

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

ARCH REAL ESTATE HOLDINGS, LLC

Plaintiff,

- against -

GREAT AMERICAN INSURANCE COMPANY,

Defendant.

Index No.:

COMPLAINT

**JURY TRIAL
DEMANDED**

Plaintiff Arch Real Estate Holdings, LLC (“AREH” or “Plaintiff”) by its attorneys, Olshan Frome Wolosky LLP, as and for its Complaint against Defendant Great American Insurance Company (“Great American”), hereby alleges as follows:

NATURE OF THE ACTION

1. This insurance coverage lawsuit concerns Great American’s voluntary payment of a non-insured entity’s attorneys’ fees incurred in filing for bankruptcy and Great American’s position that those payments reduce the available limits under an insurance policy Great American issued to AREH (the “Policy”). Not only are the non-insured’s chapter 11 bankruptcy proceeding fees not covered by the Policy, but the non-insured’s bankruptcy filing is directly adverse to AREH’s (i.e., Great American’s insured’s) interests and is causing significant harm to its business operations. Great American must immediately stop using AREH’s assets—its policy limits—to its detriment.

2. AREH is a limited liability company that manages a large real estate portfolio. It has two members: JJ Arch LLC (“JJ Arch”) and 608941 NJ Inc. (“Oak”). JJ Arch recently filed an unauthorized, bad faith chapter 11 bankruptcy in an effort to paralyze AREH’s business operations and circumvent the orders of the Supreme Court of the State of New York, which were

adverse to it and one of JJ Arch's purported principals, Jeffrey Simpson ("Simpson") and allowed AREH to continue to operate.

3. Despite Great American previously determining that JJ Arch is not an insured under AREH's Policy, Great American nevertheless is funding JJ Arch's bad faith bankruptcy in an effort to avoid Great American's obligations to pay out significant and potentially larger sums for defense costs and potential judgments on Simpson's or potentially other Insureds' behalf in ancillary civil litigation. Since the Policy provides that payment of defense costs depletes the available policy limits, Great American has taken the position that its voluntary payments for a non-insured entity's bankruptcy proceeding erode the available limits for AREH and individuals that qualify as "Insureds" under the Policy. To date, and upon information and belief, AREH understands that Great American contends that almost of a third of the Policy's limits have been eroded by the payment of legal fees, including by sums that were used to fund JJ Arch's bankruptcy.

4. By funding JJ Arch's bankruptcy proceeding, Great American has breached the terms and conditions of the Policy and is actively harming AREH—its own insured—by impairing its ability to perform important, time-sensitive business transactions.

THE PARTIES

5. AREH is a limited liability company organized under the laws of New York. Its members are (1) Oak, a New Jersey corporation with its principal place of business in Toronto, Canada; and (2) JJ Arch, a limited liability company organized under the laws of New York. JJ Arch's members are both residents of the State of New York.

6. Upon information and belief, Defendant Great American Insurance Company is a corporation organized and existing under the laws of the state of Ohio and its principal place of business is in Cincinnati, Ohio.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Great American pursuant to CPLR § 301 because Great American was, at all relevant times, a corporation authorized to transact business in the State of New York and/or conducted continuous and substantial business in the State of New York.

8. Venue is proper in this county pursuant to CPLR § 503 because the Policy was issued in New York to a New York insured and the Policy provides that New York law governs the Policy.

FACTUAL BACKGROUND

A. AREH And Its Members

9. AREH is a real estate investment management, construction management, property management and development company.

10. Under AREH's operating agreement (the "AREH Operating Agreement"), AREH has two Members: (1) (Managing Member) JJ Arch; and (2) (Investor Member) Oak.

11. Under JJ Arch's operating agreement, JJ Arch has two Members: (Managing Member) Jeffrey Simpson ("Simpson"); and Jared Chassen ("Chassen").

12. AREH, through several single purpose limited liability companies, manages a portfolio of real estate investments.

13. In addition to its status as an AREH member, Oak has invested \$50 million in properties/projects managed by AREH and has issued guarantees on loans related to these properties and projects.

B. Great American's Policy With AREH

14. Great American sold an Asset Management Liability Solution Policy No. PEPE246619 (defined herein as the "Policy"), to AREH. The Declarations page for the Policy

lists Arch Real Estate Holdings, LLC as the Named Insured. A true and correct copy of the Policy is attached hereto as Exhibit A.

15. The Policy is a contract as between Great American and AREH, and it sets forth the terms and conditions that the parties agreed to follow.

16. The Policy is a “Claims Made” Policy with a policy period of April 18, 2023, to April 18, 2024.

17. The Policy has a \$3 million aggregate limit of liability, subject to a \$150,000 Retention for each Claim first made during the Policy Period under Insuring Agreement B, and no Retention for any Claim first made during the Policy Period under Insuring Agreements A and C.

18. The Policy’s insuring agreements provide, in part, that:

- A. Except for Loss which the insurer pays pursuant to [Insuring Agreement B or C] of this Policy, the Insurer will pay on behalf of the Insured Persons all Loss which the Insured Persons become legally obligated to pay ... for a Wrongful Act.
- B. The Insurer will pay on behalf of the Insured Organization:
 - (1) Loss which the Insured Persons become legally obligated to pay as a result of a Claim but only to the extent an Insured Organization is permitted or required to indemnify such Insured Persons; or
 - (2) Loss which the Insured Organization becomes legally obligated to pay as the result of a Claim ... for a Wrongful Act.

19. Insuring Agreement “C” provides coverage for an “Insured Persons serving in an Outside Position,” and is not relevant to Great American’s payment of JJ Arch’s bankruptcy fees. Insuring Agreement “D” provides coverage for “Investigative Costs resulting from any Shareholder Derivative Demand” and is not relevant to Great American’s payment of JJ Arch’s bankruptcy fees.

20. “Insured Organization” is defined to include the “Named Insured and any Operating Entity.” Operating Entity is defined in Section III.Q. of the Policy, as amended by the RT Elite Real Estate Endorsement, as follows:

[A]ny Organization (including any Investment Fund and its General Partner(s)) created or acquired prior to or during the Policy Period of which an Insured or several Insureds collectively possess, directly or indirectly, the power to control, manage or direct by reason of an Insured’s:

- (1) ownership of greater than 50% voting securities in such Organization;
- (2) right to elect or appoint a majority of the directors, officers, trustees, trust managers, managers, members, General Partner(s), partnership managers, or joint venture managers of such Organization; or
- (3) rights and obligations pursuant to a written agreement governing the management and operation of such Organization.

Operating Entity shall include any entity (including, but not limited to, any holding company, special purpose vehicle or other acquisition vehicle) formed to hold a direct or indirect interest in a Portfolio Company.

21. The definition of Operating Entity further provides that “Operating Entity shall not include any Organization created or acquired by an any Insured Person(s) where such Organization: (i) was not created or established in connection with or to support an Investment Fund; and (ii) the Named Insured is not responsible for the financial reporting and tax filings of such Organization.”

22. JJ Arch is a member of the Named Insured, AREH. AREH does not own an interest in JJ Arch and does not manage JJ Arch. JJ Arch is not an Operating Entity under the terms and conditions of the Policy.

23. The Policy provides that the “Insurer shall be liable to pay one hundred percent (100%) of Loss in excess of the applicable Retention amount . . . up to the Limit of Liability stated in Item 3 of the Declarations.”

24. The term "Loss" is defined as follows:

[C]ompensatory damages, punitive or exemplary damages, the multiple portion of any multiplied damage award, SOX 304/Dodd-Frank 954 Costs, Investigative Costs, settlements, pre-judgment interest, post-judgment interest and Costs of Defense.

Loss shall also include any reasonable fees and expenses of any attorney representing any party who has brought a Claim against any Insured where such fees and expenses are awarded pursuant to a covered judgment against an Insured or a covered settlement (consented to by the Insurer, which consent shall not be unreasonably withheld, delayed or denied) to which an Insured is a party.

It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

Loss, other than Costs of Defense, shall not include:

- (1) taxes, criminal or civil fines or penalties imposed by law;
- (2) amounts which may be deemed uninsurable under the law pursuant to which this Policy is construed;
- (3) non-monetary relief;
- (4) employment-related benefits, stock options, perquisites, deferred compensation, severance, or any other type of compensation other than front pay or back pay;
- (5) any portion of damages, settlements or judgments, or settlements arising out of any Claim alleging the Insured Organization paid an inadequate price or consideration for any securities but solely with respect to coverage provided under Insuring Agreement. B.(2) and solely to the extent such portion of damages, settlements or judgments, or settlements constitute an increase in consideration paid to the underlying claimant;
- (6) costs incurred in connection with cleaning up, removing, eliminating, abating, containing, treating, detoxifying, neutralizing, assessing the effects of, testing for, or monitoring, Pollutants[.]

25. The Policy defines "Costs of Defense" as "reasonable legal fees, costs and expenses

(including but not limited to attorneys, experts, consultants, mediator and arbitrator fees, costs and expenses, document production fees and expenses) incurred in the investigation, defense or appeal

of any Claim including the costs of an appeal bond, attachment bond or similar bond (but without obligation on the part of the Insurer to apply for or furnish such bonds); provided, however, Costs of Defense shall not include salaries, wages, overhead or benefit expenses associated with any Insured Persons.”

26. The Policy further specifies that Great American “shall advance on behalf of the Insureds, excess of any applicable Retention, covered Costs of Defense which the Insureds have incurred in connection with covered Claims made against them prior to disposition of such Claims and within ninety (90) days of receipt and review of the invoices containing such Insured’s Costs of Defense, provided that to the extent it is finally established that any such Costs of Defense are not covered under this Policy, the Insureds, severally according to their relative interests, agree to repay the Insurer such noncovered Costs of Defense. Any amounts advanced by the Insurer shall serve to reduce the Limit of Liability stated in Item 3 of the Declarations [\$3 million] to the extent they are not in fact repaid.”

27. Thus, “Costs of Defense” must be legal fees and other sums incurred by an actual Insured for costs of investigating, defending, or appealing a claim. Costs of Defense do not include attorneys’ fees incurred in connection with the affirmative filing of a bankruptcy proceeding by an uninsured entity. Further, the Policy does not provide or anticipate that Great American will advance Costs of Defense other than those “which the Insureds have incurred.”

28. The Policy provides that all Claims, including potential future lawsuits, “involving the same Wrongful Act or Interrelated Wrongful Acts of one or more Insureds shall be considered a single Claim....” In such circumstance, “[a]ll such Claims constituting a single Claim shall be deemed to have been made on the earlier of the following dates: (1) the earliest date on which any such Claim was first made; or (2) the earliest date on which any such Wrongful Act or Interrelated

Wrongful Acts was [sic] reported under this Policy or any other policy providing similar coverage.”

29. Therefore, to the extent any future litigation arises out of a covered situation alleging Wrongful Acts and noticed to Great American under the Policy, Loss (including Costs of Defense) incurred in connection with such future litigation would be covered by the Policy and compensable through the available limits remaining in the Policy, even if the litigation arose after the expiration of the policy period.

C. *Underlying Litigation Between AREH's Members And JJ Arch's Bankruptcy Proceeding.*

30. Over the last several years, AREH and certain underlying properties have faced financial difficulties due to the actions of JJ Arch and JJ Arch's then-Managing Member, Simpson. Disputes have arisen between AREH's members (JJ Arch and Oak) as well as between JJ Arch's members (Simpson and Chassen) and between Oak and Simpson.

31. In August 2023, Simpson filed a civil proceeding styled *Jeffrey Simpson, individually and derivatively, as managing member of JJ Arch LLC, suing derivatively as managing member of Arch Real Estate Holdings LLC and JJ Arch LLC, v. Jared Chassen, et al.*, Index No. 158055/2023, pending in the Supreme Court of the State of New York, County of New York (the “Simpson Action”). A true and correct copy of the Summons and Complaint in the Simpson Action is attached hereto as Exhibit B. The Simpson Action initially focused on internal corporate governance disputes between JJ Arch's members regarding who rightfully controlled and remained a member of JJ Arch.

32. Because of Simpson's actions and the effect the turmoil at JJ Arch was having on AREH, Oak subsequently intervened in the Simpson Action by way of its motion to appoint a receiver over JJ Arch. Oak later filed a complaint in the Simpson Action, alleging various causes

of action against Simpson and JJ Arch, including breach of fiduciary duty, breach of contract, tortious interference with contract, tortious interference with prospective business advantage, defamation, fraud, declaratory judgment, equitable accounting, and derivative claims on behalf of AREH for breach of fiduciary duty. A true and correct copy of the Oak Complaint in the Simpson Action is attached hereto as Exhibit C.

33. Simultaneously with the filing of the Complaint in the Simpson Action, Oak brought an emergency motion via Order to Show Cause seeking a temporary restraining order and injunctive relief to restrain JJ Arch and Simpson from managing AREH. That same day, the Honorable Joel M. Cohen granted temporary/interim emergency relief and ordered that “pending the hearing of this Order to Show Cause, Oak will serve as acting managing member of AREH....” A true and correct copy of this November 3, 2023, Order is attached hereto as Exhibit D.

34. On November 20, 2023, Justice Cohen heard oral argument and granted Oak’s motion for a preliminary injunction. The Court instructed counsel to meet and confer promptly on the specific language for the injunction over JJ Arch and Simpson. The Court also ordered that the November 3, 2023, temporary restraining order remained in full effect. A true and correct copy of the November 20, 2023, Interim Decision and Order is attached hereto as Exhibit E.

35. On November 22, 2023, Justice Cohen entered an Amended Decision and Order On Motion (the “Preliminary Injunction”) that set forth the respective management rights of AREH and the injunctive relief granted as against JJ Arch and Simpson. A true and correct copy of the Preliminary Injunction is attached hereto as Exhibit F.

36. In the Preliminary Injunction, Justice Cohen ordered, among other things, that:

during the pendency of this action and subject to further order of the Court,

Jeffrey Simpson and JJ Arch LLC are enjoined from:

1. Acting as (or holding themselves out to third parties to be) managing members of Arch Real Estate Holdings LLC (“AREH”), and Oak shall continue to act in their stead as AREH’s sole managing member....
2. Denying prompt consent to any Major Decision proposed by Oak as Managing Member ... unless *both* JJ Arch members (Jeffrey Simpson and Jared Chassen) jointly agree to deny such consent (or, alternatively, either JJ Arch member may convey consent)....

37. Therefore, following the Preliminary Injunction AREH may undertake Major Decisions, as that term is defined in the AREH Operating Agreement, upon the consent of either Simpson or Chassen. Consent to a Major Decision proposed by Oak could only be denied by agreement of both Simpson and Chassen.

38. Accordingly, since November 3, 2023, Oak has served as AREH’s acting managing member by court order, and neither Simpson nor JJ Arch has authorization to manage AREH or unilaterally deny consent to a Major Decision, although JJ Arch remains a member, pending resolution of the Simpson Action.

39. Chassen has also filed a Counterclaim in the Simpson Action (the “Chassen Counterclaim”) alleging eighteen causes of action against Simpson including breach of contract, breach of fiduciary duty, declaratory judgment, in addition to derivative claims on behalf of JJ Arch related to Simpson’s misconduct at JJ Arch and in the affairs of AREH.

40. Accordingly, as things presently stand under the Preliminary Injunction, Simpson’s authority and power of AREH has been removed by the Court. The Preliminary Injunction was granted on an express finding of a substantial likelihood that Oak will be able to establish that

Simpson had committed Cause Events that rendered JJ Arch removable as AREH's managing member.

41. Simpson did not timely appeal the Preliminary Injunction, and instead has single-mindedly worked to subvert the Court's order through collateral attack.

42. In an effort to circumvent the Preliminary Injunction and to relitigate the matters already decided in the Simpson Action, 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 "Bankruptcy Proceeding"). A true and correct copy of the Voluntary Chapter 11 Petition of JJ Arch is attached hereto as Exhibit G.

43. The activity in the Bankruptcy Proceeding can only be described as dizzying, with over one hundred docket entries and a flurry of motion practice since its inception in March concerning the propriety of the Bankruptcy Proceeding. So far, there has been a motion to dismiss filed by Chassen, in which AREH joined, motions for relief regarding the automatic stay, a motion to expand the powers of the subchapter V trustee, a motion for sanctions for violations of the automatic stay, a motion to compel expedited discovery, two motions for the retention of two separate law firms for the debtor (JJ Arch), and most recently, a motion by a third party seeking to foreclose on a property managed by AREH.

44. In addition, JJ Arch removed the Simpson Action to the Bankruptcy Proceeding, prompting additional motion practice within that adversary proceeding, including a motion to remand. With the exception of the motion regarding foreclosure, Simpson has caused JJ Arch to oppose these motions using funds secured from Great American.

45. None of these motions has yet been resolved. Indeed, many of these motions have spawned ancillary hearings on discovery, and JJ Arch is pressing for expansive discovery and evidentiary hearings for nearly all of these motions. Notably, the foray into bankruptcy court has greatly expanded JJ Arch's (and Simpson's) legal teams—with three firms appearing on their behalf. One of these firms, Wiggin and Dana LLP ("Wiggin"), appeared as purported "conflicts counsel," due to the unprecedeted decision of another law firm, Griffin LLP ("Griffin"), to defect from representing AREH and begin representing JJ Arch, against whom AREH has asserted claims. Yet another law firm, Offit Kurman, P.A. ("Offit"), has appeared in the bankruptcy on behalf of Simpson.

46. Remarkably, between June 1 and June 3, 2023, all three of these law firms filed motions seeking to terminate their representation of JJ Arch or Simpson, respectively, pursuant to the New York Rules of Professional Conduct, citing "fundamental disagreement" and an "irreparable breakdown in the attorney-client relationship." The attorneys representing JJ Arch also specifically cited Rule 1.16(c)(6), which is applicable when a "client insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law." A true and correct copy of the motions to withdraw as counsel filed by Wiggin, Griffin, and Offit and appearing at docket numbers 118, 119, and 120 in the Bankruptcy Proceeding, have been aggregated and attached hereto as Exhibit H.

47. Nevertheless, the Bankruptcy Proceeding has drastically increased the complexity and level of activity in connection with the disputes regarding the governance and operations of JJ Arch. Moreover, in bringing this unauthorized Bankruptcy Proceeding, Simpson defied court

orders that expressly required Chassen's consent to file a bankruptcy petition. Needless to say, Chassen's consent was never sought and never granted.

48. Notwithstanding the Bankruptcy Proceeding's lack of legitimacy, Simpson achieved his primary purpose in bringing it. As intended, JJ Arch's bankruptcy has caused AREH's operations to come to a standstill at a tremendous cost to AREH and the investors in the properties it manages. Simpson effectively has leveraged the Bankruptcy Proceeding to give him the control over AREH that he was stripped of by the Preliminary Injunction in the Simpson Action.

D. *The Bankruptcy Proceeding (And Costs Associated Therein) Would Not Have Been Possible Without Great American's Financial Support.*

49. In connection with the Simpson Action, upon information and belief, Simpson, JJ Arch, and Chassen all sought coverage from Great American under the Policy. On November 22, 2023, in correspondence to Alan R. Lyons, Esq., of Herrick Feinstein LLP, in his purported role as "designated representative of all Insureds with respect to insurance coverage matters," Great American took the position that it would defend Insured Persons subject to a reservation of rights, but maintained that JJ Arch was not an Insured under the Policy. A true and correct copy of the November 22, 2023, letter is attached hereto as Exhibit I.

50. Nevertheless, based on information and belief, before filing the Bankruptcy Proceeding, Great American determined that it would be in Great American's financial interest to fund JJ Arch's costs incurred in the Bankruptcy Proceeding instead of using the Policy proceeds to pay legitimate Costs of Defense or settlements/judgments. Absent Great American's financial support, JJ Arch would not have had the resources to self-fund the Bankruptcy Proceeding or oppose AREH's efforts to obtain dismissal of the Bankruptcy Proceeding.

51. The application to retain Griffin (“Griffin Retention Application”) as JJ Arch’s general bankruptcy counsel filed in the Bankruptcy Proceeding recounts that approximately one month prior to the commencement of the Bankruptcy Proceeding, Simpson paid Griffin LLP \$76,598, for which amount Griffin LLP understands Great American agreed to reimburse Simpson (despite the Bankruptcy Proceeding being adverse to AREH’s interests and Griffin having acted as *AREH*’s counsel in the Simpson Action). A true and correct copy of the Griffin Retention Application is attached hereto as Exhibit J.

52. The Griffin Retention Application further indicates that Griffin has received \$31,542 for other services relating to the preparation and commencement of the Bankruptcy Proceeding.

53. Upon information and belief, Great American previously indicated it would pay Griffin for services rendered after the April 5, 2024, submission of the Griffin Retention Application.

54. In connection with the Griffin Retention Application, Great American’s counsel submitted a declaration regarding its funding of the case, testifying that “Great American determined to provide chapter 11 funding to the Debtor [JJ Arch] in order to mitigate against any claims against the Policy. In addition, the Debtor lacks the funding to pay for the commencement and prosecution of the Chapter 11 Case.” (See Ex. J at 66, ¶ 6.)

55. The timing of these payments and the circumstances surrounding them—particularly in light of the fact that JJ Arch otherwise could not fund the Bankruptcy Proceeding—establish that Great American’s funding was instrumental if not essential to enabling Simpson to initiate the Bankruptcy Proceeding. In turn, Great American is complicit in Simpson’s endeavors to harm AREH—Great American’s Insured—through the Bankruptcy Proceeding.

E. Great American's Decision To Pay For JJ Arch's Bankruptcy Proceeding Is A Voluntary Payment And Does Not Erode The Policy's \$3 Million Limit.

56. As noted above, Great American's decision to pay JJ Arch's bankruptcy fees is directly contrary to the position taken by Great American in writing when presented with the Simpson Action claim. On November 22, 2023, Great American analyzed who qualified as an insured under the Policy and concluded that "**JJ Arch . . . is not the Named Insured and otherwise does not constitute an Operating Entity as defined in the Policy.**" Specifically, an Insured does not maintain an ownership interest in JJ Arch; rather, JJ Arch maintains an ownership interest in the Named Insured, AREH. **Accordingly, JJ Arch is not an Insured under the Policy.**" (See Ex. I at 7 (emphasis added).)

57. JJ Arch also does not qualify as an "Insured Person" under the Policy terms, which require that an "Insured Person" be "any natural person."

58. Yet incredibly, a few months later, Great American's Senior Claims Attorney, Mr. Thomas Mundt, declared that Great American "determined to provide chapter 11 funding to the Debtor [JJ Arch] in order to mitigate against any claims against the Policy."

59. Given Great American's position that no coverage exists for JJ Arch and that JJ Arch is not an Insured, Great American's about-face decision to pay JJ Arch's bankruptcy fees in the Bankruptcy Proceeding qualifies as a voluntary payment and does not erode the Policy's \$3 million aggregate limit.

60. Moreover, the costs and expenses associated with a non-insured's *proactive* bankruptcy filing are not "Costs of Defense" or "Loss" as a result of a "Claim" for a "Wrongful Act." Thus, even if JJ Arch were an Insured (which Great American has already determined it is not), the legal fees incurred by JJ Arch in filing its own bankruptcy petition would not be covered Loss.

61. Great American has admitted that payment of JJ Arch's legal fees is not contractually required or anticipated under the terms of the Policy. Instead, such payments constitute a voluntary and *ex gratia* payment that Great American has willingly incurred for its own perceived benefit to mitigate potential future payment of Loss under the terms of the Policy.

62. AREH has demanded that Great American cease paying JJ Arch's Bankruptcy Proceeding legal fees, reminded Great American that it previously determined JJ Arch was not an insured, and emphasized that Great American's voluntary payments do not erode available policy limits. Great American has refused to acknowledge that its payment JJ Arch's Bankruptcy Proceeding legal fees has not eroded the Policy limits.

F. *Great American's Decision To Fund The Bankruptcy Proceeding Is Harming Actual Insureds.*

63. A covenant of good faith and fair dealing is implicit in every insurance contract, including the Policy.

64. As an insurer, Great American has an obligation to give the interests of its policyholder at least equal consideration as its own. Instead, Great American has acted with reckless disregard to the interests of its insured, AREH, in funding litigation by JJ Arch adverse to the interests of AREH solely in an attempt to limit Great American's obligation to pay Loss under the Policy.

65. The implied covenant of good faith and fair dealing obligates each party to the contract to, among other things, refrain from taking any action that would deprive the other of the benefits of the contract or cause undue hardship or harm to the other party.

66. In the context of insurance contracts, the implied covenant of good faith and fair dealing requires insurers to, among other things, investigate claims promptly and act in good faith.

67. By funding the Bankruptcy Proceeding, Great American is purporting to waste policy proceeds that would otherwise be available to AREH and other insureds.

68. Great American's decision to issue voluntary *ex gratia* payments to a non-insured entity is causing additional harm to Great American's actual insureds, thereby elevating Great American's financial interests ahead of its insureds' and breaching the implied covenant of good faith and fair dealing embedded within the Policy.

69. Great American's agreement to pay JJ Arch's costs also violates Great American's duty of good faith and fair dealing embedded within the Policy. Great American's position that the funding of the Bankruptcy Proceeding depletes limits constitutes a gross disregard of both the Policy language and the true insureds' interests in maintaining adequate limits for the other civil proceedings.

70. In taking this position, Great American is also directly harming AREH, its Named Insured (which has asserted claims for substantial damages against the non-insured Debtor), by, *inter alia*, paralyzing AREH's ability to function. This situation and the damage being caused has been extensively briefed in the very Bankruptcy Proceeding Great American is funding.

71. Great American's decision to underwrite unmeritorious claims in the Bankruptcy Proceeding has prevented AREH from consummating deals to resolve loans on underwater properties managed by AREH, notwithstanding that all material terms of these deals had been negotiated and agreed in principle. But for the Great American-funded Bankruptcy Proceeding, AREH would have closed such deals and mitigated costs, expenses, and damages suffered in connection with such underwater properties.

72. By paralyzing AREH's ability to function through the Bankruptcy Proceeding, Great American caused months of effort and complex negotiations to be wasted and fruitless

endeavors. AREH was deprived of the benefit of the considerable time and resources it expended in pursuing beneficial resolutions with respect to such properties.

73. These losses to AREA were a foreseeable direct result of the Bankruptcy Proceeding.

74. In fact, AREH now has been named a defendant in at least one lawsuit that arises out of Simpson's mismanagement of the property and its eventual foreclosure involving a loan and property that were subject to an agreement in principle that was thwarted by the bad faith Bankruptcy Proceeding funded by Great American.

75. Upon information and belief, Great American was aware or should have been aware that the filing of the Bankruptcy Proceeding would cause confusion and uncertainty as to the management of AREH and would result in AREH's business being paralyzed.

76. It was reasonably foreseeable to Great American that its decision to fund the Bankruptcy Proceeding would cause confusion and uncertainty as to the management of AREH and would result in AREH's business being paralyzed.

77. Accordingly, because of Simpson's misconduct, as perpetuated by Great American, AREH lost the opportunity to close multiple beneficial deals, which instead were instead lost to foreclosure and/or other litigation. AREH is now embroiled in such additional litigation resulting from its inability to consummate deals that were agreed-to in principle, causing it to needlessly incur further legal expenses and damaging it substantially.

FIRST CAUSE OF ACTION

(Declaratory Judgment)

78. AREH repeats and realleges all the foregoing allegations as though fully set forth herein.

79. Pursuant to the terms of the Policy and Great American's own admission, JJ Arch is not insured under the Policy. Further, Great American's payment of JJ Arch's legal fees and expenses in the Bankruptcy Proceeding does not qualify as "Costs of Defense" or as a covered "Loss" as a result of a "Claim" for a "Wrongful Act" under the Policy and does not erode the Policy's available limit of \$3 million.

80. An actual and justiciable controversy has arisen between AREH and Great American with respect to whether the Policy's aggregate limit erodes due to Great American's funding of the Bankruptcy Proceeding.

81. AREH seeks a declaration by the Court that (a) JJ Arch is not an insured (which Great American has already conceded); (b) Great American's decision to pay JJ Arch's costs in the Bankruptcy Proceeding constitutes a voluntary payment; and (c) to the extent Great American has made any payment of JJ Arch's costs and expenses in the Bankruptcy Proceeding, such payment does not erode the Policy's available limits for AREH and other insureds.

SECOND CAUSE OF ACTION

(Breach of Contract and Covenant of Good Faith and Fair Dealing)

82. AREH repeats and realleges all the foregoing allegations as though fully set forth herein.

83. The Policy is a valid and enforceable contract.

84. AREH has paid all policy premiums pursuant to the Policy and satisfied all obligations to the extent they have not been waived or abrogated by Great American's conduct, omissions, or actions.

85. Great American has breached the terms and conditions of the Policy by funding an unmeritorious Bankruptcy Proceeding, paying JJ Arch's fees in the Bankruptcy Proceeding, and

taking the position that AREH's insurance policy limits have been reduced by such payments, despite clear Policy language that such costs are not covered and Great American's determination that JJ Arch is not an insured.

86. As a direct, proximate, and foreseeable result of Great American's breach, AREH has been damaged and will continue to sustain compensatory damages in an amount to be determined at trial, including amounts that Great American has paid on behalf of JJ Arch.

87. AREH also has sustained and continues to sustain consequential damages, including attorneys' fees incurred in connection with this action, attorneys' fees incurred in connection with the Bankruptcy Proceeding, and damages associated with the foreseeable interference in AREH's business operations and agreed-to but unconsummated deals caused by the funding and filing of the wrongful Bankruptcy Proceeding, including subsequent litigation.

88. Alternatively, in addition to its express terms, the Policy between AREH and Great American contains an implied covenant of good faith and fair dealing that obligates Great American to perform the terms and conditions of the insurance contract fairly and in good faith and to refrain from doing any act that would prevent or impede AREH from performing any or all of the conditions of the insurance contract or any act that would deprive AREH of the benefits of the contract.

89. AREH reasonably relied on the representations of Great American that Great American would abide by the terms and conditions under the Policy.

90. Great American has breached the implied covenant of good faith and fair dealing under the Policy by failing to follow the terms and conditions set forth therein. Great American has intentionally, without cause, and in bad faith, purported to perform its obligations pursuant to said Policy in a manner that harms AREH and deprives it of the benefit of the Policy.

91. Great American's conduct in financing the Bankruptcy Proceeding evinces a gross disregard for the interests of its Insured, AREH. Great American has deliberately and recklessly refused to place AREH's interest on an equal footing with the Great American's own interests by funding litigation against AREH in a misguided effort to "mitigate" potential future legitimate Loss payable under the Policy.

92. As a direct and proximate result of Great American's acts, AREH has been damaged and will continue to sustain damages in an amount to be determined at trial. As a further proximate result of the Great American's breach of the implied covenant of good faith and fair dealing, AREH has incurred reasonable attorneys' fees in attempting to secure the performance of Great American under the Policy.

93. In addition, AREH has incurred and continues to incur consequential damages, including attorneys' fees in this action and the Bankruptcy Proceeding, as well as lost business opportunities and the damages associated with the foreseeable interference in AREH's business operations and agreed-to but unconsummated deals caused by the funding and filing of the wrongful Bankruptcy Proceeding, including subsequent litigation

94. AREH's attorneys' fees incurred in connection with this action and the Bankruptcy Proceeding are recoverable because they were the reasonably foreseeable result of Great American's bad faith breach of contract and breach of the implied covenant of good faith and fair dealing that is implicit in the Policy.

95. The consequential damages resulting from Great American's conduct were the probable and natural result of Great American's breaches.

96. As a result of Great American's bad faith breach of contract and breach of its duty of good faith and fair dealing, AREH requests entry of judgment awarding payment of damages

in an amount equal to the direct and consequential loss caused by Great American's bad faith breach, including but not limited to, an amount equal to the Policy's proceeds that Great American has wrongfully deprived AREH of via its payment of JJ Arch's defense costs in the Bankruptcy Proceeding, AREH's attorneys' fees, costs, and expenses incurred in this action and the Bankruptcy Proceeding, and consequential damages, including, but not limited to, lost business opportunities and damages associated with the foreseeable interference in AREH's business operations and agreed-to but unconsummated deals caused by the funding and filing of the wrongful Bankruptcy Proceeding, including subsequent litigation, each in amounts to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

1. On the First Cause of Action, AREH requests declaratory judgment that (a) JJ Arch is not an insured (which Great American has already conceded); (b) Great American's decision to pay JJ Arch's costs in the Bankruptcy Proceeding and any payment of such costs constitutes a voluntary payment; and (c) Great American's payment of JJ Arch's costs in the Bankruptcy Proceeding does not erode the Policy's available limits for AREH and other insureds to the extent of such payments.
2. On the Second Cause of Action, AREH requests entry of judgment for bad faith breach of contract and breach of the implied covenant of good faith and fair dealing, awarding payment of damages in an amount equal to the Policy's limit that Great American claims is being eroded by its payment of JJ Arch's defense costs in the Bankruptcy Proceeding, and consequential damages, including reasonable attorneys' fees and costs incurred attempting to secure the performance of Great

American under the Policy and in the Bankruptcy Proceeding, and all other foreseeable damages flowing from Great American's bad faith breach.

3. On All Causes of Action, AREH requests:

- a. Reasonable attorneys' fees and costs incurred herein;
- b. Costs of suit incurred herein; and
- c. Any such other and further relief as the court may deem proper.

DEMAND FOR JURY TRIAL

AREH hereby demands a trial by jury on all issues so triable.

Dated: New York, New York
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