcy was a Major Decision under the JJ Arch Operating Agreement, but Chassen's consent

⁵ *Adam Leitman Bailey, P.C. v. Jeffrey Simpson*, Index No. 659611/2024 (Sup. Ct. N.Y. Co.).

was never given. (King Aff. Ex. K (Simpson Action, [NYSCEF Doc. No. 15 at 3.1\(b\)\(ii\)](#)); Wiener Aff. ¶ 4).

On April 1, 2024, JJ Arch removed the Simpson Action to the JJ Arch Bankruptcy, and two months later the Bankruptcy Court decided to remand. [In re JJ Arch LLC., 2024 WL 2933427](#). The Bankruptcy Court found that “Mr. Simpson made three attempts to nullify Justice Cohen’s rulings in the months preceding this bankruptcy,” and held that “[i]t is well-established that ‘state-court losers complaining of injuries caused by state-court judgments’ cannot use the federal judiciary as an appellate court.” [*Id. at *17, *20*](#).

C. Dismissal of the Bad Faith JJ Arch Bankruptcy

On October 11, 2024, the Bankruptcy Court dismissed the bankruptcy entirely finding that it was commenced in both objective and subjective bad faith. [In re JJ Arch LLC., 663 B.R. 258 \(Bankr. S.D.N.Y. 2024\)](#). The Bankruptcy Court found that the filing was “an attempt by Mr. Simpson to avoid the resolution of the governance issues raised in the State Court Proceeding—a proceeding initiated by Mr. Simpson.” ([*Id. at 284*](#)). The court further held that the JJ Arch Bankruptcy “subjective bad faith” because it was filed for the purposes of forum shopping and there was no intent to actually reorganize. ([*Id. at 282-84*](#)).

The Bankruptcy Court stated that “the record overwhelmingly suggests that this bankruptcy was a means of removing the [Simpson Action] from the purview of Justice Cohen.” ([*Id. at 282*](#)). The court further ruled that “Debtor (at the direction of Mr. Simpson) has not proceeded in good faith during the early stages of the bankruptcy,” citing specifically to inconsistent statements about membership in JJ Arch, gamesmanship in the removal of the Simpson Action, improper attempts to reargue issues decided in this Court, and proposal of an objectively futile purported Plan of reorganization. ([*Id. at 283-84*](#)). After a detailed review of the record, the Bankruptcy Court held

that “this bankruptcy was filed without a ‘good faith intent to reorganize.’” (*Id.* at 284) (citations omitted)).

The proceeding also failed the “objective futility” test. The Bankruptcy Court noted the governance issues in dispute in the Simpson Action, and held that, regardless of the understanding and interpretation of the orders of this Court asserted by the parties, “Simpson either knew or should have known that, from the first, every unilateral act he took on behalf of the Debtor would be challenged … as unauthorized.” (*Id.* at 285). Further, the court held that “no reasonable person would have believed reorganization was possible … (and it appears that no reasonable person did.)” (*Id.* at *285). The Bankruptcy Court found that the Plan proposed by Debtor “could not be proposed ‘in good faith and not by any means forbidden by law’” until there had been judicial resolution of Simpson’s authority to act for Debtor. (*Id.* at 286). Further, “[t]hat necessarily means that, at the outset of this proceeding, there was ‘no reasonable possibility that the [D]ebtor [could] emerge from bankruptcy’ which, in turn, compels a finding of bad faith.” (*Id.* at 288).

D. GAIC Funds The Bad-Faith Bankruptcy Filing

GAIC reviewed, approved, and funded the plan to circumvent this Court’s Preliminary Injunction through bankruptcy. AREH learned for the first time from the Debtor’s Application (King Aff. Ex. E) that its own insurance policy, intended to cover the defense of AREH and its officers and directors, was financing the bankruptcy. The U.S. Trustee, likewise, recognized that this arrangement was both irregular and concerning, writing:

The Application discloses that funding for Griffin’s prepetition outstanding claim against AREH (Application, ¶¶ 27 & 34, resulting in the receipt of payment of \$76,598.00) and for services rendered in connection with filing of the Debtor’s Chapter 11 case (Application, ¶ 33, resulting in the receipt of payment of \$31,542.00) was covered by the Great American Insurance Company (“Great American”). Great American was the insurance carrier for the Debtor’s directors and officers maintained through a policy issued to AREH. Application, ¶ 33. The Application does not

disclose whether AREH has consented to the charges against the Great American policy. The Application also does not disclose what assets the Debtor has that would be available to cover the payments made by Great American (if such payments were ultimately disallowed) as well as any future compensation incurred by any professional retained by the Debtor.... Here, the questions relating to the potential conflict involved in Griffin representing the Debtor after having represented AREH, as well as to the source of funds to compensate the Debtor's professionals (both as to prepetition and postpetition compensation) appear to favor a deferral of the consideration of the Application until the governance issues have been resolved.

(King Aff. Ex. L)). AREH never consented to the proceeds of its insurance policy being used to fund JJ Arch's request for relief under the Bankruptcy Code. (Wiener Aff. ¶ 8).

Nevertheless, GAIC decided it would fund the Bankruptcy Case based upon the consent of JJ Arch, not its policyholder AREH. (King Aff. Ex. M ¶ 5 ("Debtor expressly consents to Great American's funding of the Chapter 11 Case...")). GAIC's purpose in funding the Bankruptcy Case was not to pay covered claims. Instead, GAIC sought to "mitigate against any claims against the Policy" by using the JJ Arch Bankruptcy Case to bring the Simpson Action and related litigation to a standstill. (*Id.* ¶ 6). GAIC also paid an "unpaid receivable" that AREH allegedly owed Griffin LLP ("Griffin") in connection with Griffin's work as AREH's counsel prior to filling the Bankruptcy Case. (*Id.* ¶ 4).

E. Insurance Lawsuits

On June 7, 2024, AREH brought the AREH Action against GAIC for its voluntary payment of JJ Arch's attorneys' fees incurred in the Bankruptcy Case and GAIC's position that those payments reduce the available limits under the Policy. (King Aff. Ex. N). GAIC acknowledges that JJ Arch is not insured under the Policy. (*Id.* ¶ 3). GAIC nevertheless funded JJ Arch's bad-faith bankruptcy. (*Id.*). Because payment of the costs of defense depletes the available Policy limits, GAIC has taken the position that its voluntary payments for JJ Arch's bankruptcy

proceeding erode the available limits for AREH and individuals that may qualify as “Insureds” under the Policy. (*Id.*).

AREH alleged that by funding JJ Arch’s bankruptcy proceeding, GAIC breached the terms and conditions of the Policy and actively harmed AREH—its own insured—by impairing its ability to perform important, time-sensitive business transactions and causing it to incur costs in the bankruptcy. (*Id.* ¶ 4). AREH seeks a declaration that: (a) JJ Arch is not an insured; (b) Great American’s decision to pay JJ Arch’s legal fees constitutes a voluntary payment that does not erode the Policy’s available limits for AREH and other insureds to the extent of such payments, as well as legal damages, including the fees incurred in connection with the bankruptcy and attorneys’ fees. (*Id.* at 22-23).

On June 26, 2024, GAIC filed this Interpleader. (King Aff. Ex. O). The Interpleader Complaint named AREH, Simpson, Chassen, as well as three law firms involved in the bankruptcy case: Griffin, Wiggin and Dana LLP (“Wiggin”), and Offit Kurman PA (“Offit”). (*Id.*). The Interpleader Complaint seeks resolution of multiple claims to coverage made under the Policy by these parties. This Court granted JJ Arch’s Motion to Intervene and made JJ Arch an Interpleader-Defendant.

The Interpleader Complaint alleges that the Policy is a Claims Made Policy with a \$3 million aggregate limit of liability. (*Id.* ¶ 2). According to the Interpleader Complaint, GAIC already has advanced \$894,000.71 in policy proceeds for purported “Costs of Defense,” as defined by the Policy, leaving \$2,105,999.29 of limits remaining. (*Id.* ¶¶ 33-35). The Interpleader Complaint alleges that the only payment to date was made on behalf of either Simpson or JJ Arch, but it does not make clear what legal work GAIC determined was proper “Costs of Defense” covered by the Policy and how much GAIC paid to any particular law firm for services rendered.

(*Id.*). The Interpleader Complaint also alleges that the three law firms contend they are entitled to the Policy proceeds based on their legal work done in the bad-faith bankruptcy filing. (*Id.* ¶¶ 4-6). Griffin represented JJ Arch as its general bankruptcy counsel. (*Id.* ¶ 4). Wiggin appeared on behalf of JJ Arch as “conflict” counsel for JJ Arch in the Bankruptcy case. (*Id.* ¶ 5). Offit appeared on behalf of Simpson in the Bankruptcy case. (*Id.* ¶ 6).

F. Status of this Action

This action was removed by JJ Arch to federal court before all parties had answered the Complaint. The action returned to this Court on November 5, 2024. ([NYSCEF Dkt. No. 101](#)).

On December 3, 2024, this Court granted JJ Arch leave to intervene ([NYSCEF Dkt. No. 135](#)), but on December 9, 2024, JJ Arch’s counsel sought leave to withdraw leaving its participation in this lawsuit in question. ([NYSCEF Dkt. No. 144](#)).

To date, the only discovery that has taken place is GAIC responding to interrogatories and making a limited production in response to discovery requests made by AREH on November 22, 2024. (King Aff. ¶ 24). AREH has also served document demands on Interpleader Defendants Wiggin, Offit, and Griffin on December 11, 2024. (*Id.* ¶ 25). AREH received written responses and objections to those document demands on January 15, February 3, and February 5, 2024. (*Id.* ¶ 26).

Offit has filed a motion for summary judgment (Motion Seq. No. 2), and GAIC has filed a motion to deposit the disputed sums with the Court and be discharged from the proceeding (Motion Seq. No. 3). (*Id.* ¶ 27). AREH opposed both of those motions on December 31, 2024. (*Id.* ¶ 28). Those motions are set to be heard on March 12, 2025. (*Id.* ¶ 29). On February 28, 2025, Wiggin and Dana also filed a motion for summary judgment. ([NYSCEF Doc No. 215](#)). That motion has a return date of March 20, 2025.

G. AREH'S Motion to Amend

In connection with the instant motion, AREH has attached as Exhibit A to the King Affirmation a proposed Amended Answer and Counterclaims. In accordance with CPLR 3025(b), AREH submits a version of this proposed amended pleading that shows all proposed changes and additions to the original pleading. (King Aff. Ex. B). Because AREH seeks to both add allegations previously made and answered by GAIC in the AREH Action as well as add new allegations, King Aff. Ex. C is included for the Court's convenience. In King Aff. Ex. C, the blue text indicates allegations to be transferred from AREH's Complaint to this action via consolidation. The green text indicates allegations that AREH seeks leave to assert for the first time via this Motion.

Argument

I. CONSOLIDATION IS APPROPRIATE UNDER THESE CIRCUMSTANCES

A. Applicable Legal Standards to Consolidate

This Court is empowered to order consolidation of any of the matters at issue. CPLR § 602(a) provides in relevant part that

When actions involving a common question of law or fact are pending before a court, the court, upon motion, ... may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

N.Y. C.P.L.R. 602(a). "Consolidation is the fusing of two or more actions so that they give rise to a single new action displacing the actions affected thereby. The actions are merged and recaptioned, realigning the parties where necessary" *Kelley v. Galina-Bouquet, Inc., 155 A.D.2d 96, 101–02 (1st Dep't 1990)* (citing 2 Weinstein, Korn & Miller, New York Civil Practice, ¶ 602.02 (2d ed.)).

“[C]onsolidation … is favored to avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts.” *Sherpa v. Ford Motor Co.*, 216 A.D.3d 834, 836 (2d Dep’t 2023) (reversing I.A.S. court’s denial of motion for joint trial). “Where common questions of law or fact exist, a motion … to consolidate [or for a joint trial] should be granted, absent a showing of prejudice to a substantial right by the party opposing the motion.” *Id.* (edits in original). “The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation.” *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 339 (1st Dep’t 2006).

B. Common Questions of Law and Fact Support Consolidation

AREH brought the AREH Action to address the single issue of whether GAIC’s payments of JJ Arch’s fees in the JJ Arch Bankruptcy were uncovered voluntary payments that did not erode the Policy’s limit of liability. The question of JJ Arch’s rights to Policy proceeds and whether the JJ Arch work erodes Policy limits is also central to the Interpleader.

First, JJ Arch has now intervened in the Interpleader. Its status as a purported “Insured” is now directly at issue.

Second, in the Interpleader GAIC has taken the position that its decision to pay JJ Arch’s Bankruptcy costs eroded the Policy limits, leaving only \$2,105,999.29 of the Policy’s \$3,000,000 limit. (King Aff. Ex. O at ¶¶ 33-35).

Third, the Interpleader names three law firms that contend they are entitled to the Policy proceeds based on their representation of either JJ Arch or Simpson in the JJ Arch Bankruptcy as well as other proceedings. (*Id.* ¶¶ 4-6).

The overlapping issues in the actions make consolidation appropriate. *See Moore v. Chase Manhattan Bank, N.A.*, 217 A.D.2d 419, 419 (1st Dep’t 1995). Additionally, consolidation avoids the specter of inconsistent judgments on common issues of Policy interpretations and fact to be

proven at trial—namely, how much of the Policy’s limit of liability remains, whether JJ Arch is entitled to Policy proceeds, and whether GAIC’s payment of JJ Arch’s and other costs in the Bankruptcy Proceeding or other actions constitutes Costs of Defense that erode the Policy’s available limits.

C. Consolidation Does Not Cause Prejudice

Consolidation is appropriate unless a party can demonstrate “prejudice to a substantial right.” *Amcan*, 32 A.D.3d at 339 (“The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation.”). No party could establish prejudice arising out of consolidation. The same facts are at issue in the Interpleader. Discovery has not yet concluded, and deadlines for discovery have not been set. Parallel actions under separate schedules would be wasteful. Both parties to the AREH Action are parties to this Interpleader. Consolidation only simplifies these proceedings.

II.

AREH SHOULD BE GRANTED LEAVE TO FILE ITS AMENDED PLEADING

A. AREH’s Request to Amend the Pleadings is Warranted

AREH further requests leave of Court to amend its pleadings to (a) add AREH’s factual allegations and affirmative claims in the AREH Action as counterclaims in this Interpleader action, and (b) add new factual allegations and a claim against GAIC for aiding and abetting breach of fiduciary duty based upon the finding of the Bankruptcy Court that the bankruptcy filing was commenced in bad-faith. CPLR 3025(b) addresses leave to amend and provides, in pertinent part that “[l]eave [to amend] shall be freely given upon such terms as may be just including the granting of costs and continuances.”

If the proposed amended pleading alleges facts sufficient to establish a *prima facie* cause of action, the Court should grant leave to amend. See *Tapps Nassau Supermarkets, Inc. v. Linden*

Blvd, L.P., 269 A.D.2d 306, 309 (1st Dep’t 2000). A party is permitted to amend a pleading as long as the proposed amendment “is not palpably insufficient or clearly devoid of merit.” *Castor Petroleum, Ltd. v. Petroterminal de Panama, S.A.*, 90 A.D.3d 424, 425 (1st Dep’t 2011); see also *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep’t 2007) (“[o]nce a prima facie basis for the amendment has been established, *that should end the inquiry.*”) (emphasis added). Courts freely allow amendment “even if the amendment substantially alters the theory of recovery.” *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014) (ruling that trial court properly allowed defendant to amend pleading to add counterclaim during trial).

When no party is prejudiced, an amended pleading may be allowed at any time – even after trial. See *Gonfiantini v. Zino*, 184 A.D.2d 368, 369 (1st Dep’t 1992) (“Where no prejudice is shown, the amendment may be allowed during or even after trial.”). The need for a party to defend the amended claim is not prejudice in itself. Prejudice is only shown if there is “some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.” *Williams v. Tompkins*, 132 A.D.3d 532, 533 (1st Dep’t 2015).

B. AREH’s Revisions to Counterclaims Against GAIC Are Meritorious

AREH previously pleaded a declaratory judgment counterclaim against GAIC. Its proposed amendment makes clear that it continues to seek coverage of Defense of Costs incurred in defense of the Simpson Action including related proceedings. GAIC paid such costs prior to filing this Interpleader Action. AREH also seeks to transfer its claim for breach of contract and the covenant of good faith and fair dealing from the AREH Action. GAIC has answered that claim, and there can be no prejudice to GAIC in allowing the amendment.

AREH also asserts a new third Counterclaim against GAIC for aiding and abetting breach of fiduciary duty. A cause of action for aiding and abetting breach of fiduciary duty requires “(1)

a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach."

[Wantickets RDM, LLC v. Eventbrite, Inc., No. 654277/2016, 2017 WL 3130436, at *5 \(Sup. Ct. N.Y. Co. July 21, 2017\)](#) (quoting [Kaufman v Cohen, 307 A.D.2d 113, 125 \(1st Dept 2003\)](#)).

AREH's proposed Counterclaim sufficiently sets forth a *prima facie* case. AREH's bases its claim upon the October 11, 2024, decision of the Bankruptcy Court dismissing the bankruptcy because of the subjective and objective bad faith of JJ Arch in filing it. [In re JJ Arch LLC., 663 B.R. at 282-88](#). The Bankruptcy Court held that "no reasonable person" would have concluded the proceeding was filed for the good faith purpose of reorganization. *Id.* at 285. Nevertheless, GAIC assisted Simpson and JJ Arch, and decided to pay Griffin to file the proceeding, knowing full well that doing so would prevent AREH from operating. The admitted purpose of the Bankruptcy was to undo the orders this Court had put in place allowing AREH to function and prevent AREH from managing and disposing of assets under its new management. (King Aff. Ex. H (First Day Affidavit of J. Simpson at ¶¶ 34-38); King Aff. Ex. P at 16:12 – 17:12).

GAIC also was well aware that the filing of the bad faith bankruptcy violated fiduciary duties that Simpson and JJ Arch owed AREH. Simpson was the managing member of JJ Arch, which is denominated the Managing Member by the AREH Operating Agreement. This Court's Preliminary Injunction order only temporarily removed JJ Arch from that role and did not eliminate fiduciary obligations. Further, in filing the Bankruptcy Proceeding, Simpson and JJ Arch sought to exercise managerial control over AREH through JJ Arch's right to consent to Major Decisions at AREH. (Wiener Aff. ¶ 5). JJ Arch took the position that the consent rights were an asset of the estate and could only be exercised through the Bankruptcy Proceeding. (King Aff. Ex. P at 16:12 – 17:12).

The consent to Major Decisions is a managerial duty at AREH, and even non-managing members have a fiduciary obligation with respect to the exercise of such rights. See *Doeblin v. Macarthur*, 2023 N.Y. Slip Op. 30133(U), 2023 WL 187904 (Sup. Ct. N.Y. Co. Jan 13, 2023) (Masley, J.S.C.). By filing the Bankruptcy Proceeding, Simpson and JJ Arch were acting in a fiduciary capacity by asserting control of the management of AREH. But instead of promoting AREH's interest, the proceeding was motivated by a non-bankruptcy purpose. *In re JJ Arch LLC.*, 663 B.R. at 284, 291. The bankruptcy was used to bring AREH's business to a halt in breach of fiduciary obligations owed to AREH.

GAIC's own filings establish that it provided substantial assistance in facilitating these breaches. GAIC's affiant admitted that JJ Arch "lacks the funding to pay for the commencement and prosecution of the Chapter 11 Case." (King Aff. Ex. M ¶ 6). The Bankruptcy Proceeding would not have been possible without GAIC.

GAIC's acts caused AREH substantial damages, through the costs and expenses of appearing in the Bankruptcy Proceeding and working to establish agreements with lenders on distressed properties that ultimately were thwarted because of the Bankruptcy Proceeding.

No prejudice results from AREH's proposed amendments. GAIC has answered a similar aiding and abetting counterclaim asserted by Chassen. GAIC has lost no "special right" in the time since AREH answered the Interpleader Complaint, nor has GAIC changed its position or undertaken any expense that could have been avoided if AREH had asserted this Counterclaim with its original answer. There is no basis on which to deny AREH leave to amend.

Conclusion

For all the foregoing reasons, AREH respectfully requests that the Motion be granted in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
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WORD COUNT CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Rules for the Supreme Court and County Court,
I hereby certify that the total number of words in this memorandum of law, excluding the caption,
table of contents, table of authorities, signature block, and word count certification is 4,680.

/s/ Sahand Farahati

SAHAND FARAHATI