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, and OFFIT KURMAN PA, *Defendants*.	Index No. 653208/2024 Motion Seq. No. 3

DEFENDANT ARCH REAL ESTATE HOLDINGS, LLC MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF GREAT AMERICAN INSURANCE COMPANY'S ORDER TO SHOW CAUSE

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Interpleader Defendant Arch Real Estate Holdings, LLC ("AREH"), by and through its attorneys Olshan Frome Wolosky LLP, hereby submits its Memorandum of Law in Opposition to Plaintiff Great American Insurance Company's Order to Show Cause (the "Motion").

Preliminary Statement

Great American Insurance Company ("GAIC") seeks to avoid a complex dispute of its own making. There are competing demands for payment of insurance proceeds pursuant to an Asset Management Liability Solution Policy No. PEPE246619 (the "Policy") sold to Named Insured AREH and covering, among other things, Costs of Defense of an Insured pursuant to its terms and conditions. Payment of Costs of Defense erode the Policy limits. The underlying question is straightforward: what legal fees are covered?

But GAIC made the decision to pay certain costs that did not fall within the Policy's coverage. It now seeks to deposit with the Court only the remaining Policy limits to which there is no dispute. GAIC attempts to have this Court bless its prior payments by granting discharge without subjecting those payments to any judicial scrutiny or even to discovery. GAIC cannot use this interpleader proceeding to avoid the consequences of its prior misuse and improper payment of the Policy proceeds.

AREH does not oppose GAIC depositing $2.1 million into the Court, but the remainder of GAIC's motion must be denied. GAIC cannot be discharged because it does not seek to interplead the full remaining Policy limits. GAIC's prior voluntary payments of uncovered costs do not erode the Policy. GAIC also cannot be discharged because it faces allegations of liability separate from the remaining policy limits. AREH has asserted that GAIC is liable for voluntary payments and bad faith breach of contract. Further, GAIC faces independent liability arising out of aiding and abetting breach of fiduciary duty claims asserted by Chassen.

GAIC is not a disinterested stakeholder. It has a vested interest in how the Court rules on the coverage decisions it already has made and whether it has liability beyond the $2.1 million it seeks to interplead. Its motion must also be denied as premature because newly added Interpleader Defendant JJ Arch has not answered. Additionally, discovery is needed before discharge can be considered so that the parties can understand what amounts have been paid under the Policy and how those Policy proceeds have been used.

GAIC's extraordinary request for an anti-suit injunction must also be rejected as a thinly-veiled attempt to avoid AREH's claims that GAIC breached the Policy and the consequences of its use of the Policy to fund a bad faith bankruptcy. GAIC has not shown the extraordinary circumstances that would warrant any anti-suit injunction.

AREH respectfully requests that this Court reject that portion of GAIC's motion requesting a discharge from this action and an injunction against pending litigation against GAIC.

Relevant Facts

The facts set forth below are taken from the Affirmation of Jeremy M. King, dated December 31, 2024 ("King Aff."), and its exhibits ("King Ex.").[1]

A. Background

AREH is a limited liability company that manages a large real estate portfolio. AREH is the sole Named Insured on the Policy. (NYSCEF Doc. No. 2 at Declarations p. 1). AREH has two members. One is JJ Arch, who was the Managing Member of AREH. JJ Arch has two members that are individuals: Jeffrey Simpson and Jared Chassen. AREH's other member is 608941 NJ Inc. ("Oak").

[1] GAIC's Memorandum of Law in support of its motion (NYSCEF Doc. No. 78) is referred to as the "GAIC Brief."

In August 2023, 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. On August 15, 2020, Simpson and JJ Arch filed a civil proceeding styled *Jeffrey Simpson, et al. v. Jared Chassen, et al*., Index No. 158055/2023 (Sup. Ct. N.Y. Co.) (the "Simpson Action"). (King Ex. 1). It sought relief against Chassen for alleged breach of the JJ Arch Operating Agreement, alleged breach of fiduciary duties owed to JJ Arch, conversion, tortious interference with a banking contract, and declaratory and injunctive relief with respect to JJ Arch governance issues and bank account control. (*Id*.).

The Simpson Action was filed by Adam Leitman Bailey, P.C. as attorneys for Simpson. This was the first law firm that appeared for Simpson.[2] On October 11, 2023, Griffin LLP was substituted as counsel for Simpson and JJ Arch in the Simpson Action. (King Ex. 3). On October 12, 2023, Sam P. Israel P.C. appeared on behalf of Simpson and JJ Arch. (King Ex. 4). On November 16, 2023, Altman & Company P.C. appeared on behalf of Simpson. King Ex. 5). On March 13, 2024, Offit Kurman P.A. appeared on behalf of Simpson. (King Ex. 6). On April 1, 2024, Wiggin and Dana LLP appeared on behalf of JJ Arch and removed the Simpson Action. King Ex. 7). Ultimately, at least five law firms appeared on Simpson's behalf in the Simpson Action and three law firms appeared to represent JJ Arch. It is unclear whether all of these firms were paid by GAIC and how much any of these firms may have received.

In mid-October, Oak appeared in the Simpson Action because of the impact the turmoil at JJ Arch was having on AREH. On October 17, 2023, Oak brought an emergency motion seeking a temporary restraining order and to have a temporary receiver appointed over JJ Arch

[2] Adam Leitman Bailey, P.C. recently commenced an action seeking confirmation of an arbitration award of attorneys' fees, taking the position that these fees were owed by Simpson. (King Aff. Ex. 2). The Bankruptcy filings listed this as debt of JJ Arch. (King Ex. 10 (Official Form 204).) Confusion with respect to the scope of representations of the various law firms is one reason that discovery is needed.

because its internal governance issues placed AREH in crisis. On November 3, 2023, this Court granted temporary/interim emergency relief to Oak and ordered that "pending the hearing of this Order to Show Cause, Oak will serve as acting managing member of AREH…." (King Ex. 8).

On November 20, 2023, this Court held argument on Oak's motion and in an Order dated November 22, 2023, it entered an order enjoining Simpson and JJ Arch from, among other things, "[a]cting as (or holding themselves out to third parties to be) managing members of Arch Real Estate Holdings LLC … and Oak shall continue to act in their stead as AREH's sole managing member…." (King Ex. 9 at 2).

Subsequently, on March 7, 2024, JJ Arch filed 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 Ex. 10). The filing was made pursuant to a purported Written Consent of the Management Member of JJ Arch, which set forth that Simpson caused the filing as the "sole member and manager of [JJ Arch]." (*Id.* at 7). The Written Consent further made clear that the reason for the filing was "that in the judgment of Simpson, it is desirable and in the best interests of [JJ Arch], its creditors and other parties in interest, that [JJ Arch] file or cause to be filed a voluntary petition for relief" under the Bankruptcy Code. (*Id.*)

On April 1, 2024, JJ Arch removed the Simpson Action to the JJ Arch Bankruptcy. (King Ex. 7).[3] AREH and Chassen sought remand, which was granted by the Bankruptcy Court. *In re JJ Arch LLC.*, No. 24-10381, Adv. Pro. No. 24-1335, 2024 WL 2933427, at *1 (Bankr. S.D.N.Y. June 10, 2024). The Bankruptcy Court held that the bankruptcy forum was being abused to avoid rulings by this Court. (*Id.* at *20). The Bankruptcy Court also specifically

[3] On September 20, 2024, JJ Arch also removed this Interpleader Action to the Bankruptcy Proceeding during the pendency of the instant motion. (NYSCEF Doc. No. 87).

found that "the tenth [permissive abstention] factor – forum shopping [by JJ Arch] – weighs in favor of abstention." (*Id.*).

JJ Arch appealed the remand decision, but that appeal was mooted because the Bankruptcy Court found that the entire bankruptcy proceeding had been brought in bad faith. On October 11, 2024, the Bankruptcy Court dismissed the bankruptcy because of the illegitimacy of the filing from the very beginning. *In re JJ Arch LLC.*, 663 B.R. 258 (Bankr. S.D.N.Y. 2024). The court made a two-part inquiry into the existence of bad faith: "whether there was 'no reasonable likelihood that the debtor intended to reorganize' (the 'subjective bad faith' prong); and (ii) whether there was 'no reasonable possibility that the debtor will emerge from bankruptcy' (the 'objective futility' prong)." *Id.* at 281. Both clearly showed Simpson's and JJ Arch's obvious bad faith in bringing the proceeding and using it to incapacitate AREH.

Simpson and JJ Arch acted in "subjective bad faith" because there was no intent to actually reorganize. The Bankruptcy Court found 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. 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 entire purpose of the filing was to circumvent the Simpson Action. It "was instead 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 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. In fact, "no reasonable person would have believed reorganization was possible under these facts (and it appears no reasonable person did.)" *Id.* 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 287. 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.

B. Alleged Erosion of the Policy Limits

Hundreds of thousands of dollars in legal fees were incurred on behalf of JJ Arch that the Bankruptcy Court found "excessive for a debtor without a stream of revenue" and thereby caused "a substantial or continuing loss to or diminution of the estate . . ." *Id.* at 277. "Mr. Simpson has, since the August Exchange, hired no less than six firms—some on his behalf and some on behalf of [JJ Arch]—who have appeared both before this Court and before Justice Cohen." *Id.* at n. 31.[4] GAIC funded that proceeding, as well as paying other uncovered activities that do not properly erode the limits of liability. The Policy covers Insured Persons and Insured

[4] The Bankruptcy Court referred to the "exceptional rate at which [JJ Arch] has incurred expenses," citing to GAIC's allegation in the Interpleader Complaint it has advanced "advanced $894,000.71 in Costs of Defense incurred by Simpson," which the Bankruptcy Court noted that "[n]either [JJ Arch] nor Mr. Simpson have provided evidence disputing." *Id.*

Organizations in connection with AREH business, not JJ Arch or individuals conducting JJ Arch business. On November 22, 2023, GAIC made this coverage position clear. "JJ Arch is not an Insured under the Policy." (King Ex. 11). Further, "Simpson does not satisfy the definition of Insured Person," although GAIC was willing to cover defense of alleged Wrongful Acts by Simpson "in his capacity as the de facto managing member of AREH." (*Id.*). On January 4, 2024, Simpson acknowledge this limitation, confirming to GAIC that "I understand that unrelated to [AREH], JJ Arch litigation, where it does not pertain to the matter of control, [legal costs] will be excluded from coverage." (King Ex. 12 at 2).

Nevertheless, GAIC then decided to fund non-Insured JJ Arch's bad faith bankruptcy. On March 7, 2024, GAIC was sent a draft petition by JJ Arch's counsel, Griffin LLP, and GAIC approved the filing. (King Ex. 15). Previously, Simpson had written to Griffin LLP and encouraged them to use AREH Policy proceeds to seek affirmative relief for the benefit of JJ Arch. "If there is an opportunity for you to help JJ Arch LLC, at that point I will introduce you to [GAIC] and you will be able to dialogue directly on your initiative and compensation requirements." (King Ex. 12 at 1 (emphasis added)).

GAIC has never explained why it funded a non-Insured's bankruptcy. It has sworn that it paid Griffin LLP at least "$31,542 for the commencement and prosecution of the [JJ Arch] Chapter 11 Case for a global restructuring of [JJ Arch] and certain of its affiliates," and another $76,598 for work by Griffin on behalf of AREH. (King Ex. 14 ¶ 4). But the remaining alleged erosion of the $894,000.71 in purported "Costs of Defense" is unexplained, as is the basis for contending that only $2,105,999.29 of Policy limits remain for interpleader. (NYSCEF Doc. No. 1 at ¶¶ 33-35). GAIC has not supported its position with any documentation demonstrating this purported Policy erosion.

C. The Insurance Litigations

On June 7, 2024, AREH brought a related lawsuit (the "AREH Action") against GAIC seeking relief for GAIC's voluntary payment of JJ Arch's attorneys' fees. AREH seeks damages caused by GAIC's breach of the terms of the Policy in funding litigation adverse to AREH's interests and harming AREH by impairing its ability to perform important, time-sensitive business transactions. (King Ex. 15). AREH also seeks a declaration 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." (*Id*. at 22-23)

On June 26, 2024, GAIC filed its Interpleader Complaint instead of pleading defensive interpleader in response to AREH's lawsuit. The Interpleader Complaint alleges that GAIC properly advanced $894,000.71 in Policy proceeds for purported "Costs of Defense." (NYSCEF Doc. No. 1 at ¶¶ 33-35). It further alleges that the entirety of this amount was advanced to or on behalf of Simpson. (*Id.*) GAIC makes clear that it has favored Simpson's claims over other Insureds, and that it has refused to make any payments to Chassen at Simpson's request. (*Id.* ¶¶ 38-46).

AREH disputes GAIC's position that all of these payments have eroded the Policy limits. (NYSCEF Doc. No. 69 at 12). AREH's Answer also raises multiple affirmative defenses, which include the following:

- "Plaintiff fails to place the full remaining Limit of Liability provided by the Policy at issue. Plaintiff cannot be discharged absent deposit of the full Policy limits."

- "Interpleader is premature because the propriety of prior payments by Plaintiff of certain costs must be determined by the Court in related litigation filed by AREH in New York County Supreme Court under Index No. 652914/2024."

- "Plaintiff's attempt to deduct $894,000.71 from the Limit of Liability provided by the Policy is barred as a voluntary payment. Plaintiff cannot be discharged absent deposit of the full Policy limits.

- "Plaintiff cannot be discharged because it is subject to independent liability to AREH in the related litigation filed by AREH in New York County Supreme Court under Index No. 652914/2024."

(*Id*. at 18-19).

On August 16, 2024, Offit Kurmin filed its motion for summary judgment seeking payment of legal fees charged to Simpson in connection with certain legal services. (NYSCEF Doc. No. 29). On September 10, 2024, GAIC filed the Motion seeking to deposit the sum of $2,105,999.29 into the Registry of this Court, to be discharged from the litigation, and to obtain an injunction preventing the AREH Action from proceeding. (NYSCEF Doc. No. 80).

On November 19, 2024, Chassen filed an Amended Answer and Counterclaims. (NYSCEF Doc. No. 104). Chassen alleged, among other things, that GAIC is liable for aiding and abetting breach of fiduciary duty as well as tortious interference with contract due to its acts in funding and encouraging the JJ Arch Bankruptcy. (*Id.* at ¶¶ 42-53).

On November 29, 2024, this Court granted JJ Arch leave to intervene in this matter. (NYSCEF Doc. No. 135.) On December 10, 2024, JJ Arch's counsel moved this Court by order to show cause to withdraw as counsel for JJ Arch in this action. (NYSCEF Doc. No. 147).

ARGUMENT

A. GAIC Cannot Be Discharged Pursuant To CPLR § 1006(f)

AREH does not object to GAIC depositing the undisputed amount of the limits remaining in the Policy, but doing so does not entitle GAIC to discharge. GAIC has not satisfied its burden of proof under the interpleader statute, nor is it a disinterested party entitled to discharge.

Instead, GAIC improperly seeks to shelter itself from liability from its decisions to fund affirmative litigation adverse to the interests of its policyholder.

1. GAIC cannot be fully discharged because the total amount of GAIC's interpleader fund is disputed.

GAIC bears the burden to submit admissible evidence that it intends to deposit the entire amount in dispute with the Court.

> The stakeholder shall submit proof by affidavit or otherwise of the allegations in his pleading. The court may grant the motion and require payment into court, delivery to a person designated by the court or retention to the credit of the action, of the subject matter of the action to be disposed of in accordance with further order or the judgment.

CPLR § 1006(f). GAIC requests to interplead $2,105,999.29, substantially less than the $3 million aggregate limit of liability. The sole support submitted for GAIC's claim on available limits is a statement in an attorneys' affirmation that "factoring in Costs of Defense advanced on behalf of Simpson, the remaining limit of liability is $2,105,999.29." (Carleton Aff. ¶ 11 (NYSCEF Doc. No. 76)).

GAIC's single conclusory statement in an attorney's affirmation is not proof establishing that $894,000.71 of Policy proceeds have been properly eroded by payment of covered Costs of Defense. GAIC has not submitted any evidence demonstrating what has been spent or whether those funds were used to pay "Costs of Defense." From GAIC's pleading, it appears evident that at least some portion of this alleged erosion went to pay amounts not falling within coverage.

First, GAIC has provided nothing to show that its payments were for costs incurred by an Insured. AREH disputes that JJ Arch falls within the definition of "Insured." (*See* King Ex. 11 at 7). No JJ Arch fees should be covered. GAIC has used at least some policy proceeds to pay JJ Arch's counsel despite previously taking the position that JJ Arch is not insured by the Policy. (King Ex. 14 ¶ 8).

Second, AREH also disputes that legal expenses incurred with respect to activity undertaken by a putative Insured in a non-Insured capacity fall with the Policy's coverage. For example, Simpson faces claims with respect to his alleged obligations, duties, and managerial role of non-insured JJ Arch. (*See* King Ex. 16 ¶¶ 77-82, 89-117.) Further, allegations of mismanagement or misappropriate of JJ Arch's – not AREH's — assets do not allege wrongful acts committed in an insured capacity. Requests seeking provisional remedies with respect to Simpson's "managerial control" of JJ Arch, access to JJ Arch bank accounts, access to the books and records of JJ Arch, JJ Arch holdings in which AREH has no interest, and contempt for acts undertaken in a JJ Arch capacity do not fall within the AREH policy. (King Ex. 17). Simpson previously recognized that such issues "will be excluded from coverage." (King Ex. 12 at 2).

Simpson also could not act in an insured capacity after November 3, 2023, when this Court entered a Temporary Restraining Order providing that Oak would serve as acting managing member of AREH, because Simpson's acts could no longer be as the *de facto* manager of AREH. (King Ex. 8). The Court later enjoined "Jeffrey Simpson and JJ Arch" from acting as AREH's managing member. (King Ex. 11). Fees incurred in connection with allegations arising out of subsequent activities cannot be Costs of Defense incurred in connection with Wrongful Acts committed in an insured capacity. For instance, there is no coverage for Chassen's motion seeking contempt based on Simpson's alleged disobedience of this Court's orders for at least two reasons. (King Ex. 17). The conduct at issue happened after Simpson was removed as *de facto* managing member of AREH. Also, it involves non-AREH activity. Chassen seeks relief "that will ensure that JJ Arch and Chassen are protected from Simpson" acting in a JJ Arch, not AREH, capacity. (*Id.* at 1).

Third, AREH disputes that legal fees incurred while seeking affirmative relief, even if "advanced on behalf of Simpson," constitute "Costs of Defense" under the Policy. Simpson's complaint in the Simpson Action seeks affirmative relief for affirmative claims, which are not "Costs of Defense." (King. Ex. 1). Neither are JJ Arch's fees incurred in filing for relief under the Bankruptcy Code or Simpson's costs to retain counsel to enforce his rights in the JJ Arch Bankruptcy, neither of which qualify as the cost of defending against a Claim. (King Ex. 15).

GAIC does not make clear what comprises the purported erosion of the Policy, and it cannot seek discharge by interpleading only a portion of the Policy limits. Where the amount of the interpleader fund is disputed, the stakeholder cannot be fully discharged. *Bisgeier v. Prudential Ins. Co. of Am.*, 150 N.Y.S.2d 625, 628 (Sup. Ct. Bronx Cnty. 1956) ("If the stakeholder deposits in court part of the amount of the debt and there is a dispute as to the balance, he is discharged to the extent of the amount deposited and remains in the action to defend his interest in the balance."); *Nelson v. Cross & Brown Co.*, 192 N.Y.S.2d 335, 340 (1st Dep't 1959) (reversing an order of "partial" discharge because of a dispute as to liability for the total amount claimed). AREH disputes proper erosion and has pleaded GAIC's voluntary payments of uncovered amounts as an affirmative defense in this action. (NYSECF Doc. No. 69 (Affirmative Defenses 2-4)).

GAIC's own sworn statements establish that at least some of the Policy proceeds were used to fund the JJ Arch Bankruptcy[5] (*see* King Ex. 14 ¶¶ 4-6), conclusively establishing that GAIC proposes to deposit less than the full available Policy limits. GAIC did this with JJ Arch's consent, but not with the consent of its Insured, AREH. (King Ex. ¶ 5.) While it is clear the

[5] To the extent JJ Arch is covered for costs in connection with the JJ Arch Bankruptcy, then GAIC must likewise cover AREH's costs in connection with appearing in that same proceeding. AREH is the Named Insured on the Policy. GAIC admits that it already paid JJ Arch's bankruptcy counsel $76,598 for undefined work purportedly on AREH's behalf. (King Ex. 14 ¶ 4.) The questions of fact abound with respect to GAIC's position on erosion.

Policy is not eroded to the extent GAIC claims, GAIC's attempt to seek discharge must also be denied for its failure to provide evidence accounting for the entirety of the purported erosion.

2. GAIC cannot be fully discharged because it faces claims in addition to the amounts it proposes to interplead.

AREH's allegations against GAIC also preclude discharge. GAIC cannot be discharged in this Interpleader Action while facing allegations of independent liability. *Inovlotska v. Greenpoint Bank*, 8 A.D.3d 623, 624–25 (2d Dep't 2004) (finding "[t]he Supreme Court improvidently exercised its discretion in discharging" stakeholder pursuant to CPLR 1006(f) where the stakeholder "was a named defendant against whom the plaintiff asserted independent liability, and as such, was not a mere stakeholder, notwithstanding the fact that the [stakeholder] claimed no interest in the disputed funds."); *CMI II, LLC v. Newman & Newman, P.C.*, 851 N.Y.S.2d 57 (Sup. Ct. N.Y. Cnty. Oct. 1, 2007) ("courts have consistently declined to discharge purported interpleaders when they are subject to independent liability"); *Birnbaum v. Marine Midland Bank, N.A.*, 465 N.Y.S.2d 725, 727 (1st Dep't 1983) ("under the circumstances of this case, involving, inter alia, a claim that the bank acted improperly and inconsistently with its depositor's instructions in honoring those checks, payment into court and discharge as stakeholder under CPLR § 1006 (f) . . . would be inappropriate and unwarranted").

GAIC breached its duties of good faith and fair dealing in funding legal proceedings adverse to AREH's interests, causing AREH to incur damages, including attorneys' fees in this action and the Bankruptcy Proceeding." (King Ex. 15). There is no basis for GAIC to pay for JJ Arch bankruptcy fees, but not pay the legal fees of AREH, the Named Insured on the Policy, incurred in connection with that same proceeding. GAIC cannot use the Policy proceeds to advance its own interests to AREH's detriment by "mitigat[ing] against any claims against the Policy." (King Ex. 14 ¶ 6.)

Additionally, the dismissal order from the Bankruptcy Court has now made clear that the JJ Arch Bankruptcy was filed in "subjective bad faith." Further, it held that no reasonable person could have believed that reorganization was possible and that the proceeding could not have been commenced in good faith. The court's finding of a lack of any cognizable proper purpose to the proceeding leads to the conclusion that the only purpose behind it was to interfere with the orders of this Court regarding the management of the AREH business. GAIC is liable for providing willing and knowing substantial assistance in that filing. GAIC currently faces counterclaims from Chassen alleging aiding and abetting Simpson's breach of fiduciary duty. (NYSCEF Doc. No. 104 ¶¶ 41-47).

GAIC faces claims for damages beyond its proposed interpleader amount, precluding discharge in this action. GAIC cannot use interpleader to avoid this liability.

3. GAIC cannot be fully discharged because it is not a disinterested stakeholder.

GAIC also cannot use interpleader as a legal tactic to feign "disinterest" and protect itself after misusing the Policy proceeds. Any discharge must be limited solely to liability arising out of the remaining unspent $2.1 million. The wrongful and tortious payments of the purportedly eroded $894,000 make GAIC very interested in the Court's adjudication on the claims of voluntary payments, breach of the duty of good faith, aiding and abetting breach of fiduciary duty, and tortious interference. *See* *Nat'l Cold Storage Co. v. Tiya Caviar Co.*, 52 Misc. 2d 289, 290, 276 N.Y.S.2d 57 (Sup. Ct. N.Y. Cnty. Dec. 14, 1966) ("Where there is an issue of independent liability, as here, the interpleading party does not stand as a disinterested stakeholder."); *Am. Motorists Ins. Co. v. Oakley*, 14 N.Y.S.2d 883, 886 (Sup. Ct. Broome Cnty. Oct. 7, 1939) ("The party pursuing the remedy is obviously not completely disinterested, if one

of the important questions to be determined is whether by his own act, he may have rendered himself liable to both claimants.").

The authority relied upon by GAIC is distinguishable because each case involves interpleading undisputed amounts for full policy limits. For instance, in *Lincoln Life and Annuity Co. of New York v. Caswell*, 31 A.D.3d 1, 8 (1st Dep't 2006), the insurer interpleaded the entire life insurance policy proceeds. Similarly, in *Downe Commc'n, Inc. v. Aetna Cas. & Sur. Co.*, 37 N.Y.2d 903, 905 (N.Y. 1975), the insurer interpleaded the full amount of the attachment bond. Further, the interpleader plaintiff was not subject to independent liability, and the Court expressly found that its "liability cannot exceed the amount it seeks to deposit in court."

Here by contrast, GAIC's liability may very well exceed the amount it seeks to deposit because of its voluntary payments of uncovered costs and independent liability on contract and tort allegation. GAIC has not cited one case where a liability insurer was able to interplead less than full policy limits and receive a discharge from allegations with respect to prior payments made.

GAIC seeks to foist upon the Court the responsibility to make coverage determinations to escape the consequences of the decisions already made. After the backlash from its improper payments, and in the face of threats of lawsuits by Simpson if anyone else received insurance coverage, GAIC refused to make further coverage determinations. (*See, e.g.,* NYSCEF Doc. No. 69 at ¶ 37). Interpleader resolves multiple claims to the same funds. It is not a procedural shield against the consequences of prior acts. "It is not the purpose of interpleader to protect against double liability, but only against double vexation in respect to one and the same liability."

Oakley, 14 N.Y.S.2d at 886. GAIC must still face claims with respect to the funds it has already paid.

GAIC has every interest in defending its prior coverage decisions that purportedly eroded the Policy, making discharge improper. *Navarone Prods., N.V. v. HSBC Gibbs Gulf Ins. Consultants Ltd.*, 880 N.Y.S.2d 225 (Sup. Ct. N.Y. Cnty. Dec. 29, 2008), *aff'd*, 65 A.D.3d 868, 884 N.Y.S.2d 425 (2009) ("discharge would be 'inappropriate and unwarranted'" where stakeholder "cannot be considered disinterested[.]"). GAIC cannot simply sweep its prior payments and the consequences of its acts under the rug and avoid scrutiny by invoking interpleader.

4. GAIC's request to be discharged is premature.

GAIC may only bring a motion pursuant to CPLR 1006(f) "[a]fter the time for all parties to plead has expired." JJ Arch has intervened, but now its counsel has sought to withdraw before filing a responsive pleading. (NYSCEF Doc. No. 147). Moreover, discovery is necessary to understand the scope of GAIC's remaining liability given that the interpleaded amount is not a sum certain. Both the Court and the parties are unaware of the facts underlying GAIC's contention that it has properly paid out $894,000.71 of Policy proceeds.

B. GAIC's Request For An Anti-Suit Injunction Is Overbroad And Improper

This Court should reject GAIC's bold request to enter "a preliminary injunction during the pendency of this Interpleader Action, and thereafter ***permanently and perpetually*** enjoin each and every Interpleader and Intervenor Defendant from instituting or prosecuting ***any action*** or proceeding against GAIC ***with respect to or arising out of the Policy*** in dispute in any state or federal court or other forum." (GAIC's Proposed Order to Show Cause, NYSCEF Doc. No. 81). GAIC's request makes plain that it does not seek interpleader to distribute disputed funds as a

disinterested party. Its true goal is to obtain protection from legal liability flowing from its prior improper payments.

In addition, GAIC has failed to make the showing necessary to obtain injunctive relief. The movant must establish: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position. *Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dep't 2001). New York courts routinely and consistently recognize that "[p]reliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers." *Id*. "A movant's burden of proof on a motion for a preliminary injunction is [thus] particularly high." *Council of City of N.Y. v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't 1998). Courts require "a clear showing" of each of the required elements. *Mr. Dees Stores, Inc. v. A.J. Parker, Inc.*, 159 A.D.2d 389, 389 (1st Dep't 1990) (affirming denial of an application for preliminary injunction).

GAIC faces an especially high burden because it seeks an anti-suit injunction, which is itself a "drastic" remedy that would deny AREH "the right to freely petition the courts for redress of grievances." *Perry v. Perry*, 957 N.Y.S.2d 266 (Sup. Ct. Westchester Cnty. 2012). It requires "extraordinary circumstances which would justify the extreme" relief. *Roman v. Sunshine Ranchettes, Inc.*, 469 N.Y.S.2d 449, 450–51 (2d Dep't 1983); *see also Tinker v. Gorman*, 289 N.Y.S.2d 827, 830 (Sup. Ct. N.Y. Cnty. 1968) ("[I]t is not the practice of courts to interfere with proceedings in another court unless they appear to be vexatious or oppressive or instituted to obtain some unjust or inequitable advantage.").

First, GAIC has not attempted to show a "likelihood of ultimate success on the merits" for the claims that it seeks to enjoin. GAIC only make the argument that it has "establish[ed]

itself as an Interpleader Plaintiff pursuant to CPLR § 1006" by stating a willingness to deposit the undisputed portion of the Policy proceeds. (NYSCEF Doc. No. 78 at 5). Merely being an Interpleader Plaintiff does not mean GAIC is insulated from liability. *See Inovlotska*, 8 A.D.3d at 624–25; *CMI II, LLC.*, 851 N.Y.S.2d 57 at *8; *Birnbaum*, 465 N.Y.S.2d at 725; *see also* CPLR 1006(e) (contemplating "the issue of an independent liability of the stakeholder to a claimant"). GAIC must show both a likelihood of success on the merits of its claim for discharge and that allowing ancillary litigation to continue would interfere with the interpleader, which it will not. (*Id.*)

Second, GAIC has no "irreparable injury" required for an injunction. GAIC simply states that it "faces immediate harm by present litigation and must bear the cost to defend itself" and "faces a continued threat to additional lawsuits by other adverse claimants." (NYSCEF Doc. No. 78 at 5). The monetary damages claimed by GAIC does not constitute "irreparable harm." *See Founders Ins. Co. v. Everest Nat. Ins. Co.*, 839 N.Y.S.2d 474, 475 (1st Dep't 2007) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"); *Fam. Friendly Media, Inc. v. Recorder Television Network*, 903 N.Y.S.2d 80, 82 (2d Dep't 2010) ("Economic loss, which is compensable by money damages, does not constitute irreparable harm"); *Dana Distributors, Inc. v. Crown Imports, LLC*, 853 N.Y.S.2d 111 (2d Dep't 2008) ("Where, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue"); *Strougo v. Barclays PLC*, 194 F. Supp. 3d 230, 234 (S.D.N.Y. 2016) ("[T]he prospect of incurring litigation costs, even if substantial, is not sufficient to constitute irreparable injury.").

Third, the balance of equities also favors denying GAIC's request for an injunction. GAIC. GAIC has inexplicably favored and paid only one party claiming rights to coverage over

the other claimants. AREH taking legal action to preserve the Policy proceeds for payment of proper covered claim and to recover damages far outweighs GAIC's decision to bankroll one party's personal litigation strategy, including forum shopping efforts to avoid the rulings of this court and bad faith bankruptcy filings aimed at incapacitating AREH.

Furthermore, GAIC's request is not narrowly tailored to give the relief provided for in the interpleader statue. GAIC requests an injunction of any action "with respect to or arising out of the Policy." Such a broad injunction encompasses not only potential claims regarding the $2,105,999.29 that GAIC seeks to deposit, but also claims regarding the $894,000.71 that GAIC chose not to interplead in this action. There is no basis in the interpleader statute to give GAIC an injunction with respect to litigation challenging those latter voluntary payments as those funds were not deposited into Court pursuant to the statute. There is also no basis to enjoin litigation over consequential damages flowing from such payments or independent tort liabilities.

GAIC's cited cases demonstrate that it is not entitled to an injunction. In *Heene v. Sewell*, 189 N.Y.S.2d 924 (Sup. Ct. Ulster Cnty. 1959), the Court specifically noted that a stay was only warranted because "where the rights of the stakeholder might be jeopardized by hasty action[.]" Here, GAIC seeks injunctive relief to protect itself, not the rights of any stakeholder. In *United States Mortg. & Tr. Co. v. Vermilye & Power*, 130 N.Y.S. 303 (App. Term 1911), the Court merely "restrain[ed] the parties to the present action from taking such proceedings as would render ineffective the order made in this action." Nothing in the affirmative relief sought by AREH that GAIC seeks to enjoin would render any order in this Interpleader Action ineffective. AREH's affirmative relief claims concern different funds than GAIC seeks to interpleader.

CONCLUSION

For the foregoing reasons, Arch Real Estate Holdings LLC respectfully request that this Court deny Great American Insurance Company's request for discharge and request for a preliminary and permanent injunction in their entirety.

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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 5942.

/s/ *SAHAND FARAHATI*
SAHAND FARAHATI