SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GREAT AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

ARCH REAL ESTATE HOLDINGS LLC,

Defendants.

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Index No. 158055/2023

Justice Joel M. Cohen

Mot. Seq. No. 3

JARED CHASSEN'S MEMORANDUM OF LAW IN OPPOSITION TO GREAT AMERICAN INSURANCE COMPANY'S MOTION FOR INTERPLEADER AND DISCHARGE

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INTRODUCTION

The Court should deny Great American Insurance Company's ("GAIC") motion seeking to interplead the remaining policy funds and discharge it from liability. Besides being premature because filed before joinder of issue, GAIC's motion fails to establish any basis to discharge it from Jared Chassen's ("Chassen") tort claims—arising out of GAIC's support for the bad-faith JJ Arch LLC ("JJ Arch") bankruptcy—and does not even address Chassen's claims at all. Further, as Chassen shows, there are disputed issues of material fact that preclude any summary dismissal of Chassen's claims. Additionally, Chassen has a viable claim for declaratory relief that any sums paid towards the bad-faith JJ Arch bankruptcy do not qualify as Costs of Defense within the meaning of the Policy. Thus, as GAIC fails to establish what the payments it made to Simpson were for, it has not established that it can obtain any discharge as to the Policy funds it already paid. At most, it can interplead the remaining Policy sums and obtain a discharge as to that amount.

FACTUAL BACKGROUND

A. The Policy, the Parties, and the Corporate Control Proceeding

GAIC is an insurance company which provided insurance coverage to Arch Real Estate Holdings LLC ("AREH") under Policy Number PEPE246619 in the total amount $3,000,000.00, inclusive of Costs of Defense (the "Policy"). Chassen Affirm. ¶ 2.[1] The Policy was a "claims made" policy with a policy period between April 18, 2023 and April 14, 2024. NYSCEF No. 2.

AREH, the named insured, for its part, has two members, 608941 NJ LLC ("Oak") and JJ Arch. Chassen Affirm. ¶ 3. Since November 2023, and pursuant to court order in the action captioned *Simpson v. Chassen*, Index No. 158055/2023 (the "Corporate Control Action"), Oak has

[1] "Chassen Affirm." refers to the affirmation of Jared Chassen submitted in opposition to this motion.

acted as managing member of AREH. Previously, JJ Arch was the managing member of AREH. *Id.*

Simpson and Chassen are the two members of JJ Arch, and in August 2023 each attempted to resign the other as members of JJ Arch and have been litigating against each other in the Corporate Control Action and other subsequently filed proceedings. *Id.* at ¶ 4.

On August 21, 2023, the Court issued an Order Regarding Interim Operating Procedures which among other things ruled that "the August 2023 instruments sent by Simpson and Chassen to the other purportedly resigning or terminating the other as member or managing member of JJ Arch are hereby void and of no force or effect." Chassen Affirm., Ex. A, Corporate Control Action, NYSCEF No. 36.

The Court also ordered that during the pendency of the proceeding "the business, affairs, and assets of JJ Arch shall be managed by Simpson, subject to the limitations set forth in Section 3.2 of the JJ Arch Operating Agreement, which provides among other things that any Company Major Decision, as defined in the JJ Arch Operating Agreement, shall be undertaken only with the prior written consent of Chassen." *Id.* One of those Company Major Decisions requiring Chassen's consent was the decision to file bankruptcy. *Id.* at NYSCEF No. 395, Amended JJ Arch Operating Agreement at § 3.2(b). The Court further directed them to cooperate in good faith in their respective roles. Chassen Affirm., Ex. A, Corporate Control Action, NYSCEF No. 36.

On September 1, 2023, days after being expressly directed to cooperate in good faith with Chassen, Simpson again purported to terminate Chassen and shut off his access to company systems, and his bank account viewing access. Corporate Control Action at NYSCEF No. 87. On September 15, 2023, the Court ordered that Simpson "shall reinstate Chassen" and that "neither Simpson nor Chassen shall purport to terminate or 'resign' the other from membership in the

company without court permission." Chassen Affirm. Ex. B, Corporate Control Action at NYSCEF No. 86, Sept. 15, 2023 Signed Order to Show Cause. The Court expressly reiterated that its "Order Regarding Interim Operating Procedures (NYSCEF 36) remains in effect." *Id.*

On September 29, 2023, the Court granted Simpson's motion to be restored as managing member, in part, "to the extent set forth in the Court's Interim Order (NYSCEF 36) and Order to Show Cause entered in Mot. Seq. 003 (NYSCEF 86), which shall remain in effect until further Order of the Court." *Id.* at NYSCEF No. 159.

On November 22, 2023, the Court granted a preliminary injunction which provided that "Simpson's [September 1, 2023] purported termination letter to Chassen is void and shall not take effect." Chassen Affirm., Ex. C, Corporate Control Action, NYSCEF No. 419, Nov. 22, 2023 Decision and Order. Further, "Simpson and Chassen are enjoined from unilaterally seeking to terminate or force the resignation of the other member without permission of the Court." *Id.* The Court again expressly reiterated that its "Order Regarding Interim Operating Procedures (NYSCEF 36) remains in effect." *Id*

On or about November 22, 2023, GAIC provided coverage to Simpson under the Policy finding that Simpson qualified as the de facto managing member of AREH by virtue of his role as managing member of JJ Arch. GAIC expressly denied coverage to JJ Arch. Chassen Affirm. ¶ 10.

In late 2023, Chassen sought coverage under the Policy, which GAIC approved on or about April 25, 2024. *Id.* at ¶ 11. Though approved for coverage by GAIC, to date, Chassen not received any funds from the Policy. *Id.*

The Policy itself is narrow in what it covers. *Id.* at ¶ 13. It covers "Loss," which includes "Costs of Defense." NYSCEF No. 2 at III.N. "Costs of Defense" include "reasonable legal fees, costs, and expenses incurred in the investigation, defense, or appeal of any Claim . . ." *Id.* at III.B.

"Claim," in turn, means, inter alia, "a written demand for momentary, non-monetary, or injunctive relief against an Insured . . . or civil proceeding . . . against any Insured . . . commenced by . . . complaint . . ." *Id.* at III.A. Thus, a Claim does not include any affirmative litigation brought by a party, but only the defense of claims.

B. The Bad-Faith Bankruptcy and Chassen's Claims Against GAIC

On March 7, 2024, Simpson filed a Chapter 11 Bankruptcy Petition (the "Petition") for JJ Arch as purported "sole member" in defiance of the orders entered in the Corporate Control Action that nullified his purported August 5, 2023 termination email. *Id.* at ¶ 14. In his List of Equity Security Holders attached to the Petition, Simpson swore that he was the sole member, saying that:

> Jared Chassen of 55 Manor Pond Lane, Irvington, NY 10533, previously owned a 49% percent membership interest in the Debtor JJ Arch LLC . . . Mr. Chassen was deemed to have resigned as a member of JJ Arch as of August 5, 2023, pursuant to the definition of 'Resignation' as set forth in the Limited Liability Company Agreement of JJ Arch LLC, dated December 11, 2017, as amended and restated on May 21, 2021 . . . and Section 7.5 of the Operating Agreement.

Chassen Affirm. Ex. D, Corporate Control Action at NYSCEF No. 732.

GAIC through its counsel reviewed and approved of the Chapter 11 Petition before Simpson filed it. *See* Chassen Affirm. Ex. E, NYSCEF No. 114. The plan to file the bad-faith bankruptcy appears to have been hatched together with GAIC's counsel and Scott Griffin, Esq. beginning in or about January 2024. *See* Chassen Affirm. Ex. G, NYSCEF No. 115. GAIC was thereafter involved in the decision-making in connection with the bad faith bankruptcy. Chassen Affirm. ¶ 15.

GAIC testified to the Bankruptcy Court that "Great American determined to provide chapter 11 funding to the Debtor in order to mitigate against any claims against the Policy." Chassen Affirm. Ex. G, Mundt Decl. at ¶ 6. GAIC's funding of the bankruptcy did not, and would not mitigate any claims against the Policy, as it only moved the forum of the Corporate Control

Action to the bankruptcy court, while adding an additional layer of cost and expense in connection with litigating bankruptcy issues. *Id.* at ¶ 16. GAIC could not, and did not, reasonably believe that the bankruptcy filing would mitigate claims against the Policy. *Id.*

GAIC has testified to the Bankruptcy Court that it had paid, and was intending to further pay, for the bankruptcy because "the Debtor lacks the funding to pay for the commencement and prosecution of the Chapter 11 Case." Chassen Affirm. Ex. G, Mundt Decl. at ¶ 6. In other words, without GAIC's funding, JJ Arch was unable to file and prosecute the bad-faith bankruptcy. Chassen Affirm. ¶ 17.

In fact, to effectuate the bad-faith bankruptcy, and retain Griffin LLP as counsel for JJ Arch, GAIC went as far as paying $78,598.00 purportedly owed by AREH for Griffin LLP's outstanding legal bills for its representation of AREH—despite, to Chassen's knowledge, to this day denying coverage to AREH. *See* Chassen Affirm. Ex. G at ¶ 4; Chassen Affirm. ¶ 38. Simpson himself asserts that "GAIC saw the merits through KBR [its law firm] since there properties in many states, 2004 discovery would be an option and we would proceed on that basis . . . there is explicit evidence where GAIC endorses the bankruptcy." NYSCEF No. 108, Simpson Memo of Law at 7-8.

On October 11, 2024, the Bankruptcy Court dismissed the bankruptcy entirely because of, inter alia, Simpson's subjective and objective bad faith in filing it and his subsequent gross mismanagement of the bankruptcy estate. *In re JJ Arch LLC*, 663 BR 258, 275-290 (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. Further, "no reasonable person would have believed reorganization was possible . . ." *Id.* at 285. The Bankruptcy Court also dismissed the bankruptcy

on a finding that there was "gross mismanagement of the estate," which included a failure to preserve estate assets, a failure to adequately report operating activities and comply with his "fiducial obligation" to the Court and the parties, and a failure to adequately explain his insider transactions with YJ Simco LLC. *Id.* at 278-280. JJ Arch's "post-petition lack of income and excessive accrual of expenses—[also] indicate that there has been 'gross mismanagement of the estate . . .'" *Id.* at 278 (citations omitted). Simpson incurred hundreds of thousands of dollars of legal fees 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 (citations and quotations omitted, cleaned up).

In October 2024, the Bankruptcy Court remanded the Corporate Control Action and this action to the New York County Supreme Court. Chassen Affirm. ¶ 20.

Chassen has asserted counterclaims in this proceeding against GAIC for aiding and abetting breach of fiduciary duty, tortious interference with contract, bad faith/breach of the implied covenant of good faith and fair dealing, and for declaratory relief that any payments in connection with the bad-faith bankruptcy were not costs of defense within the meaning of the Policy, but voluntary payments that cannot diminish or dilute the Policy. Chassen Affirm. Ex H, NYSCEF No. 104. GAIC's deadline to answer Chassen's counterclaims is January 20, 2025. *See* NYSCEF No. 136.

AREH has also brought claims against GAIC alleging, inter alia, that the payments it made in connection with the bankruptcy were voluntary payments that cannot dilute the Policy. *See* NYSCEF No. 69.

C. GAIC's Requested Relief

This interpleader action asks the Court to allow GAIC to interplead the remaining insurance funds to the Court, and to then have the parties raise their respective claims to the funds, with the Court to decide who has rights to the funds and GAIC discharged from any liability to the Interpleader Defendants. *See* NYSCEF No. 1, Interpleader Complaint at 15 (seeking "an Order permitting and directing GAIC to deposit the sum of $2,105,999.29 into the Registry of this Court, in full satisfaction of its obligations under the Policy" and "entering an Order requiring the Interpleader Defendants to interplead their rights to the proceeds of the Policy; and discharging GAIC from any and all liability to Interpleader-Defendants and any and all current or future claims and/or obligations relating to the Policy.").

According to GAIC's Interpleader Complaint, at the time of the filing GAIC had already "advanced $894,000.71 incurred by Simpson," and so, at the time of the Interpleader Complaint, "$2,105,999.29 remains of the Policy's Limit of Liability." NYSCEF No. 1 at ¶¶ 33, 35.

GAIC asserts that in or about April 2024, GAIC, recognizing that both Mr. Simpson and Mr. Chassen were covered under the Policy, sought to reach an equitable compromise, and "offered to divide the remaining policy proceeds equally between Simpson and Chassen." *Id.* at ¶ 8. But instead of accepting that compromise, Mr. Simpson refused any compromise. As GAIC states in the Interpleader Complaint, "Simpson rejected the proposal unequivocally and . . . threatened to sue GAIC if GAIC advances any Costs of Defense incurred on Chassen's behalf." *Id.* He "insisted that no Costs of Defense payments be made on behalf of Chassen." *Id.* at ¶ 38. Chassen was told by GAIC that because Mr. Simpson refused any compromise, GAIC would not advance any of Mr. Chassen's or Mr. Simpson's legal expenses and would instead interplead the remaining funds. Chassen Affirm. ¶ 11.

On September 10, 2024, GAIC moved for an order allowing it to interplead the remaining Policy funds, and to obtain an injunction barring any suits against GAIC connected to the Policy. NYSCEF Nos. 76-81. GAIC moved for this relief before Chassen's time to respond to the Complaint had expired. NYSCEF Nos. 61, 94.

On September 20, 2024, Simpson caused JJ Arch to remove this proceeding to the bad-faith JJ Arch bankruptcy. NYSCEF Nos. 87-89. On October 28, 2024, the Bankruptcy Court remanded this proceeding back to this Court. NYSCEF No. 101.

On October 31, 2024, Chassen filed his answer, (NYSCEF No. 98), and on November 19, 2024, amended his answer to assert counterclaims against GAIC. Chassen Affirm. Ex. H, NYSCEF No. 104. GAIC has until January 20, 2025 to answer Chassen's counterclaims. NYSCEF No. 136.

ARGUMENT

I. GAIC'S MOTION IS PREMATURE BECAUSE IT WAS FILED BEFORE THE TIME FOR ALL PARTIES TO PLEAD HAS EXPIRED AND IT HAS NOT JOINED ISSUE WITH RESPECT TO CHASSEN'S COUNTERCLAIMS

CPLR 1006(a) defines a "stakeholder" as "a person who is or may be exposed to multiple liability as the result of adverse claims." *Id.* In turn, "[a] claimant is a person who has made or may be expected to make such a claim." *Id.* CPLR 1006(a) authorizes "[a] stakeholder" to "commence an action of interpleader against two or more claimants." *Id.*

CPLR 1006(f) allows "the stakeholder" to "move for an order discharging him from liability in whole or in party to any party" by filing a motion "after the time for all parties to plead has expired." *Id.* "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." *Id.*

The motion must be made after the time for all pleadings has expired because such a motion is effectively a summary judgment motion (or if there is no responsive pleading, a default judgment motion). *Fid. & Deposit Co. of Maryland v Barroga-Hayes*, 129 A.D.3d 773, 774 (2d Dep't 2015) (interpleader "motion . . . was for summary judgment on the complaint insofar as it sought interpleader relief pursuant to CPLR 1006 (f)."); *See also Mahon, Mahon, Kerins & O'Brien, LLC v Moskoff*, 85 A.D.3d 738, 739 (2d Dep't 2011) (motion under CPLR 1006(f) is "in effect" a summary judgment motion).

CPLR 3212, which governs summary judgment motions, only allows a party to seek summary judgment "after issue has been joined." Thus, "[a] motion for summary judgment cannot be made until after issue is joined." *Valentine Tr., Inc. v Kernizan*, 191 A.D.2d 159, 160 (1st Dep't 1993) (qouting *Markle Found. v Mfrs. Hanover Trust Co.*, 173 A.D.2d 784, 785 (2d Dep't 1991)); *See also Adago v Sy*, 216 A.D.3d 402, 402 (1st Dep't 2023); *Stone Column Trading House Ltd. v Beogradska Banka A.D. in Bankruptcy*, 139 A.D.3d 577, 578 (1st Dep't 2016). "The rule requiring joinder of issue is strictly adhered to." *Shah v Shah*, 215 A.D.2d 287, 289 (1st Dep't 1995). Indeed, without joinder of issue "the motion court lacked jurisdiction to grant summary judgment dismissal on the amended complaint." *Moezinia v Damaghi*, 152 A.D.2d 453, 456 (1st Dep't 1989). Similarly, a default judgment motion requires that the time for serving a responsive pleading has elapsed and expired. *See* CPLR 3215(a).

Here, GAIC filed this motion before Chassen answered, and Chassen has interposed counterclaims that GAIC has not yet responded to, with its time to answer not yet having expired. *See* NYSCEF No. 136. Since there has been neither joinder of issue nor a default, its motion was filed prematurely and should be denied. *Venetian v Prudential Ins. Co. of Am.*, 2009 NY Slip Op 32460[U], *4 (N.Y. Co. 2009) ("As plaintiff has been granted an extension of time to serve

defendant Chaundry, his time to plead has not yet expired and Prudential may re-file such motion after such time.").

II. GAIC DOES NOT MEET ITS BURDEN FOR THE DISCHARGE IT SEEKS BECAUSE CHASSEN HAS VIABLE CLAIMS FOR INDEPENDENT LIABILITY

Under CPLR 1006(f), "[t]he 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." *Id.*

"The proof offered by [a stakeholder] to support a discharge should be as weighty on the single-liability issue as the proof needed to support a summary judgment motion under CPLR 3212. The effect of an order of discharge is essentially the same as the grant of summary judgment: it is the equivalent of a trial. If the court has any doubt about whether [the movant] is just a stakeholder, or for any good reason feels that [the stakeholder] should remain in the action as a party, it will deny [the stakeholder's] motion to be discharged." *Jackson Natl. Life Ins. Co. of NY v Vita*, 2014 NY Slip Op 30806[U], *5 (Suffolk Co. 2014) (quoting Siegel, NY Prac. § 149 (5th ed 2011)).

Thus, even if an interpleader plaintiff is allowed to deposit disputed funds, "whether the plaintiff is entitled to be discharged from this action is a separate issue." *Jackson Natl. Life Ins. Co. of NY*, 2014 NY Slip Op 30806[U], *5 (citing CPLR 1006(e)-(f)). CPLR 1006(e) provides that "[w]here the issue of an independent liability of the stakeholder to a claimant is raised by the pleadings or upon motion, the court may dismiss the claim of the appropriate claimant, order severance or separate trials, or require the issue to be tried in the action." *Id.* In other words, if "the claimants have asserted independent bases for holding the purported stakeholder liable, then it is

not dischargeable." *Walia v Saavn Holdings, LLC*, 84 Misc 3d 1228[A], *3 (N.Y. Co. 2024) (citing *Inovlotska v Greenpoint Bank*, 8 A.D.3d 623, 624-625 (2d Dep't 2004)) ("Greenpoint was a named defendant against whom the plaintiff asserted independent liability, and as such, was not a mere stakeholder, notwithstanding the fact that the bank claimed no interest in the disputed funds."); *Fireman's Fund Ins. Co. v Murphy-Clagget*, 2019 NY Slip Op 32334[U], *6 (N.Y. Co. 2019) ("Discharge of an interpleading stakeholder is also improper where it is shown that the stakeholder has some independent liability."); *See also Birnbaum v Mar. Midland Bank, N.A., 96* A.D.2d 776, 777 (1st Dep't 1983) (discharge denied where there was issue of independent liability of stakeholder).

In its complaint, GAIC seeks an order "permanently and perpetually enjoin[ing] each and every Interpleader-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." NYSCEF No. 1 at 15. In support of its motion, GAIC submits the affirmation of Anthony Ingraffia, who testifies that "[a]t the time of this filing, factoring in Costs of Defense advanced on behalf of Simpson, the remaining limit of liability is $2,105,999.29." NYSCEF No. 77 at ¶ 10. Further, he testifies that "[a]s an offer of compromise, GAIC offered to divide the remaining policy proceeds equally between Simpson and Chassen. Simpson rejected the proposal unequivocally and has threatened to sue GAIC if GAIC advances any Costs of Defense incurred on Simpson's behalf." *Id.* at ¶ 11. GAIC "initiated this Interpleader Action to resolve multiple and competing demands to the proceeds of the Policy by the Interpleader Defendants that expose GAIC to liability." *Id.* at ¶ 13.

The discharge GAIC seeks is overbroad, as merely depositing the remaining policy funds does not relieve GAIC of its tort liability or the need to adjudicate the propriety of its payments of

pre-interpleader policy funds. As discussed below, Chassen has asserted claims against GAIC for aiding and abetting breach of fiduciary duty, bad faith/breach of the implied covenant of good faith and fair dealing, and tortious interference with contract (NYSCEF No. 104) to which it is premature to dismiss or discharge merely because GAIC seeks to interplead remaining policy funds.

Once Chassen raised the issue of independent liability "by pleading or motion," GAIC had the burden to establish that there were no disputed issues of material fact as to such claims. GAIC has not met its burden to obtain a discharge by showing that that there are no disputed issues of material as to its liability to Chassen. Further, even if it had, Chassen has sufficiently shown that there are issues of fact as to whether GAIC has independent liability to Chassen. Accordingly, to the extent the Court allows GAIC to interplead the remaining insurance proceeds, it should decline to discharge Chassen's claims and should allow them to proceed.

A. GAIC Faces Independent Tort Liability for Aiding and Abetting Breach of Fiduciary Duty

1. Simpson Breached His Fiduciary Duties to Chassen by the Bad-Faith Bankruptcy

A "managing member of an LLC owes fiduciary duties to the LLC members," (*Matter of Goodwin Law Group P.C. v. Zilong Wang*, 226 A.D.3d 537, 538 (1st Dep't 2024)), to the LLC itself, (*McKinnon Doxsee Agency, Inc. v. Gallina*, 187 A.D.3d 733, 736 (2d Dep't 2020)), and to the entities managed by the LLC. *Arfa v. Zamir*, 75 A.D.3d 443, 444 (1st Dep't 2010).

In his managerial capacity, Simpson owed a "duty of undivided and undiluted loyalty" that barred "not only blatant self-dealing, but also require[ed] avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014) (citations and quotations omitted). Simpson's fiduciary duties included a duty "to make full disclosure of all material facts referable

to the operation and management of the LLC." *Chiu v. Man Choi Chiu*, 71 A.D.3d 621, 623 (2d Dep't 2010). Simpson could not take actions for his own improper personal benefit that are "not in the best interests of the party to whom a duty is owed." *McKinnon Doxsee Agency, Inc*, 187 A.D.3d at 736.

On October 11, 2024, the Bankruptcy Court dismissed the JJ Arch bankruptcy because of, inter alia, Simpson's subjective and objective bad faith in filing it. *In re JJ Arch LLC*, 663 BR at 275-290. Further, "no reasonable person would have believed reorganization was possible . . ." *Id.* at 285. The Bankruptcy Court also dismissed the bankruptcy on a finding that there was "gross mismanagement of the estate," which included a failure to preserve estate assets, a failure to adequately report operating activities and comply with his "fiducial obligation" to the Court and the parties, and a failure to adequately explain his insider transactions with YJ Simco LLC. *Id.* at 278-280. JJ Arch's "post-petition lack of income and excessive accrual of expenses—[also] indicate that there has been 'gross mismanagement of the estate . . .'" *Id.* at 278 (citations omitted). Simpson incurred hundreds of thousands of dollars of legal fees 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 (citations and quotations omitted, cleaned up).

The counterclaims allege that in putting JJ Arch into bankruptcy in subjective and objective bad faith, in relying on a termination email the court had nullified, in incurring hundreds of thousands of dollars in legal fees on behalf of JJ Arch, and in breaching fiduciary disclosure obligations and grossly mismanaging JJ Arch, Simpson breached his fiduciary duties to JJ Arch and Chassen. *In re JJ Arch LLC*, 663 BR at 275-290.

2. GAIC is Liable to Chassen for Aiding and Abetting Simpson's Breach of Fiduciary Duty

GAIC is liable to Chassen for aiding and abetting Simpson's breach of fiduciary duty. "A claim for aiding and abetting a 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." *Kaufman v Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). "Knowing participation in a breach of fiduciary duty occurs when the defendant provides substantial assistance to the primary violator." *Smallberg v Raich Ende Malter & Co., LLP*, 140 A.D.3d 942, 944 (2d Dep't 2016). A "plaintiff is not required to allege that the aider and abettor had an intent to harm" but only that the aider and abettor "had actual knowledge of the breach of duty." *Kaufman*, 307 A.D.2d at 125.

The evidence, and GAIC's own admission in the Interpleader Complaint, shows that GAIC funded Mr. Simpson's adjudicated bad-faith bankruptcy filing on behalf of JJ Arch, an entity to whom it denied coverage. *See* Chassen Affirm, Ex. G, Mundt Declaration (testifying to JJ Arch bankruptcy funding); *See also* NYSCEF No. 54, GAIC Coverage Letter to Simpson and JJ Arch (denying JJ Arch coverage and evidencing awareness of events in Corporate Control Action). An email that Mr. Simpson filed to NYSCEF in support of his request for relief shows that GAIC reviewed and approved the bad-faith bankruptcy petition before it was filed, a petition wherein Mr. Simpson stated that he was the "sole member" based on the court nullified August 5, 2023 termination email, and despite court orders baring any further unilateral terminations. Chassen Affirm. Ex E, NYSCEF No. 114, March 7, 2024 4:43 p.m. email. Another email he filed suggests that GAIC's counsel and Scott Griffin, Esq. worked together since January 2024 to hatch the bad-faith bankruptcy filing. Chassen Affirm. Ex. F, NYSCEF No. 116, Jan. 5, 2024 4:02 a.m. email. Mr. Simpson himself asserts in a memorandum of law that "GAIC saw the merits through KBR

[its law firm] since there properties in many states, 2004 discovery would be an option and we would proceed on that basis . . . there is explicit evidence where GAIC endorses the bankruptcy." NYSCEF No. 108 at 7-8.

GAIC has testified to the Bankruptcy Court that it had paid, and was intending to further pay, for the bankruptcy because "the Debtor lacks the funding to pay for the commencement and prosecution of the Chapter 11 Case." Chassen Affirm. Ex. G, Mundt Decl. at ¶ 6. In other words, without GAIC's funding, JJ Arch was unable to file and prosecute the bad-faith bankruptcy.

Further, GAIC testified that to effectuate the retention of Griffin LLP as counsel for JJ Arch it went as far as paying $78,598.00 purportedly owed by AREH for Griffin LLP's outstanding legal bills for its representation of AREH—despite, to Chassen's knowledge, to this day denying coverage to AREH. *See* Chassen Affirm. Ex. G at ¶ 4; Chassen Affirm. ¶ 38.

Chassen and JJ Arch have viable claims GAIC aided and abetted Mr. Simpson's primary breaches by knowingly approving and paying for the bad-faith bankruptcy with full knowledge of Mr. Simpson's bad-faith. Further, GAIC's coverage letter to Simpson, (NYSCEF No. 54), shows that it had extensive knowledge of the Corporate Control Action. Chassen and JJ Arch have suffered extensive damage because of the unlawful bankruptcy filing, with JJ Arch, inter alia, suffering a substantial diminution in value, and Chassen forced to incur costs and fees in connection with the bad-faith bankruptcy. Chassen Affirm. ¶ 39.

B. GAIC Faces Additional Tort Liability

Chassen has brought a claim against GAIC for acting in bad faith. "It is well established that, as between an insurer and its assured, a fiduciary relationship does exist, requiring utmost good faith by the carrier in its dealings with its insured." *Hartford Acci. & Indem. Co. v Michigan Mut. Ins. Co*., 93 A.D.2d 337, 340-341 (1st Dep't 1983). "In defending a claim, an

insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured." *Id.* at 341. An insurer acts in bad faith when it favors its own interests or "favors one insured over another." *Brock v. Wagner*, 2000 NYLJ LEXIS 3365, *8 (Suffolk Co. July 17, 2000).

Further, as in all contracts, implicit in contracts of insurance is a covenant of good faith and fair dealing . . ." *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of NY*, 10 N.Y.3d 187, 194 (2008). "The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct." *Gutierrez v Govt. Empls. Ins. Co.*, 136 A.D.3d 975, 976 (2d Dep't 2016). Even "an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement." *Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 A.D.2d 288, 302 (1st Dep't 2003).

Here, in approving and funding the bad-faith JJ Arch bankruptcy, and authorizing the filing as purported "sole member" of JJ Arch, GAIC favored Simpson's (and purportedly its own) interests over Chassen's interests and acted with bad-faith to Chassen, damaging him and forcing him to incur additional costs in connection with the JJ Arch bankruptcy and enabling Simpson to harm his interests in JJ Arch through the bad-faith bankruptcy. Chassen Affirm. ¶ 40.

In addition to his claims for aiding and abetting breach of fiduciary duty and bad faith, Chassen has brought claims for tortious interference with contract, as Mr. Simpson's bankruptcy filing was in derogation of Mr. Chassen's consent rights under the JJ Arch Operating Agreement and court orders which had nullified Mr. Simpson's Augsut 5, 2023 termination email and mandated that Simpson obtain Chassen's consent. Chassen Affirm. ¶ 41.

"The elements of tortious interference are a valid contract between plaintiff and another, the defendant's knowledge of the contract and intentional procurement of its breach without justification, and damages resulting therefrom." *Nostalgic Partners, LLC v NY Yankees Partnership*, 205 A.D.3d 426, 428 (1st Dep't 2022). No showing of malice is required to state a claim for tortious interference with contract. *EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 A.D.3d 551, 553-554 (1st Dep't 2019).

The evidence shows that GAIC was aware of the JJ Arch Operating Agreement and the Court's Interim Orders, (*see* NYSCEF No. 54), and that it procured Simpson's breach of the JJ Arch Operating Agreement by paying for the bankruptcy petition in derogation of Chassen's consent rights and the court's orders. Chassen Affirm. Exs. E-G. GAIC had no justification for doing this, (Chassen Affirm. ¶ 41), and does not attempt to meet its burden to show economic justification. *Foster v Churchill*, 87 N.Y.2d 744, 750 (1996) (burden to establish defense of economic justification on defendant). And even if GAIC had attempted to establish "economic justification," the defense does not apply where interference was effectuated through illegal means such as a bad-faith bankruptcy. *E.F. Hutton Intl. Assoc. v Shearson Lehman Bros. Holdings, Inc.*, 281 A.D.2d 362, 362-363 (1st Dep't 2001).

At a minimum, it is premature to discharge such claims without discovery, as much of the information relevant to this claim is in GAIC's exclusive possession, including discovery about the full extent of GAIC's role. *See* CPLR 3212(f); Chassen Affirm. ¶ 42.

C. Any Interpleader Order Must Only Discharge GAIC from Liability as to the Interpleaded Funds, Not the Already Paid Funds

Any interpleader order should be limited to the amount interpleaded by GAIC, and not discharge GAIC as to funds previously paid in connection with the bad-faith JJ Arch bankruptcy or which GAIC has not established were Costs of Defense. "An insurance policy is a written

contract between an insurer and an insured and is based, in essence, on contract law" and "like all contracts, should be enforced according to their terms unless they are prohibited by public policy, statute or rule." *Am. W. Home Ins. Co. v Gjonaj Realty & Mgt. Co.*, 192 A.D.3d 28, 38 (2d Dep't 2020).

Here, there are disputed issues of fact as to whether the amounts by GAIC towards the bad-faith JJ Arch bankruptcy qualify as Costs of Defense under the Policy. The Policy covers "Loss," which includes "Costs of Defense." NYSCEF No. 2 at III.N. "Costs of Defense" include "reasonable legal fees, costs, and expenses incurred in the investigation, defense, or appeal of any Claim . . ." *Id.* at III.B. "Claim," in turn, means, inter alia, "a written demand for momentary, non-monetary, or injunctive relief against an Insured . . . or civil proceeding . . . against any Insured . . . commenced by . . . complaint . . ." *Id.* at III.A. Thus, a Claim does not include any affirmative litigation brought by a party, but only the defense of claims, and certainly not a bankruptcy for a party that GAIC denied coverage to.

Further, GAIC has not offered any evidence of what it paid for and in what amounts. Indeed, GAIC has not even identified whether the sums purportedly paid on behalf of Simpson includes the $78,598.00 purportedly owed by AREH for Griffin LLP's outstanding legal bills for its representation of AREH, an entity GAIC has not extended coverage. *See* Chassen Affirm. Ex. G at ¶ 4; Chassen Affirm. ¶ 38. Given GAIC's failure to identify what it paid for and in what amounts, and Chassen's affirmative claim that bankruptcy-related payments do not, and would not, qualify as Costs of Defense, the Court should decline to discharge GAIC from any liability other than liability as to the interpleaded remaining policy funds.

CONCLUSION

For the forgoing reasons, the Court should deny the motion.

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WORD COUNT CERTIFICATION

I, Allen Schwartz, Esq., certify that the foregoing Memorandum of Law contains less than 7000 words, as counted by Microsoft Word's word-processing system, excluding the caption, table of contents, table of authorities and signature block, and that it complies with the applicable word limits.

/s/
Allen Schwartz