IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: NPC INTERNATIONAL, INC., Debtor.[1]	Chapter 11 Case No. 20–33353 (CML) (Jointly Administered)
REPUBLIC VANGUARD INSURANCE COMPANY, Plaintiff, v. NPC INTERNATIONAL, INC., the NPC INTERNATIONAL GUC TRUST, and JACOB ROE, Defendants.	Adv. Pro. No. 22-03042
JAMES RIVER INSURANCE COMPANY, Plaintiff, v. NPC INTERNATIONAL, INC., the NPC INTERNATIONAL GUC TRUST, REPUBLIC VANGUARD INSURANCE COMPANY, JACOB ROE, and BAILEY DORNEMANN, Defendants.	Consolidated into Adv. Pro. No. 23-03042

JACOB ROE'S RESPONSE BRIEF

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are NPC International, Inc. (7298) ("NPCI"); NPC Restaurant Holdings I LLC (0595); NPC Restaurant Holdings II LLC (0595); NPC Holdings, Inc. (6451); NPC International Holdings, LLC; (8234); NPC Restaurant Holdings, LLC (9045); NPC Operating Company B, Inc. (6498); and NPC Quality Burgers, Inc. (6457). On June 25, 2021, the Court entered a final decree closing each of the chapter 11 cases other than NPCI's chapter 11 case [Docket No. 1785]. Commencing on June 25, 2021, all motions, notices and other pleadings relating to any of the Debtors shall be filed in NPCI's chapter 11 case. The Debtors' corporate headquarters and service address is 720 W. 20th Street, Pittsburg, KS 66762.

Without waiving any of the other arguments addressed in his opening trial brief, Defendant Jacob Roe files this Response Brief and would respectfully show this Court the following.

I. ARGUMENT IN RESPONSE

1. Both Plaintiff Insurers expressly bound themselves to coverage and in doing so promised that NPC's bankruptcy or insolvency would not relieve them of their obligations under their Policies. Now that NPC is insolvent and in bankruptcy, both Plaintiff Insurers seek to use its bankruptcy to escape liability by arguing that the grant of an allowed unsecured claim is not a payment.

2. Neither of the Plaintiff Insurers have convincingly argued why the Court should apply those provisions to allow them to escape liability. Rather, they have set up a strawman argument that NPC seeks to be wholly relieved from its obligation to pay the SIRs and would have the Plaintiff Insurers drop-down and provide coverage lower in the insurance stack. In support, Plaintiff Insurers cite cases where courts predictably rejected such overreach. But no one is arguing that Republic should drop down and pay first dollar.

3. The focus should instead be on whether a reasonably prudent insured would have understood that the allowance and resulting discharge of an unsecured claim in bankruptcy constitutes "actual payment" of the value of the claim. In making that decision, the Court should consider that the claims administration process is mandatory, that bankruptcy's protections are intended for debtors, and that *Plaintiff Insurers specifically promised they would still perform in the event of NPC's bankruptcy*. Plaintiff Insurers should be held to that promise.

A. Kansas law is more favorable towards coverage when determining whether an insurance policy is ambiguous and how the Court will construe and apply even unambiguous policies.

4. Republic argues that "Kansas law on policy construction is not materially different from Texas. Choice of law should not be an issue." Republic Br. at 15. James River similarly argues "that Texas, Kansas and Florida do not differ in the interpretation of an excess-insurance policy." James River Br. at 8. Neither of the Plaintiff Insurers compare the full applicable authority.

5. Roe agrees with the Plaintiff Insurers that there are many similarities between Kansas and Texas law.[2] For example, both states agree that ambiguities are resolved in favor of the insured. *See Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120, 1126 (Kan. 2002) ("If the meaning is ambiguous, the contract must be construed against the drafter."); *Wells v. Minnesota Life Ins. Co.*, 885 F.3d 885, 889–90 (5th Cir. 2018) ("We construe ambiguities in Texas insurance contracts against the insurer . . . .") (citing *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 866 (Tex. 2000)).

6. But Kansas law is materially different and more favorable toward coverage in matters regarding construction of insurance policies generally. For this reason, Roe requests that the Court apply Kansas law. Kansas law requires construing the policy from the perspective of the insured's understanding rather than the insurer's intent; it requires considerations of fairness and practicality rather than adhesion to technical accuracy; and it permits a finding that a policy is ambiguous based on a lack of clarity. The differences are illustrated in this chart:

[2] No party is contending that the law of Florida, where the suits are pending, is appropriate.

Kansas Law	**Texas Law**
"Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning."[3]	"[U]nder Texas contract law, 'ambiguity' means more than 'lack of clarity.'"[4]
"Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction."[5]	"We must honor plain language, reviewing policies as drafted...."[6]
"[T]he test ... require[es] a determination of '**not what the insurer intends** to [sic] language to mean, but **what a reasonably prudent insured would understand** the language to mean.'"[7]	"The goal of contract interpretation is to ascertain **the parties' true intent as expressed** by the plain language they used."[8]

7. While Roe believes the outcome under Texas law would be the same as under Kansas law, to the extent this Court finds the analysis to be close in any respect, Roe requests that the Court take notice of and apply the more favorable law of Kansas.

B. Plaintiff Insurers inaccurately portray Roe's argument as requiring them to drop-down.

8. Plaintiff Insurers contend that they are being asked to drop-down and provide coverage lower in the insurance stack. James River Br. at 11; Republic Br. at 20. Republic further argues that NPC is seeking to be relieved from its obligations under the Republic Policy. Republic Br. at 30-31.

9. These are strawman arguments that neither Roe nor NPC have ever made. To the contrary, Roe's argument is and always has been that NPC must satisfy the SIRs—

[3] *Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120, 1125 (Kan. 2002).

[4] *Pan Am Equities, Inc. v. Lexington Ins. Co.*, 959 F.3d 671, 674 (5th Cir. 2020).

[5] *Liggatt*, 46 P.3d at 1125.

[6] *Pan Am Equities,* 959 F.3d at 674.

[7] *Liggatt*, 46 P.3d at 1126 (emphasis added).

[8] *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (emphasis added).

and in fact can through the bankruptcy proceedings—and that NPC's, Republic's, and James River's exposure to Roe's claim remains the same as it would be outside of bankruptcy.

10. Republic Policy's SIRs are limitations on insurance that are construed narrowly against Republic. The SIRs' express language requires "actual payment," which means only that there must be "[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation." PAYMENT, Black's Law Dictionary (11th ed. 2019) (emphasis added). The Republic Policy's requirement that the payment and resulting discharge be "actual" merely requires them to be "existing in fact, real." ACTUAL, Black's Law Dictionary (11th ed. 2019). An allowed, unsecured claim falls squarely within that definition. And that conclusion is bolstered when considered in the context of the Republic Policy's bankruptcy savings provisions and the many other courts that have made similar conclusions.

C. None of the cases cited by Plaintiff Insurers involve a court holding that an SIR cannot be satisfied by the grant of an unsecured claim.

11. Despite Roe's unwavering adherence to his argument that NPC must satisfy the SIRs, Plaintiff Insurers cite numerous cases in which the insured or claimant have argued that the insured's bankruptcy has altogether excused it from satisfying the SIR. It is these cases, according to Republic, that are the "most analogous" to the present case. Without fail, those cited cases are all distinguishable.

12. James River argues that *In re Tailored Brands, Inc.* indicated "that a general, unsecured bankruptcy claim given to a claimant does not satisfy an insured's SIR." James River Br. at 13. A closer reading shows that legal issue was never before the Court and that the case is distinguishable on every material fact. First, the procedural

posture was that of a creditor, Hoffman, seeking *post-confirmation* relief from the discharge injunction. *In re Tailored Brands, Inc.*, No. 20-33900, 2021 WL 2021472 at *1 (Bankr. S.D. Tex. May 20, 2021). Unlike Roe, Hoffman did not timely file a proof of claim or obtain a stipulation prior to confirmation of the plan, preserving his rights to adjudicate his claims and collect against third-party insurers outside of the bankruptcy case. *See id.* at *1-2. Instead, Hoffman relied on an exception to the discharge injunction under *In re Edgeworth* that permits the adjudication of personal injury claims when collection is limited to third-party insurers. *See id.* at *2-4; *see also In re Edgeworth*, 993 F.2d 51, 53-55 (5th Cir. 1993). The debtors there contested application of this exception, arguing collection would not be limited to third-party insurers and, instead, that debtors would be required to pay defense costs because their SIR was not yet exhausted. *See id.* at *3-4 (finding $179,000 of debtors' SIR remained). After confirmation of the plan, Hoffman moved for leave to file a late proof of claim. *Id.* at *2. While the debtors agreed to allow Hoffman a $250,000 general unsecured claim, they expressly reserved their rights to prevent Hoffman from obtaining relief from the plan injunction.[9] And most importantly, Hoffman never argued that the debtor's allowance of his unsecured claim satisfied the SIR, just that the costs debtors would be forced to bear (up to $179,000) are "negligible" and would not interfere with debtors' "fresh start in economic life." *Id.* at *3-4. Hoffman did not assert the positions asserted by Roe here, and because of that, *In re Tailored Brands* provides zero support for the Plaintiff Insurers' position.

13. Plaintiff Insurers also argue that *Mt. Hawley Ins. Co. v. Ne Van Hampton*, No. CV H-23-360, 2023 WL 6725735 (S.D. Tex. Oct. 12, 2023) controls. But like in *In re*

[9] *See In re Tailored Brands, Inc.*, No. 20-33900, Bankr. S.D. Tex. [Dkt. 1585].

Tailored Brands, no party ever argued that a grant of an allowed unsecured claim satisfied the applicable SIR. *See Mt. Hawley Ins. Co.*, 2023 WL 6725735, at *3-4. In fact, it does not even appear that there existed an allowed claim at the time the insurers' performance was requested.[10] Rather, Your Honor signed a stipulation in the bankruptcy case that was similar but not identical to the Stipulation in this case. *See In re Texas Taxi, Inc.*, No. 21-60065, Bankr. S.D. Tex. [Dkt. 109] ("Mt. Hawley Stipulation"). The Mt. Hawley Stipulation authorized the claimant, Hampton, to file suit to liquidate his claim and collect from insurance and provided that any unpaid amounts insurance did not cover would be considered an unsecured claim. Mt. Hawley Stipulation at ¶ 8. Hampton did liquidate his claim via a default judgment against the debtor-insured, the insurer denied coverage, and a coverage suit followed. *Mt. Hawley Ins. Co.*, 2023 WL 6725735, at *1. In the coverage suit, Hampton argued that (1) the applicable SIR was not a condition precedent to the insurer's liability, and (2) that the debtor-insured's bankruptcy wholly excused it from paying the SIR. *Id.* at *3. Based on those facts and that argument, Judge Rosenthal held that "the Policy limits are not due unless and until the insured 'first pay[s]' the damages amount." *Id.* This case thus stands only for a proposition that Roe has already embraced—that NPC must satisfy the SIR. Once again, Roe's arguments that are presented here were not presented in the case cited by Plaintiff Insurers.

14. James River also argues that several non-bankruptcy cases from other jurisdictions inform the definition of actual payment. Chief among them is the Fifth Circuit's analysis of when an excess policy is triggered by payments under a primary

[10] The recitals in the Mt. Hawley Stipulation state that Hampton had filed a proof of claim. The terms of the Mt. Hawley Stipulation included that debtors would not object to the claim, but that the parties were required to adjust that claim based on the outcome of the state court lawsuit and that no party could take action to collect from the debtors without court approval. The docket sheet does not reflect that the parties ever adjusted Hampton's claim or sought or obtained Court relief to be paid based on that claim.

policy. *See Martin Resource Management Corp. v. AXIS Ins. Co.*, 803 F.3d 766, 769 (5th Cir. 2015) (*citing Comerica Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp. 2d 1019, 1032 (E.D. Mich. 2007)). But that court's analysis was based on Texas's technical approach to interpreting policies, not Kansas law's standard of "what a reasonably prudent insured would understand the language to mean." *Liggatt*, 46 P.3d at 1126. Further, that court did not contend with the bankruptcy savings clauses that apply here:

> Bankruptcy or insolvency of the "insured" or the "insured's" estate **will not relieve us** of any obligations under this Coverage Form.[11]
>
> ***
>
> We will have no obligation under any circumstances to assume or satisfy your obligation for the actual payment of damages, expenses, costs, and benefits, until the Self-Insured Retention and "Corridor Self-Insured Retention" have been exhausted. **Our obligation to pay damages, expenses, costs, or benefits under this policy will not be affected, modified or changed in the event of your bankruptcy.**[12]

15. James River cites *Rapid-American* for similar purposes as it cites *Martin Resource*. In that case, the debtor-insured sought to access excess liability insurance despite several underlying insurers being insolvent and not exhausting their limits, but it did not concern the insured's ability to pay an SIR. *See In re Rapid-Am. Corp.*, No. 13-10687 (SMB), 2016 WL 3292355, at *13 (Bankr. S.D.N.Y. June 7, 2016). Nevertheless, in its analysis, that court cited with approval cases in which debtors' insurers were held to their obligations on policies with SIRs despite the debtors' bankruptcies, by virtue of

[11] Ex. A, Republic Policy at Business Auto Coverage Form, Section IV, B.1. (emphasis added). The SIR Endorsement reiterates that Republic's obligations are unchanged in the event of bankruptcy:

[12] Ex. A, Republic Policy at SIR Endorsement, A. (emphasis added).

bankruptcy savings statutes. *See id.*[13] The court found the SIR situation distinguishable, insofar as the excess policies allowed for underlying limits (not SIRs) to be satisfied by the debtor *or someone on debtor's behalf*. *Id.*[14] Similarly to the other cases on which Plaintiff Insurers rely, *Rapid-American* involved litigants in materially different circumstances making entirely different arguments.

16. James River finally argues that it and Republic should be excused from performing under their policies because there has not been a "fully adversarial trial." *See Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655 (Tex. 2017). *Hamel* is not on point. At the outset, *Hamel* does not apply because NPC has not assigned Roe any cause of action against the Plaintiff Insurers. That "key factual predicate"—an assignment—of that line of cases is missing, so the "fully adversarial trial" test does not apply. *See id.* at 664–65. Even if the test did apply, the issue fundamentally is whether the unsecured claims process binds the Plaintiff Insurers because it could be a considered a breach of the Policies' consent clauses. While Roe does not concede that it was a breach, such a breach would "not excuse [an insurer's] liability under the policy unless it was prejudiced by the settlements." *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 754 (Tex. 2013).

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[13] "*Admiral Ins. Co. v. Grace Indus., Inc.,* 409 B.R. 275, 282 (E.D.N.Y.2009) ("[B]ecause the bankruptcy clause must be given full force and effect ..., the policy's SIR endorsement cannot be construed under any theory as precluding Grace from coverage if it cannot fund the SIR as contractually required."); *Am. Safety Indem. Co. v. Vanderveer Estates Holding, LLC (In re Vanderveer Estates Holding, LLC),* 328 B.R. 18, 24–25 (Bankr.E.D.N.Y.2005) (holding, pursuant to Illinois statute similar to New York's section 3420(a)(1), that "injured parties shall be compensated whether or not a bankrupt debtor pays its self-insured retention"), *aff'd sub nom. Am. Safety Indem. Co. v. Official Comm. of Unsecured Creditors,* No. 05–5877 ARR, 2006 WL 2850612 (E.D.N.Y. Oct. 3, 2006); *Rollo v. Servico New York, Inc.,* 914 N.Y.S.2d 811, 813–14 (N.Y.App.Div.2010) ("[D]efendants' insurer remains obligated to pay damages for injuries or losses covered under the policy, despite the fact that defendants' obligation to satisfy the SIR was discharged through the bankruptcy proceedings . . . .")."

[14] *In re Rapid-Am. Corp.*, 2016 WL 3292355, at *13 ("In the SIR cases, the bankrupt had to pay the SIR before coverage liability attached. ... Bankruptcy prevented the insured from satisfying its pre-petition SIR obligation. In contrast, the operative exhaustion language in the Insurance Policies only requires that the amounts be paid by or on behalf of Rapid. Thus, the Insurance Policies still permit some party other than Rapid to satisfy the exhaustion requirements and trigger coverage.").

Plaintiff Insurers have not alleged that they were precluded from defending against the Roe Lawsuit or the Dornemann Lawsuit or that such a settlement was unreasonable. To the contrary, Republic is defending the Roe Lawsuit and actually anticipates being successful upon final judgment. James River has also been actively negotiating and participating in the suit. There is no prejudice as a matter of law. Regardless of whether the Court inquires into prejudice under *Lennar Corp.* or whether there has been a fully adversarial trial under *Hamel*, the facts do not support such a finding because of Plaintiff Insurers' knowledge of and participation in the Roe Lawsuit. *Cf. In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 726 (Tex. 2006) (allowing an insurer to timely move to intervene after receiving notice "that [the would-be intervenor insurer's] interests . . . would no longer be represented by [the named party insured].").

D. Roe cites numerous cases in which a bankruptcy court has permitted an unsecured claim to satisfy an SIR.

17. In Roe's Trial Brief, he cites several cases[15] directly on point in which courts have expressly held that an insurer of a bankrupt insured must still perform under its policy even if an SIR is alleged to be outstanding. The cases Roe cites base their reasoning on the existence of a contractual bankruptcy savings clause or on the provisions of or policies underlying the Bankruptcy Code.

18. James River largely avoids discussing any of them. Republic, on the other hand, argues that Roe's reliance on these cases is misplaced and the facts distinguishable because they "involve an applicable state statute or a standard bankruptcy clause, and

[15] *Sturgill v. Beach at Mason Ltd. P'ship*, No. 1:14CV0784 (WOB), 2015 WL 6163787, at *2 (S.D. Ohio Oct. 20, 2015); *Pinnacle Pines Cmty. Ass'n v. Everest Nat'l Ins. Co.*, No. CV-12-08202-PCT-DGC, 2014 WL 1875166, at *5 (D. Ariz. May 9, 2014); *Admiral Ins. Co. v. Grace Indus., Inc.*, 409 B.R. 275, 280–81 (E.D.N.Y. 2009); *In re OES Env't, Inc.*, 319 B.R. 266, 269 (Bankr. M.D. Fla. 2004); *In re Keck, Mahin & Cate*, 241 B.R. 583, 596 (Bankr. N.D. Ill. 1999).

many of which are distinguished, or rely on principles rejected by, the court in *Pak-Mor*." Republic specifically argues that *Sturgill* is distinguishable because it was "ultimately based on the existence and language of a bankruptcy clause in the policy that stated, '**Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under the policy**.'" Republic Br. at 30 (emphasis added).

19. Republic's analysis completely overlooks that its policy includes materially identical bankruptcy savings clauses as are at issue in *Sturgill*:

> Bankruptcy or insolvency of the "insured" or the "insured's" estate *will not relieve* ***us*** of any obligations under this Coverage Form.[16]
>
> ***
>
> We will have no obligation under any circumstances to assume or satisfy your obligation for the actual payment of damages, expenses, costs, and benefits, until the Self-Insured Retention and "Corridor Self-Insured Retention" have been exhausted. ***Our obligation*** **to pay damages, expenses, costs, or benefits under this policy will not be affected, modified or changed in the event of your bankruptcy.**[17]

If the presence of a bankruptcy savings clause was sufficient in *Sturgill*, then it is also sufficient when interpreting the Republic Policy.

20. Republic also seeks to distinguish cases in which applicable state law required insurance policies to include bankruptcy savings clauses. But regardless of whether Republic was required to include a bankruptcy savings clause in the Republic Policy, it included just such a clause. Because Republic included that clause, it cannot nullify it. *Sturgill v. Beach at Mason Ltd.*, NO. 1:14cv0784 (WOB), 10 (S.D. Ohio Oct. 20,

[16] Ex. A, Republic Policy at Business Auto Coverage Form, Section IV, B.1. (emphasis added). The SIR Endorsement reiterates that Republic's obligations are unchanged in the event of bankruptcy.

[17] Ex. A, Republic Policy at SIR Endorsement, A. (emphasis added).

2015) ("[W]hile Ohio does not have a statute requiring liability policies to contain a bankruptcy clause, the fact remains that the Steadfast policy *does* contain such a clause. As recognized in the above authority, to adopt Steadfast's position would nullify that provision.").

21. Republic's other attempts to distinguish cases that are favorable to Roe are similarly unavailing. For instance, Republic claims that *In re Keck, Mahin & Cate* is distinguishable because that court relied on both the express terms of the plan and a state statute. The implication, it seems, is that neither of those are present in this case. But in reality, the *In re Keck, Mahin & Cate* court based its holding primarily on the terms of policy, which included a bankruptcy savings clause that stated, "[t]he bankruptcy or insolvency of the FIRM or any other ASSURED shall not relieve the Company of its obligation to pay claims made under this Policy." *In re Keck, Mahin & Cate*, 241 B.R. 583, 597 (Bankr. N.D. Ill. 1999). The Republic Policy's bankruptcy savings clause is substantively similar and should be applied similarly. As to the express terms of the plan that Republic implies are not present here, the court noted that regarding the SIR, the Plan provided that:

> the SIR is satisfied by the Plan's grant to Class IV creditors of an unsecured claim for the SIR portion of their recovery and such creditors' acceptance of the Plan. ALAS will not be liable for any part of the SIR. Indeed, its exposure is not increased by a penny. ALAS is neither liable to the Class IV claimants for the SIR nor obligated to fund the costs of defending actions brought by these claimants until the SIR is satisfied.

Id. at 596. Each of those circumstances is present in the Stipulation. *See* Stipulation at ¶ 2 (allowing claim in the full amount of the Republic Policy's SIRs),¶ 4 (permitting Roe to recover from insurers amounts in excess of the SIR), ¶ 8 (contemplating Roe setting off

any recovery against insurers in the "amount of any such deductible or self-insured retention, including the SIR.").

22. As for Republic's argument that *Pak-Mor* rejected the reasoning of some of the underlying cases Roe cites, it is a distinction without a difference. The *Pak-Mor* court rejected that reasoning in the context of holding that payment of the SIR was not wholly excused. *See Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, No. SA-05-CA-135-RF, 2005 SL 34487723, at *2 (W.D. Tex. Nov. 3, 2005). Roe's argument adopts that holding. The *Pak-More* court left open how that payment was to be made, finding that the insured "may satisfy the self-insured retention by making its payment in whatever form it wants," including a promissory note to be paid—or possibly not paid—later. And *Pak-Mor* did not consider whether an allowed, unsecured claim could satisfy that payment requirement. Moreover, *Pak-Mor*'s bankruptcy savings clauses were beside the point. The *Pak-Mor* policy's "actual payment" provision began with the clause "[n]otwithstanding any provisions of the policy or any endorsements to the contrary." *See id.* at *2. Ergo, "actual payment" was required regardless of the bankruptcy-savings (or any other) provisions.

E. By its terms, the James River Policy applies to any judgment in excess of remaining underlying limits (under $2,000,000) regardless of whether NPC fails to pay the SIRs.

23. Though James River does not address any of the cases discussing the impact of a bankruptcy savings clause on a bankrupt insured's SIR, it nevertheless makes sweeping proclamations about its obligations under the James River Policy. James River argues that it issued a "true excess policy that pays only after exhaustion by payment of the SIRs and Republic Vanguard's limit of insurance."

24. However, James River expressly agreed in the James River Policy that coverage applies regardless of whether the SIR is satisfied under the Republic Policy:

> If you do not maintain the 'underlying insurance(s)' in full force and effect or fail to meet all conditions, terms and warranties of such 'underlying insurance(s)',[18] this policy will apply as if those policies were available and collectible.
>
> Your failure to comply with the foregoing shall not invalidate this policy, but in the event of such failure, we shall be liable under this policy only to the extent that we would have been liable if you had complied.

Ex. H, James River Policy at Section VI, 1. Other terms from Section VI, 1 Accordingly, the James River Policy will apply whether the Court rules in favor of Republic or Roe. It even applies regardless of whether anyone—NPC, Republic, or otherwise—pays the SIRs and Republic's policy limits. Moreover, because it applies only to the amount of underlying insurance and SIRs *scheduled,* and it only scheduled $2,000,000 (i.e., it did not include the corridor SIR), all that is necessary to reach James River's policy is a judgment in excess of $2,000,000 minus whatever has been paid toward defense costs.

II. CONCLUSION

NPC's "actual payment" of the SIR may take any form so long as it discharges its portion of the underlying obligation. Here, the unsecured claims process—allowance, valuation, satisfaction, and discharge of Roe's claim—meets that standard. The Republic Policy does not have any other reasonable construction from the standpoint of a reasonably prudent insured and in light of the bankruptcy-savings provisions. Further, the James River Policy expressly states that it will apply in bankruptcy "as if such 'underlying insurance(s)' were available and collectible." Because the value of Roe's claim will likely exceed the applicable SIRs, Republic and James River must insure NPC for

[18] To compound matters, the James River Policy lists only one of the SIRs when defining the underlying insurance. *See* Ex. H, James River Policy at Section V, 1 (defining "underlying insurance" by reference to the schedule) & Schedule of Underlying Insurance endorsement (listing only a $1,000,000 SIR).

those excess amounts. Roe requests judgment in his favor on the declarations Plaintiff Insurers seek and for any and all other relief to which he is entitled, reserving all rights against non-party insurers and against Republic and James River insofar as those non-party insurers' policies may affect the SIRs.

Respectfully submitted this 9th day of August 2024.

/s/ Ryan E. Chapple

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Jacob Roe's Response Brief has been served on counsel for Debtor, Debtor, and all parties receiving or entitled to notice through CM/ECF on this 9th day of August 2024.

/s/ Ryan E. Chapple
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