UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WACO HIPPODROME INC.,	§	
	§	
PLAINTIFF,	§	
	§	
v.	§	CIVIL NO. 6:22-cv-349-ADA-DTG
	§	
CENTRAL MUTUAL INSURANCE COMPANY D/B/A CENTRAL INSURANCE,	§	
	§	
DEFENDANT.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSED MOTION TO COMPEL APPRAISAL AND MOTION TO ABATE LITIGATION PENDING RESOLUTION OF THE APPRAISAL PROCESS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW **WACO HIPPODROME, INC.** ("Plaintiff" or "Waco Hippodrome") and files this PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSED MOTION TO COMPEL APPRAISAL AND MOTION TO ABATE LITIGATION PENDING RESOLUTION OF THE APPRAISAL PROCESS ("Response") and in furtherance thereof would respectfully show unto the Court as follows:

I.
SUMMARY OF RESPONSE

Nearly three years into litigation and after agreeing to four (4) scheduling orders and trial dates, receiving Plaintiff's expert reports and nearing the end of the discovery period, *and* after taking contrary positions *and* where substantial fact issues affecting damages remain, Central now moves for the first time to abate the lawsuit and resolve the case by appraisal.

Central has clearly waived its right to an appraisal under the Policy. *See In re Allstate,* 549 S.W. 3d 881 (Tex. App.-Fort Worth 2018, no pet.); *see also Skypac Corp. v. Great Lakes Reins. (UK) SE*, No.

1:16-CV-115, 2016 WL 9414096, at *2 (E.D. Tex. Dec. 16, 2016) (holding that right to appraisal was waived when parties had "**spent significant finances in nearly nine months of litigation in both state and federal court" and where parties had "designated experts, … filed final amended pleadings, and have almost completed discovery**")(emphasis added). But even if Central had not waived its right to appraisal, there are numerous unresolved fact issues which, without being decided by a jury, would render an appraisal meaningless, if not impossible. Furthermore, a party is not entitled to an abatement for the purpose of appraisal where fact issues or extra-contractual claims exist. "Federal district courts sitting in diversity and applying Texas law have, ***in most cases***, declined to abate litigation pending appraisal where questions of coverage remain." *Barron v. Century Surety Co.*, No. 1:22-CV-00144-MAC, 2023 WL 7105592, at *2 (E.D. Tex. Aug. 30, 2023). For this and related reasons, Defendant's Motion must be DENIED.

II.
FACTUAL BACKGROUND

A. Plaintiff's Asserts a Claim under the Policy – *February 2021*

Over three years ago and four months ago, on **February 22, 2021**, Plaintiff first notified Central of a claim for benefits under a 2020 property and casualty policy (the "Policy" or the "Insurance Policy") related to damage to the Waco Hippodrome (the "Hippodrome") from a winter storm. *See* Exhibit Nos. 1, 2, 3 (100:9-11). On February 24, 2021, and April 28, 2021, Central and/or its agents performed partial inspections of Hippodrome and personal property contained therein. *See, e.g.* Exhibit Nos. 2, 3 (137:6-18, 139:5-25). During these alleged inspections, it became clear to Plaintiff that Central was handling the claim in bad faith and had no intent to properly adjust the claim or otherwise honor the terms of the Policy. *See* Exhibit No. 4.

At no time during this time period did Central demand an appraisal under the Policy. *Id.*

B. Plaintiff Files Lawsuits Against Central – *October 2021 – April 2022*

On **October 5, 2021**, Plaintiff filed suit against Central, and its agents, in the 414th Judicial District Court of McLennan County, Texas (the "Original Lawsuit"), asserting contractual and extra-contractual claims concerning the Policy. *See* Exhibit No. 5 (Plaintiff's Original Petition – FM). Shortly thereafter, the Original Lawsuit was removed to Federal Court by Central (Cause No. 6:21-cv-01140-ADA-JCM).

On **November 19, 2021**, the Parties entered a Joint Stipulation of Dismissal without Prejudice of the Original Lawsuit in order to permit Defendant to perform a third and fourth inspection of the Property. *See* Exhibit No. 4.

On **January 12, 2022,** and **February 8, 2022**, Central again performed partial inspections of the Hippodrome, but failed to complete the inspections, properly adjust the claim, or otherwise honor the terms of the Policy. *See* Exhibit Nos. 2, 3 (140:20-142:7), 4.

On **April 1, 2022**, Plaintiff filed an Original Complaint against Defendant for the second time (the "Present Lawsuit" or "Second Lawsuit")(ECF No. 1).

On **July 20, 2022**, Central filed its Original Answer (ECF No. 7) in the Second Lawsuit, which included twenty (20) affirmative defenses, a denial of conditions precedent, *and* a reservation of rights. Notably, Central's Original Answer challenged "coverage" under the Policy generally as to all of Plaintiff's alleged damages. *See, e.g.,* ECF No. 7 (¶¶128-130, 136-143)(stating, in relevant part, "**a bona fide controversy exists regarding… the existence of any covered loss or damage.**"). At no time during this time period did Central demand an appraisal under the Policy. *See* Exhibit No. 4.

C. The Parties Engage in Vigorous Discovery, Enter Agreed Scheduling Orders, and Prepare for Trial – *August 2022 – July 2024*

From August 2022 through July 2024 (nearly two years), the Parties have engaged in extensive fact discovery, expert discovery, motions practice, and preparation for trial. *See* Exhibit No. 4.

On **September 20, 2022**, the Parties filed their Rule 26(f) Conference and Agreed Discovery Plan (ECF No. 11) and commenced discovery. On September 27, 2022, the Parties served their Initial Disclosures under Fed. R. Civ. P. 26(a)(1). *See id.* Also on September 27, 2022, Plaintiff served its Initial Discovery Requests on Central. *Id.* On **October 7, 2022**, Central served its Initial Discovery Requests upon Plaintiff, which included 34 Requests for Production and 16 Interrogatories. *See id.* On **November 4, 2022**, Central served its Objections and Responses to Plaintiff's Initial Discovery Requests, along with its initial document production (CMIC0000001-2489). *See id.*

On **November 10, 2022**, the Court entered its original ***Agreed* Scheduling Order**, consistent with the Parties Agreed Discovery Plan (ECF No. 17). Also on November 15, 2022, Plaintiff served its Objections and Responses to Central's Initial Discovery Requests, along with its initial document production (HIPPO000001-6204), Plaintiff's complete financial statements, and tax returns for 2019, 2020, and 2021. *See* Exhibit No. 4.

From **December 2022** through **August 2023**, the Parties continued to engage in discovery, periodically supplementing document production. *Id.* For example, on **April 3, 2023**, Plaintiff supplemented its document production at the request of Central (HIPPO006205-6338) by producing more detailed financial statements (e.g. Monthly Profit & Loss Statements and proof of business activity for the entire year of 2021). *See id.*

On **September 11, 2023**, Plaintiff provided Central with the initial report of Brandi N. Kleinman of Weaver (the "draft Weaver Report") as part of a confidential settlement communication and for the purpose of mediation under the Agreed Scheduling Order. *See* Exhibit Nos. 4, 6. On **September 12, 2023**, the Parties mediated the case under the Agreed Scheduling Order. *See* Exhibit No. 4. However, the parties reached an *impasse* and the case was *not* resolved at mediation. *Id.*

On **October 13, 2023**, the Court entered an ***Agreed* First Amended Scheduling Order** (ECF No. 25). This was the second scheduling order and trial date agreed to by Central. *Id.*

During the month of **February 2024**, the parties took numerous depositions and written discovery. For example, on February 1, 2024, Plaintiff deposed Chris Hoffman, a consulting assisting Central with the adjustment of the Claim. *Id.* On February 5, 2024, Plaintiff deposed Central's Corporate Representative for the first time. *See* Exhibit Nos. 3, 4. During this deposition, Central testified that there were numerous fact issues concerning coverage for Plaintiff's claims for personal property and business interruption. *See, e.g.,* Exhibit No. 3 (75:10-76:2, 79:11-80:9, 174:13-176:9). On February 7, 2024, Central deposed Plaintiff's Corporate Representatives (Shane Turner and Cody Turner). *See* Exhibit No. 4. On February 14, 2024, Central deposed Will Campos, a former employee of Plaintiff WHI. *See id.* On February 16, 2024, Plaintiff supplemented its document production at the request of Central (HIPPO006339-6364). *Id.* On February 23, 2024, Plaintiff deposed Adam Fahey, a consultant working for Central on the Claim. *Id.*

Also on **February 23, 2024**, *at the parties'* request, the Court entered an ***Agreed*** **Second Amended Scheduling Order** (ECF No. 27). *See* Exhibit No. 4. This was the third scheduling order and trial date agreed to by Central. *Id.*

On **April 5, 2024**, Plaintiff hired Frederick "Rick" J. Bingham as a retained, testifying expert on liability in order to meet the expert designation deadline in the Agreed Second Amended Scheduling Order. *Id.* At no time during this time period did Central demand an appraisal under the Policy. *Id.*

D. Central informally Requests an Appraisal and Abatement "Subject to… the Right to "Deny Coverage for all or any Part of any Appraisal Award"

On **April 11, 2024**, over three years after Plaintiff notified Central of Plaintiff's claim under the Policy, Central (for the first time) requested an Appraisal and an Abatement of the case. *See* Exhibit No. 4, 6. Plaintiff immediately notified Central of its opposition to both an Appraisal and Abatement. *See* Exhibit No. 4. Central did not file any motions with the Court. *Id.* Importantly, Central

represented that its demand for appraisal was "**subject to a complete reservation of rights… including the right to deny coverage for all or any part of any appraisal award**…." *See* Exhibit No. 7.

E. The Parties *Continue* to Engage in Vigorous Discovery, Enter more Agreed Scheduling Orders, and Prepare for Trial – *May 2024 – June 2024*

On **May 9, 2024**, Central served its Second Set of Interrogatories and First Requests for Admission. *See* Exhibit No. 4. On May 23, 2024, the Court entered an Order compelling certain discovery responses and depositions from Central and extending expert designation deadlines (ECF No. 33).

On **May 29, 2024**, the Court entered the ***Agreed* Third Amended Scheduling Order** at the parties' request (ECF No. 35). This was the fourth scheduling order and trial date agreed to by Central. *See* Exhibit No. 4. Central still had not filed any motions to abate the case or to seek an appraisal. *Id.*

On **June 7, 2024** and **June 10, 2024**, Plaintiff responded to Central's Second Set of Discovery Requests. *Id.* On June 11, 2024, Plaintiff deposed Caroline Veahman Isenberg, Central's primary claims handler for the Claim. *See* Exhibit Nos. 4, 8. On June 12, 2024, Plaintiff deposed the Central Corporate Representative (for a second time). *See* Exhibit Nos. 4, 9.

On **June 14, 2024**, Central notified Plaintiff by email of Central's desire to conduct at least four additional depositions and to amend its Answer to allege that the Policy is now "void." *See, e.g.,* Exhibit No. 10 (stating "**please be advised that the [P]olicy is void**"). On **June 20, 2024**, Central threatened to unilaterally issue deposition notices to one or more witnesses if Plaintiff failed to provide agreed dates. *See, e.g.,* Exhibit No. 11 (stating "**we [Central] simply cannot wait any longer as our discovery period is ending soon.**").

On **June 26, 2024**, Plaintiff designated two retained, testifying experts, with accompanying reports, and numerous non-retained, testifying experts per the Agreed Third Amended Scheduling

Order (ECF No. 35). *See* Exhibit Nos. 4, 12 (Bingham Report), 13 (Weaver Report). Plaintiff has paid, or owes, Mr. Bingham more than **$85,000** for time spent addressing the pending factual issues in dispute and in developing the report necessary for compliance with the Agreed Third Amended Scheduling Order. *See* Exhibit No. 4, 4(a). Plaintiff has paid, or owes, Weaver more than **$120,000** for time spent calculating the business interruption loss and in developing the report the report necessary for compliance with the Agreed Third Amended Scheduling Order. *See* Exhibit Nos. 4, 4(b).

F. Central Files a Motion to Compel Appraisal and Motion to Abate Litigation

On **June 26, 2024**, more than three years after Plaintiff notified Central of Plaintiff's claim under the Policy, and more than two and a half years after the Original Lawsuit was filed, Central filed a Motion to Compel Appraisal and Motion to Abate Litigation (ECF No. 40). In its Motion, Central asks the Court for the first time to abate the case and compel an appraiser *solely to determine the amount of damages Central owes to Plaintiff* under the Policy.

G. The Parties *Continue* to Engage in Vigorous Discovery and Prepare for Trial – *June 2024 to the Present*

Inexplicably, just two days later, on **June 28, 2024**, Central filed a Motion for Leave to File Amended Answer and Affirmative Defenses (ECF No. 43), seeking to add an affirmative defense that the Policy was void altogether. On **July 5, 2024**, Central noticed the second deposition of Plaintiff's corporate representative (Cody Turner) and the depositions of two former employees of Plaintiff (Jesse Lee and Wil Campos) related to liability issues. *See* Exhibit No. 14. On **July 11, 2024**, Central sought to inspect the rooftop tile area of Plaintiff's property to evaluate whether there is a covered loss on the subject property. *See, e.g.,* Exhibit No. 15.

III.
ARGUMENT & AUTHORITIES

A. THE MOTION TO COMPEL APPRAISAL MUST BE DENIED

As detailed below, Central's Motion to Compel Appraisal and Motion to Abate Litigation must

be denied in its entirety because: (1) Central has waived its contractual right to appraisal; (2) numerous fact issues exist in this case that must be decided by the jury thus making appraisal inappropriate and ineffective; (3) Central has materially breached the Policy in multiple facets; and (4) abatement of the litigation is not appropriate when "questions of coverage" and extra-contractual claims.

1. Central Waived its Right to Appraisal under the Policy

a. Actions Inconsistent with the right of appraisal

Courts routinely find that a party has waived its contractual right to appraisal. *See In re Allstate,* 549 S.W. 3d 881 (Tex. App.-Fort Worth 2018, no pet.); *Skypac Corp. v. Great Lakes Reins. (UK) SE*, No. 1:16-CV-115, 2016 WL 9414096, at *2 (E.D. Tex. Dec. 16, 2016) (**holding that right to appraisal was waived when parties had "spent significant finances in nearly nine months of litigation in both state and federal court" and where parties had "designated experts, … filed final amended pleadings, and have almost completed discovery"**)(emphasis added); *see also Chik-Kin v. Axis Surplus Ins. Co.*, No. 3:13-CV-2804-N, 2015 WL 3466723, at *3 (N.D. Tex. Jan. 21, 2015) (denying motion to compel appraisal that was not filed until "**one and a half years into the litigation** and approximately one month before trial")(emphasis added); *see also Meadows v. Allied Prop. & Cas. Ins. Co.*, No. 1:19-CV-002-H, 2020 WL 6122543, at *1 (N.D. Tex. Jan. 7, 2020) (holding appraisal rights were waived after **delay of more than fourteen months** between the impasse and invocation of the appraisal clause)(emphasis added); *see also 10830 Bellaire Blvd., Inc. v. Amguard Ins. Co.*, No. H-19-4026, 2020 WL 6122363, at *2-3 (S.D. Tex. May 21, 2020) (finding right to appraisal was waived when demand was made twenty-four months after impasse and after parties were engaged in litigation and had incurred costs of hiring experts)(emphasis added); *see also Hayley v. Meridian Security Ins. Co.*, No. 7:22-CV-00036-O, 2022 WL 18859312, at *3 (N.D. Tex. Oct. 17, 2022) (finding waiver where demand for appraisal was made **three months before trial date** and **after deadline for designating experts**,

and finding that demand for appraisal was "**a dilatory tactic to further delay trial and the resolution of this case**")(emphasis added).

In this case, Central first filed its Motion to Compel Appraisal and Motion to Abate Litigation:

- More than three years after Plaintiff notified Central of its claim under the Policy;
- More than two and a half years after Plaintiff's Original lawsuit was filed;
- After the parties have engaged in extensive discovery, including numerous depositions and multiple "discovery dispute" hearings before the Court;
- After Plaintiff has designated all of its expert witnesses in the case;
- After Plaintiff has spent and/or incurred over $200,000 in expert witness fees;
- After Central agreed to four (4) different Agreed Scheduling Orders in the case, including a trial date of September 30, 2024;
- After Central has asserted over twenty affirmative defenses against Plaintiff, most of which seek to void the Policy in which the contractual appraisal provisions exist;
- Within nineteen days of the end of the fact discovery deadline; and
- Within three months and four days of the agreed trial setting on September 30, 2024.

See Exhibit No. 4.

A party's unreasonable delay in invoking an appraisal clause a primary factors in a waiver-by-conduct analysis. *See, e.g., In re Allstate*, 549 S.W.3d at 888; *In re Universal Underwriters of Tex. Ins. Co.,* 345 S.W.3d 404, 408 (stating that "unreasonable delay is a factor in finding waiver"). Whether the party's delay in invoking an appraisal clause is reasonable or unreasonable depends on the time between the "point of impasse" in the parties' negotiations concerning the amount of loss and the time the appraisal clause is invoked. *Id.* (stating that "reasonableness must be measured from the point of impasse"). An impasse is reached when it becomes apparent to both sides that they disagree as to the damages and that further negotiations are futile. *Id.*; *see Jai Bhole, Inc. v. Emp'rs Fire Ins.*, No. CIV.A. G-10-522, 2014 WL 50165, at *2 (S.D. Tex. Jan. 7, 2014) (holding point of impasse occurred when insurer chose to stand on its defenses).

Plaintiff and Central conducted a mediation on September 12, 2023. *See* Exhibit No. 4. The parties reached an impasse at mediation and, since that date, Central has made zero offers to Plaintiff for any real or personal property loss suffered by Plaintiff. *See* Exhibit No. 4.

Other factors or circumstances—in addition to the "delay-in-requesting-an-appraisal-after-the-point-of-impasse factor" – are pertinent in determining whether a party has waived by conduct its right to an appraisal. *See Allstate* 549 S.W.3d at 889; *See also Universal Underwriters,* 345 S.W.3d at 407-08 (recognizing appellate court decisions holding that party waived appraisal clause "were not based solely on the length of delay, but rather on the parties' conduct, as indication of waiver"); *See Pounds v. Liberty Lloyds of Tex. Ins.*, 528 S.W.3d 222, 225–28 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (recognizing denial of the claim as a "circumstance[ ] to consider in determining whether the insurer impliedly waived its appraisal right through inconsistent conduct"); *See Trelltex, Inc. v. Intecx, L.L.C.*, 494 S.W.3d 781, 791 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

In *In re Allstate*, the appellate court held that the trial court did not abuse its discretion by determining that Allstate's conduct was inconsistent with the assertion of its appraisal right and constituted waiver of its appraisal right. 549 S.W.3d at 883-84, 891-92 (emphasis added) (where the insurance company conducted six inspections of the claimed damage to the insured's roof). Here, Central has performed at least four inspections of Plaintiff's property and, currently, has a fifth request for inspection pending. *See* Exhibit No. 4.

In *In re Allstate*, the insurance company agreed to a February 2018 trial setting. 549 S.W.3d at 891-92. Here, Central has agreed not once, not twice, not three times, but four times to an Agreed Scheduling Order and September 30, 2024 trial setting without ever seeking to compel appraisal. *See* Exhibit No. 4.

In *In re Allstate*, the insurance company filed a motion to compel a seventh inspection of the insured's roof and requested an extension of time to designate experts for trial. 549 S.W.3d at 891-92.

Here, Central has taken numerous depositions, still seeks additional depositions, seeks a sixth inspection of the building and even recently filed a Motion for Leave to amend its pleadings to assert an additional affirmative defense, alleging that the Policy is void due to fraud. *See* Exhibit No. 4.

Based on similar facts as the present case, the court in *In re Allstate* held that it was within the trial court's discretion to determine that Allstate's conduct clearly constituted intentional conduct inconsistent with its right to invoke the contractual right of an appraisal. 549 S.W.3d at 893-94 (reasoning that "**because Allstate failed to demand an appraisal for more than three months after May 9, 2017, and because Allstate's above-outlined intentional conduct performed in the meantime was inconsistent with its right of appraisal, we hold that the trial court did not abuse its discretion by determining that Allstate had waived its right of appraisal**."); *see also In re Gen. Elec. Capital Corp.,* 203 S.W.3d 314, 316 (Tex. 2006)(recognizing waiver may be predicated on intentional conduct inconsistent with claiming a known right); *In re Guideone Nat'l Ins.*, No. 05-15-00981-CV, 2015 WL 5050233, at *2 (Tex. App.—Dallas Aug. 27, 2015, orig. proceeding [mand. dism'd]) (mem. op.)(holding trial court did not abuse its discretion by concluding that GuideOne waived its right to seek appraisal and denying mandamus relief); *see also Jai Bhole, Inc.*, 2014 WL 50165, at *2 (finding waiver by conduct precluded insurer's invocation of appraisal clause).

Here, Central's inconsistent actions are even more profound than Allstate's actions, namely:

(a) **Central waited over three years since Plaintiff submitted its insurance claim before Central sought to invoke appraisal**;

(b) **Central filed over twenty affirmative defenses against Plaintiff, most of which seek to void the Policy, before Central sought to invoke appraisal**;

(c) **Central agreed to four Agreed Scheduling Orders in this case, including a trial setting that is only two and a half months away, before Central sought to invoke appraisal**; and

(d) **Central waited until Plaintiff disclosed its experts, and incurred over $200,000 in expert witness fees, before Central filed its Motion to Compel Appraisal**.

See Exhibit Nos. 4, 6, 7, 10, 11, 14, 15. For these and related reasons, Central's Motion to Compel Appraisal, as in *In re Allstate*, should be DENIED.

b. Prejudice against Plaintiff

In *In re Allstate*, the insurance company also argued that the trial court abused its discretion by denying its motion to compel an appraisal because the insured did not establish prejudice. 549 S.W.3d at 892; *see also Universal Underwriters.* 345 S.W.3d at 411 (explaining that party challenging enforceability of an appraisal clause based on waiver must establish both waiver by conduct and prejudice). The Texas Supreme Court has explained that "**prejudice to a party may arise in any number of ways that demonstrate harm to a party's legal rights or financial position**." *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008) (defining prejudice for purposes of waiver of arbitration as "the inherent unfairness in terms of delay, expense, or damage to a party's legal position")(quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004)); *see also In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 47 n.5 (1st Cir. 2005) ("[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." (*quoted in Perry Homes*, 258 S.W.3d at 597)); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218, 222 (1st Cir. 1995) (finding prejudice where party "incurred expenses as a direct result of [opponent's] dilatory behavior").

In *In re Allstate*, the court states that "**prejudice may arise not only from the delay but *also* from the requesting party's intentional conduct in the meantime—like conduct triggering additional expenses, conduct constituting inherent unfairness, conduct constituting purposeful manipulation of the appraisal process, and conduct giving the party requesting appraisal an unfair tactical advantage**." 549 S.W.3d at 892.

In this case, Plaintiff will be severely prejudiced by invocation of the appraisal process under these circumstances. For example, Plaintiff has incurred over $200,000 in expert witness expenses in

order to comply with a Scheduling Order agreed-to by Central, where such expenses would not have been incurred had Central accepted coverage and timely demanded appraisal. *See* Exhibit No. 4. In addition, Plaintiff has been forced to take numerous depositions concerning coverage and liability which would have been unnecessary had Central accepted coverage and timely demanded appraisal. *Id.*

In *In re Allstate*, the court denied Allstate's motion to compel an appraisal because there was an almost three-month delay from the point of impasse before Allstate invoked its right of appraisal. 549 S.W.3d at 892-93. Here, **Central waited nine and a half months** after the 2023 failed mediation before attempting to invoke the right of appraisal. *See* Exhibit No. 4. In *In Re Allstate*, the insurer engaged in intentional conduct and verbal statements to the trial court inconsistent with its right of appraisal. 549 S.W.3d at 892-93. Here, Central has: (a) asserted over twenty affirmative defenses against Plaintiff, most of which seek to "void" the Policy; (b) agreed to four scheduling orders and trial dates, (c) asserted "reservation of rights" on Plaintiff's entire claim; and (d) repeatedly maintained a "**right to deny coverage for any or all part of any appraisal.**" *See, e.g.,* Exhibit Nos. 4, 6, 7.

Finally, the Court should consider that Central first notified Plaintiff of its intent to seek an appraisal three months ago, ***but waited to file its Motion until the very day that Plaintiff served its expert reports***. *See* Exhibit No. 4. Obviously, Central wanted to gain a tactical advantage by receiving the opinions of Plaintiff's experts before it attempted to shut down the litigation pending an appraisal. For this and related reasons, Central's Motion to Compel Appraisal should be DENIED.

2. Numerous Fact Issues Exist, Including Fact Issues Concerning Coverage, Making Appraisal Inappropriate and Ineffective in this Case

In its Motion to Compel Appraisal, Central claims that appraisal is appropriate because only the value of property or amount of Plaintiff's loss is at issue. *See* ECF No. 40 at 1-2, 4-5. This representation by counsel is blatantly false. In reality, as shown by the sworn testimony and other

written documents in this case, there are numerous fact issues that exist in this case beyond just the "amount" owed to Plaintiff. These fact issues must be decided by the tier of fact before an appraisal could even be conducted.

For example, Central's own pleadings assert that fact issues exist regarding coverage. *See, e.g.,* ECF No. 7 (¶¶128-130, 136-143)(stating, in relevant part, "**a bona fide controversy exists regarding… the existence of any covered loss.**").

Also by way of example, Central's own corporate representative has testified, in his first deposition, that:

- There is a fact issue concerning the period of restoration, a key factual issue that must be resolved by a jury prior to any calculation of damages. *See* Exhibit 3, pp. 75:10-76:2, 79:11-80:9);
- There is a fact issue concerning whether damage to the Hippodrome's Roof Tiles were a covered loss under the Policy. *Id.* at 174:13-17;
- There is a fact issue concerning whether damage to the Hippodrome's Sony Projectors were a covered loss under the Policy. *Id.* at 174:23-175:1;
- There is a fact issue concerning whether damage to the Hippodrome's theater furniture was a covered loss under the Policy. *Id.* at 175:6-10;
- There is a fact issue concerning whether damage to the Hippodrome's CCTV and/or security system was a covered loss under the Policy. *Id.* at 175:11-16;
- There is a fact issue concerning whether damage to the Hippodrome's speakers and AV equipment was a covered loss under the Policy. *Id.* at 175:17-21; and
- There is a fact issue concerning whether damage to the Hippodrome's marquee sign system was a covered loss under the Policy. *Id.* at 175:22-176:5.

Central's corporate representative, in his second deposition, also testified that:

- There is a fact issue concerning the period of restoration, a key factual issue that must be resolved by a jury prior to any calculation of damages. *See* Exhibit 9, pp. 110:24-111:17.

Similarly, Central's only adjuster on Plaintiff's claim, Carolyn Veahman Isenberg, also testified in her deposition that:

- There is a fact issue concerning whether damage to the Hippodrome's Roof Tiles were a covered loss under the Policy. *See* Exhibit 8, pp. 254:11-255:13;
- There is a fact issue concerning the period of restoration, a key factual issue that must be resolved by a jury prior to any calculation of damages. *Id.* at 231:10-233:24;
- There is a fact issue concerning whether damage to the Hippodrome's Sony Projectors were a covered loss under the Policy. *Id.* at 185:6-20;
- There is a fact issue concerning whether damage to the Hippodrome's theater furniture was a covered loss under the Policy *Id.* at 192:23-194:15; and
- There is a fact issue concerning whether damage to the Hippodrome's marquee sign system was a covered loss under the Policy. *Id.* at 203:14-204:2.

Even certain correspondence by lead counsel for Central in this case highlights numerous fact issues that must be decided by the trier of fact in this case:

- Central's counsel wrote that Central demands appraisal "subject to a **complete reservation of rights**… including the **right to deny coverage** for all or any part of any appraisal award that may be issued…." *See* Exhibit 6, 04.11.24 Ltr from Gibbs Re Appraisal;
- Central's counsel admits that there is a fact issue concerning the "period of restoration," stating "**Hippodrome has made it clear that it does not agree with Central's evaluated period of restoration**." *See* Exhibit 7, 05.09.24 Ltr from Gibbs Re Appraisal, Denial of Coverage;
- Central's counsel again admits that its demand for appraisal is "**subject to a complete reservation of all rights... including the right to deny coverage for all or any part of the appraisal award that may be issued**." *Id.*;
- Central's counsel states that there is a fact issue concerning the period of restoration, a key factual issue that must be resolved by a jury prior to any calculation of damages. *See* Exhibit 10, 06.14.24 Email from Gibbs re" "Policy is Void"(stating "**the policy is void in its entirety**.") *Id.*; and

- Central's counsel also repeatedly demands the deposition of a former employee of Plaintiff for the purpose of exploring fact issues concerning coverage and/or liability issues. *See* Exhibit 11, 06.20.24 E-Mail from Gibbs Re Discovery.

Likewise, Plaintiff's retained, testifying liability expert also discussed the pending factual issues preventing any appraisal, including without limitation:

- A fact issue concerning the period of restoration, a key factual issue that must be resolved by a jury prior to any calculation of damages. *See* Exhibit 12, (pp.76-95)(analyzing the testimony of Central and its agents, who offered estimates for the period of restoration ranging between 2 months to more than 1 year);

- A fact issue concerning whether damage to the Hippodrome's Roof Tiles were a covered loss under the Policy. *Id.* at pp.21-24; and

- A fact issue concerning whether damage to the Hippodrome's theater furniture was a covered loss under the Policy. *Id.* at p.87.

Despite Central's misstatements to the contrary, a jury must decide any and all of these fact issues before an appraiser could even make any determination of the amount of the loss suffered by Plaintiff.

3. Material Breach of the Policy by Central Discharges Any Appraisal Obligation

Central's demand for appraisal is strictly based on the contractual language of the Policy (ECF No. 40 at 1-2, 4-5). The only right to any type of appraisal in this case is based within the insurance contract.

The Texas Supreme Court has stated that "[i]nsurance policies are contracts, and as such, are subject to rules applicable to contracts generally. A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform." *Hernandez. v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994); *see also Hanson Prod. Co. v. Americas Ins. Co.*, 108 F.3d 627, 630 (5th Cir. 1997)(adopting the *Hernandez* decision).

Plaintiff sued Central for breach of the insurance policy (ECF No. 1 at 10). Plaintiff's liability expert found that Central materially breached the insurance policy in numerous ways. *See* Exhibit 12, pp. 11-30; 40-48; 96-97 (e.g. Central failed to fully investigate Plaintiff's claim; Central failed to fairly adjust Plaintiff's claim; Central failed to adequately inspect Plaintiff's property and associated damages; Central failed to properly document and photograph Plaintiff's property and related damages; Central unreasonably delayed inspections of Plaintiff's property; Central shifted the "onus" of adjusting Plaintiff's claim back to Plaintiff; and Central failed to issue a single "reservation of rights" letter to Plaintiff).

Each of these factual issues of breach must be decided by the trier of fact. If the jury finds that Central did breach the Policy, then, based on well settled Federal and Texas law, Plaintiff is excused from any contractual appraisal obligation.

B. THE MOTION TO ABATE MUST ALSO BE DENIED

Central contends that if the Court orders an appraisal, it should also abate this case pending the outcome of the appraisal. According to Central, an abatement would "promote judicial economy" because an appraisal "will likely resolve this case" (ECF No. 40 at 14, 15). Not so.

As discussed above, Plaintiff has asserted a number of extra-contractual claims that cannot be resolved via appraisal, and there are critical underlying fact issues that must be determined (including the applicable period of restoration) before the amount of Plaintiff's loss can be finally calculated. Conducting an appraisal before those fact issues are resolved would be a largely meaningless exercise.

Central thus has it backwards—while a trial of this case and resolution of important fact issues might serve to inform an appraisal, conducting an appraisal in the dark without first achieving clarity on key parameters of Plaintiff's loss (including the period of restoration), would be an absolute waste of time and judicial resources.

Although Central contends that courts "frequently" stay litigation while an appraisal is

pending, that contention is incorrect. As the Texas Supreme Court recognized in *In re Universal Underwriters* (one of the most cited cases in Central's motion), a trial court's refusal to stay a case pending an appraisal "is not subject to mandamus, and the proceedings ***need not be abated*** while the appraisal goes forward." 345 S.W.3d at 412 n. 5 (citation omitted) (emphasis added). And in Federal Courts, abatement pending an appraisal is the ***exception***, not the rule: "Federal district courts sitting in diversity and applying Texas law have, ***in most cases***, declined to abate litigation pending appraisal where questions of coverage remain." *Barron v. Century Surety Co.*, No. 1:22-CV-00144-MAC, 2023 WL 7105592, at *2 (E.D. Tex. Aug. 30, 2023) (citing *Carter v. Underwriters at Lloyd's, London*, No. 7:17-CV-00127-O, 2018 WL 10483854, at *2 (N.D. Tex. July 27, 2018) (collecting cases)) (emphasis added).

Here, "questions of coverage" indeed remain. Since filing its Original Answer, Central has continuously challenged "coverage" under the Policy. *See, e.g.,* ECF No. 7 (¶¶ 128-130, 136-143) (stating that "a bona fide controversy exists regarding… the existence of any covered loss or damage."). Central's initial demand for an appraisal was also made "subject to a complete reservation of rights… including the right to deny coverage for all or any part of any appraisal award…." *See* Exhibit No. 6. And in a letter dated May 9, 2023, Central's counsel reiterated that coverage under the Policy remains a hotly disputed issue in this case:

> Central does not intend to waive, and expressly reserves, any and all rights or defenses that may be available under the terms and conditions of the Policy, the common law, or any applicable statute, including without limitation ***the right to deny coverage for all or any part of any appraisal award*** that may be issued in this matter as the claim, or a portion thereof, is not appropriate for appraisal.

(ECF No. 40-8) (emphasis added). Accordingly, by Central's own admission, it wants the Court to order an appraisal and stay this case pending the outcome of that appraisal, while at the same time reserving its right to ignore any appraisal award while it continues to dispute coverage in this lawsuit—an issue that must be resolved by the trier of fact. Abatement is not warranted in these circumstances.

Barron, 2023 WL 7105592, at *3 (abatement not appropriate when appraisal "would do nothing to determine what appears to be the most contested issue in this case"); *see also Gibson Prods. Co. of Kerville, Inc. v. Allied Prop. & Cas. Ins. Co.*, No. SA-16-CA-1299-FB, 2017 WL 2839784, at *3 (W.D. Tex. June 14, 2017) (Biery, J.) (declining to abate pending appraisal because "[a]s defendant contends in its response, it disputes coverage….").

Abatement is also inappropriate when a lawsuit includes "extra-contractual claims that are not governed by the appraisal clause." *Kincaid v. Acceptance Indem. Ins. Co.*, No. 5:23-CV-282-H-BQ, 2024 WL 811518, at *8 (N.D. Tex. Feb. 27, 2024). Here, Plaintiff asserts several extra-contractual claims that cannot be resolved through appraisal, including violations of the Texas Deceptive Trade Practices Act (DTPA), violations of the Texas Insurance Code, negligence, and negligent misrepresentation. ECF No. 1 at 11-17. Accordingly, the Court should refuse to abate the case so that these claims can proceed to resolution, along with the multiple other fact issues that must be decided by a jury.

Central's unreasonably long delay in demanding an appraisal (as well as its active participation in litigation for over two years and three months) also weighs heavily against abatement. For instance, in *JNH Holding, Inc. v. Nationwide Prop. & Cas. Ins. Co.*, No. 4:16-CV-00866, 2017 WL 10191090, at *2 (E.D. Tex. September 18, 2017), the court declined the defendant's delayed request to abate the case because "Plaintiff was required to incur the costs of hiring experts … effectively reducing or eliminating entirely the efficiencies the appraisal process is intended to provide." And in *Pek v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:18-CV-00259-ALM-KPJ, 2019 WL 6652011, at *3 (E.D. Tex., March 14, 2019), the court refused to abate the case because the insurance company "'sat on [its] hands and now attempts to stall the litigation in this case by invoking appraisal at this late date.'" (citation omitted). Here, the parties are near the end of discovery (less than 3 weeks remain until the deadline for fact discovery to be completed), Plaintiff has disclosed its expert witnesses at significant expense (in excess of $200,000 in retained expert witness expenses), and trial is approximately two months

away. The Court should not stay the case under these circumstances.[1]

Most importantly, Central's request to derail this case on essentially the eve of trial should be denied because an appraisal would ultimately accomplish nothing. That is because, as discussed previously, there are fundamental fact issues that must be resolved before the amount of Plaintiff's loss can be finally determined, namely the period of restoration for Plaintiff's loss. Thus, if an appraisal is to be conducted at all, that exercise could only conceivably be productive ***after*** a jury resolves certain critical fact issues, as well as the issue of coverage. The Texas Supreme Court has recognized that even when a trial court compels an appraisal, it maintains discretion "as to the ***timing*** of the appraisal." *In re Allstate Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002) (emphasis added); *see also In re Terra Nova Ins. Co.*, 992 S.W.2d 741, 742 (Tex. App.—Texarkana 1999, orig. proceeding) (holding that trial court did not abuse its discretion in refusing to "immediately enforce" appraisal provision because it would "militate against judicial efficiency to abate the actions and order appraisal at this time."). Accordingly, even if the Court orders an appraisal (which it should not do), not only should it decline to abate the case—it should order that any appraisal be postponed until ***after trial***, so that critical fact issues integral to any appraisal can be resolved first.

For this and related reasons, Central's Motion to Compel Appraisal and Motion to Abate Litigation pending Resolution of the Appraisal Process must be DENIED in its entirety.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that for the foregoing reasons, Central Insurance's Motion be DENIED by this Court and for such other and further relief to which it may show itself to be justly entitled.

[1] It is telling that Central demanded an appraisal three months ago but waited to file its motion until ***the very day*** that Plaintiff served its expert reports. Obviously, Central wanted to gain a tactical advantage by receiving the opinions of Plaintiff's experts before it attempted to shut down the litigation pending an appraisal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on the following counsel of record in accordance with the Federal Rules of Civil Procedure on this 12th day of July 2024 as follows:

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