IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

FIRST BAPTIST CHURCH ODESSA,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CASE NO. 7:18-cv-00208-DC**
	§	
BROTHERHOOD MUTUAL INSURANCE COMPANY,	§	
	§	
Defendant	§	

PLAINTIFF'S RESPONSE TO BROTHERHOOD MUTUAL INSURANCE COMPANY'S OPPOSED MOTION FOR LEAVE TO FILE COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Plaintiff files this, its Response to Brotherhood Mutual Insurance Company's Opposed Motion for Leave to File Counterclaims and Third-Party Complaint, and respectfully shows the following:

I. BACKGROUND

A. First Baptist Suffers a Casualty Loss to its Properties Resulting from a June 14, 2017 Weather Event

Plaintiff First Baptist Church Odessa ("First Baptist") is a domestic, nonprofit, corporation that provides a host of religious, educational, and eleemosynary services to the Odessa Texas community. First Baptist carries out its Christ-centered ministry from several buildings located in downtown Odessa, Texas, starting with the church building itself (709 N. Lee Ave, Odessa, Texas). Located within blocks of its main building are several nearby adjunct buildings which First Baptist uses to further its ministry, including 221 East 4th Street, 400 N. Texas Avenue, and 208 Adams Avenue. First Baptist also conducts outreach activities at its property located at 4410 Andrews Highway.

First Baptist insures each of these properties (the "Properties") against casualty loss under an insurance policy ("Policy") issued by Defendant Brotherhood Mutual Insurance Company ("Brotherhood"), paying annual premiums of over $97,000. Brotherhood markets itself as the second largest provider of insurance lines and other services to Christian churches in the United States. On or about June 14, 2017, a severe weather-related event struck the Odessa, Texas area causing substantial damage to surrounding homes and businesses including First Baptist's Property. The storm caused significant damage to the Properties, including damage to multiple roofs, a/c units, skylights, and other exterior parts of the Properties. In addition, the storm resulted in significant interior damage to the Properties and their contents resulting from water intrusion.

B. Brotherhood Assigns a Claim Number to First Baptist's Loss and Slowly Begins Adjusting the Loss

Approximately two days after the storm event, First Baptist opened a claim under its Policy seeking reimbursement for its losses. (Ex. 1.) Brotherhood responded, assigned claim number 542626 to the loss ("Claim"), and assigned Rachel Ford to adjust the loss. (*Id.*) After receiving additional Claim information from Steve Crone of First Baptist, Ms. Ford, on June 20, 2017, assigned outside investigation of the claim to Hennesy Adjusting Services. Hennesy assigned the physical inspection of the Properties to Mr. Randy Inman who performed an inspection of the Properties on June 26, 2017. (*Id.*) In his first form report to Brotherhood dated July 23, 2017, Inman noted visible damages to a variety of roofing and exterior surfaces at the Properties. (*Id.*)

Despite having clear proof of First Baptist's loss under the Policy and in a blatant attempt to delay payment on the Claim, Brotherhood, on July 31, 2017, assigned additional claim investigation to Knott Engineering. (*Id.*) Brotherhood retained Knott after Brotherhood's engineering service, HAAG Engineering, had completed its proposal outlining service costs that exceeded the amount Brotherhood wished to pay. (*Id.*) On August 9, 2017, Knott inspected the Properties and, on

September 7, 2017, made its recommendations regarding the loss. (*Id*.) Although almost three months had passed since First Baptist had made its Claim, Brotherhood had yet to write a single estimate on the Loss or issue any payment on same.

C. Four Months After First Baptist Reported Its Loss, Brotherhood Finally Makes Its Loss Estimate which Wrongfully Denies Coverage for Most of the Claim

As can be imagined, the Knott report failed to consider overwhelming amounts of damage caused by the storm. On September 22, 2017, Brotherhood's adjuster (Rachel Ford) provided Hennesy with a copy of the Knott report and requested a loss estimate. (*Id*.) On October 16, 2017, Hennesy prepared a repair estimate of four of the Properties totaling $195,405.68 ACV and sent a short form report of same to Brotherhood that day. (*Id*.) Based on this report, Brotherhood offered to resolve First Baptist's claim for payment of $185,505.86 ACV and $97,597.54 in coverable depreciation. Brotherhood made this offer on October 26, 2017, over four months after First Baptist reported the Loss.

D. One Year Later, in October 2018, Brotherhood Acknowledges Its Bad Faith Settlement Offer of October 2017 by Offering a (Still Grossly Inadequate) Supplemental ACV Payment of over $605,000; First Baptist Files Suit and Subsequently Invokes Appraisal

Knowing that Brotherhood had wrongfully and grossly underestimated the value of the Claim, First Baptist retained the firm of McClenny Moseley and Associates ("MMA") to recover fair value. MMA subsequently engaged in negotiations with Brotherhood to resolve the Claim, with both parties retaining engineering firms to produce reports on the loss. (*Id*.) Both sides engineers ultimately documented damages greatly exceeding the scope and estimate utilized by Brotherhood in its October 2017 claim settlement. (*Id*.) Based on the report of its engineer (HAAG Engineering), Brotherhood, on October 8, 2018, subsequently offered First Baptist a supplemental ACV payment of $605,506.10. (*Id*.)

Given the parties' extreme differences in evaluation of First Baptist's loss, First Baptist filed suit on October 8, 2018, alleging Brotherhood's breach of insurance contract and various violations of Texas statutory law. (Doc 2-1.) On November 28, 2018, Brotherhood removed the case to this Court. (Doc. 1.) Following removal to this Court, MMA's counsel had a phone conversation with Jennifer Durbin of Brotherhood discussing the case, during which time Durbin indicated that she intended to invoke appraisal of the dispute. When Durbin failed to follow through with invocation of appraisal, First Baptist's counsel sensed that Brotherhood was again attempting to stall resolution of the claim. Thus, on October 1, 2019, First Baptist demanded appraisal of the Claim pursuant to the Policy and appointed Mr. Raymond Choate ("Choate") as First Baptist's appraiser. (Ex. 2.) Brotherhood responded on October 18, 2019, acknowledging the invocation of appraisal and appointing Mr. V'Rhett Williams ("Williams") as its appraiser. (*Id*.)

E. Choate and Williams Select Eddie Kizer to Act as Umpire and Proceed to Appraise the Claim

On October 22, 2018, Choate sent Williams a form letter acknowledging Williams' appointment as Brotherhood's appraiser, along with an excerpt of the Policy outline the appraisal process. (Ex. 3.) In pertinent part, this provision of the Policy provides as follows:

> If either makes a written demand for appraisal, each selects a competent, independent appraiser and notifies the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the property is located to select an umpire.

(*Id*.) Pursuant to this Policy language, Choate and Williams subsequently agreed that Eddie Kizer would act as umpire in the event the two appraisers were unable to reach a resolution of the value of the Claim. (Ex. 4.) Kizer accepted the appointment on January 23, 2020. (*Id*.)

F. Choate, Williams, and Kizer Begin the Appraisal Process; Kizer Withdraws on June 1, 2020 Resulting in the Appointment of Mark Weeks as Umpire

In February 2020, Choate and Williams began communicating about the appraisal of the Properties and dates for inspection of same. During these communications, Williams projected a "it's my way or the highway," attitude and made clear to Choate that the inspection process would go according to his plans. Given Williams' attitude, which evidenced a clear bias toward a very low valuation of the Claim, Choate realized that Kaiser's involvement as umpire was inevitable. On March 9, 2020, Choate and Williams then inspected the Properties in preparation for producing their respective loss estimate for the Claim. Kaiser was also present at inspection in his role as umpire.

Subsequently, on June 1, 2020, Kizer called Choate to advise that, due to an increase in claims volume, he did not have sufficient time to serve as umpire for the Claim. Kizer then confirmed this resignation in an email that same day. (Ex. 5.) Choate, a non-lawyer being unsure of how to proceed, forwarded the email to MMA's attorney James McClenny, asking "What now?" (*Id*.) McClenny responded as follows: "Let's discuss potential replacements for the umpire. We may need to go to the judge to get one appointed." (*Id*.)

On June 1, 2020, Choate called Williams to request the appointment of a new umpire. (Ex. 6.) Williams never responded. On June 5, 2020, Choate followed up with this request, asking Williams "[w]hen would you like to discuss new umpires?" (Ex. 7.) Williams ignored this email also. On June 12, 2020, Choate followed up with a third email and phone call asking Williams to give him a call or email to discuss appointment of a new umpire. (Ex. 8.) Williams continued ignoring these communications. Given that the claim was approximately three years old and that Brotherhood was again causing delay of its resolution, MMA retained attorney Chris Lyster to have a new umpire appointed.

On June 15, 2020, and as expressly permitted under the Policy, Lyster sent a letter to the

Honorable Mike Moore of the 29th Judicial District Court of Palo Pinto County, Texas explaining the procedural posture of the Claim, the parties' inability to resolve the appraisal, the resumes of potential umpire candidates, and requesting "that you appoint a competent and disinterested umpire to oversee the appraisal process." (Ex. 9.) The following day, Judge Moore responded by appointing Mark Weeks ("Weeks") to act as umpire. (*Id.*)

G. MMA Advises Brotherhood's Counsel of the Weeks Appointment; Weeks Advises the Appraisers of His Intent to Conduction an Inspection of the Properties on July 6, 2020

On June 19, 2020, MMA sent an email to Brotherhood's counsel Jennifer Durbin advising of Weeks' appointment. (Ex. 10.) On June 22, 2020, Choate sent an email to Weeks and Williams advising that he would like to set up a conference call to discuss moving forward with the appraisal and requesting the appraisers' availability. (Ex. 11.) Weeks responded by email on June 23, 2020, proposing that the call be held on June 29, 2020. (Ex. 12.) Williams responded that same day, stating that he had prior obligations on June 29, 2020, but that he was free on July 1 or 2, 2020. (*Id.*) The following day, Choate and Weeks confirmed their availability for July 2, 2020. (Ex. 13.)

Williams did not respond to the emails requesting availability for the conference call, but forwarded the email to Brotherhood's attorney Amanda Hazelton. On June 25, Hazelton emailed MMA's counsel, along with the appraisers and Weeks, advising of her opinion that Judge Moore was without jurisdiction to appoint Weeks as umpire and that Brotherhood did not agree to the appointment. (Ex. 14.) Having been commissioned to act as umpire for the Claim, Weeks nevertheless sent an email on July 2, 2020 reminding Choate and Williams of the conference call set for 10 a.m. that morning. (Ex. 15.)

Later that day, Weeks sent a follow-up email to Choate and Williams noting that although Williams did not participate in the call, he had "scheduled this time around your schedule so we

could all participate in the call . . . ." (*Id.*) Weeks then advised that he was scheduling the inspection of the Properties for July 6th at 8 a.m. starting at 709 N. Lee Avenue" and invited both appraisers to participate. (*Id.*) Weeks concluded by asking to "[p]lease let me know if either of you plan to participate on Monday, July 6th, 2020 at 8am." (*Id.*) Later that day, Williams emailed Choate and Weeks advising that Brotherhood objected to Weeks appointment as appraiser, but that "we have been requested by Brotherhood Mutual to inform your office that ***Brotherhood Mutual will agree to pay your fee*** for any of the umpire cost associated with this appraisal." (Ex. 16.) Weeks responded the following day, stating that

> I will note this in my file and proceed as scheduled with my appointment on Monday. I will proceed as the umpire until a[n] order from the courts state otherwise. As of this moment I have a order from a judge to act as the umpire so I will follow that until another order is presented that tells me otherwise.

(*Id.*)

H. Weeks Conducts the July 6th Inspection With; Brotherhood's Counsel, however, Does not Seek Court Intervention to Stop the Appraisal

After receiving no further communications regarding the Weeks email of July 2, 2020, Weeks and Choate traveled to the Properties on July 6, 2020 to perform the inspection beginning at 8 am. In an email dated July 6, 2020 at 8:10 a.m., however, Williams sent an email to Choate and Weeks clarifying that Brotherhood did "NOT" agree to pay any fees incurred by Weeks for performing his umpire duties. (Ex. 17.) By that time, however, Choate and Weeks had begun the inspection, with Choate only noticing Williams' email around noon. (Ex. 18.) Around that time, Williams finally broke his silence and followed up with a call to Weeks advising that either Brotherhood or its counsel had instructed him that he was not to participate in the inspection. (Ex. 19.)

In a follow up email to Choate and Williams dated July 11, 2020, Weeks explained that, due to Williams' silence, the inspection had gone forward:

> If you knew you weren't going to participate in the process or had an issue with this scheduled time why did you not call or email the panel and explain your position before we all changed our schedules around and drove to the location? Seeing how I was already on site and court appointmented with an order from a judge with no further communication until after my arrival I went ahead and completed an inspection with Mr. Choate. This was in no way meant to happen but your failure to participate forced us to do the inspection without you present.

(*Id*.) Williams subsequently forwarded this email to Brotherhood's counsel Amanda Hazelton who, on July 13, 2020, reiterated her jurisdictional objection to Weeks' appointment and the appraisal moving forward. (Ex. 20.) Despite these objection, Brotherhood took no formal action to apprise this Court of its apparent concern with the appointment of Weeks.

I. Weeks and Choate Continue Prosecution of the Appraisal Resulting in an Award dated October 13, 2020

On August 24, 2020, Weeks sent a follow-up email to Choate and Williams inquiring whether either had had an opportunity to review the appraisal file and move its resolution forward. (Ex. 21.) Following no response from either, Weeks followed up with a September 29, 2020 email advising that "[a]s the court appointed umpire on this file I have no choice but to move the appraisal process forward. At this time I would like for you to have your positions forwarded to me by October 19th 2020. At that time I will review each position and move forward with the decision." (*Id*.) Choate complied and, on October 13, 2020, forwarded a proposed award for the Claim in the amounts of $56,596,606.32 (RCV) and $50,502,246.63 (ACV). (Ex. 22.)

Neither Weeks' request nor Choate's response evoked a response from Williams. Obviously fearing that Brotherhood's directive to boycott of appraisal proceedings might result in entry of Choate's proposed award, however, Brotherhood's counsel Amanda Hazelton decided to act. (Ex. 23.) Specifically, Hazelton reiterated her objection to the jurisdiction of Weeks' appointment and, for the first time, advised that she would be filing "Motions with the W.D. Court to address improper appraisal proceedings." (*Id*.)

On October 21, 2020, Choate emailed Weeks, stating that "D[ue] to Mr. Williams deliberate refusal to act, I ask that you sign my attached award." (Ex. 24.) Two days later, Weeks responded as follows:

> Mr. Williams at this time I am moving forward with this appraisal. Seeing how you have not sent any information regarding your position I have no choice but to consider you having a zero dollar position with no damage seen. I have asked for this information from you several times and gave more than enough time for you to prepare something. With that said the only thing I have to go off of is Mr. Choate's position and the inspection performed.

(*Id.*)

Weeks then addressed Choate, asking for Choate to clarify a charge for "contingency" contained in his proposed award:

> Mr. Choate, I have reviewed your award and I am trying to figure out what a contingency item is? Can you consider removing this from your award for signature or come to another solution? I know when me and you met on site we discussed damages, dollar figures and best way of going about getting the loss correct. I don't recall talking about a contingency line. If I am wrong please let me know. If we want to use the contingency line as a "Paid When Incurred" type item I could agree to that. I know that a loss of this size has many items that are specialty items and many items that will not be seen until work has been started. With that said I am ok allowing for the contingency being on there but with a $0 acv value being put on it. Please let me know your thoughts."

(*Id.*) Choate complied by addressing Weeks' concerns with the contingency amount, agreeing to stipulate to a $0 ACV payable only if and when such charges were incurred in restoring the Properties. (*Id.*) Weeks agreed to the stipulation. (*Id.*) Choate then revised the proposed ACV from $50,502,246.63 to $48,076,677.36. (Ex. 25.) Weeks and Choate signed the award the same day. (*Id.*)

In summary, Brotherhood appointed Williams to act as its appraiser in January 2020, initially cooperating with First Baptist by inspecting the Properties in March 2020, and agreeing to appointment of Kizer as an umpire. Following Kizer's withdrawal in late May, however, Williams

refused to respond to multiple requests from Choate to have a new umpire appointed. As a result, Plaintiffs were left with no choice but to move forward and have an umpire appointed. As permitted under the Policy and Texas law, First Baptist applied to Judge Moore of the 29th Judicial District Court of Palo Pinto County, Texas. Judge Moore granted First Baptist's request and appointed Weeks. First Baptist's counsel immediately provided Brotherhood with notice of the appointment, with Weeks resuming the appraisal process.

Acting at the direction of Brotherhood and/or its counsel, however, Williams declined further participation in the appraisal process. Only after it became apparent, in October 2013, that Weeks might enter Choate's proposed award did Brotherhood's counsel decide to seek intervention from this Court. In a desperate attempt to do something, Brotherhood now asks this Court for leave to file a counter claims against First Baptist for breach of contract, fraud, conspiracy to commit fraud. As to the fraud and conspiracy claims, Brotherhood seeks leave to add Choate and Weeks as third-party defendants based on their decisions to move forward with the appraisal. Based on the same facts, Brotherhood also seeks leave to add third-party tortious interference with contract claims against Choate and Weeks. For the reasons expressed below, First Baptist now asks the Court to deny Brotherhood's Motion to the extent it seeks to add the third-party claims

II. AUTHORITY AND ARGUMENT

A. Pleading Amendment Standard Under FRCP 15

When a party wishes to add a new claim after the deadline for amending the pleadings has passed, the party generally must move for leave to amend. *See Douglas v. Wells Fargo Bank, N.A.*, __ F.3d __, 2021 WL 1152939, *5 (5th Cir. 2021). In order to be entitled to such leave, the movant must establish good cause as provided in Federal Rule of Civil Procedure 15. *See id.* The grant of leave to amend pleadings pursuant to Rule 15(a) is generally within the discretion of the trial court

and shall be "freely given when justice so requires." FED. R. CIV. P. 15(a); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). However, leave to amend "is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (quoting *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. Unit A July 1981)).

When the request to amend a pleading involves the addition of new parties, the movant must also comply with the requirements of Federal Rule of Civil Procedure 13. *See Accresa Health, LLC v. Hint Health, Inc.*, 2019 WL 10960486 at *4-5 (E.D. Tex. 2019) (analyzing motion to amend pleadings and counter claims against new defendant under FRCP 13 and FRCP 15). Specifically, and "provided [that] the requirements of Rules 13(f) and 13(h) are met," a court's decision whether to permit amendment of a pleading to add counterclaims or counter defendants is governed by Rule 15(a)." *Id.*

B. Brotherhood's Motion for Leave to Add Third-Party Claims Against Choate and Weeks Does Not Even Attempt to Make the Required Joinder Showing

Brotherhood's Motion seeks leave to amend its answer to file counter claims against First Baptist, and third-party claims against non-parties Choate and Weeks. (Doc 36.) Choate and Weeks are not current named in First Baptist's Original Petition or Amended Complaint, or as counter parties in Brotherhood's answer. (Docs. 2-1, 38, 2-1.) In order to amend its pleading and add claims against Choate and Weeks, Brotherhood must satisfy both the "good cause" showing of Rule 15 as wells as establish mandatory or permissive joinder under Rule 13. *See Accesa*, 2019 WL 10960486 at *4-5. Brotherhood, however, doesn't even address the joinder requirements of FRCP 13, and in particular Rule 13(h) which states as follows: "Joinder of Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counter-claim or crossclaim." *See* FED. R. CIV. P. 13(h) (West 2009). Instead, Brotherhood simply argues that good cause exists to add claims against Choate and Weeks under Rule 15(a) and (d). (Doc. 36 at ¶¶ 3-7.)

As noted by the Eastern District of Texas, this failure to address the Rule 13(h) joinder requirements is fatal to Brotherhood's request under FRCP 15 to amend its pleading and add third-party claims against Choate and Weeks. *See StoneCoat of Texas, LLC v. ProCal Stone Design, LLC*, 2019 WL 9899507, *7 (E.D. Tex. 2019) (citing *SAES Getters S.p.A. v. Aeronex, Inc*., 219 F. Supp. 2d 1081, 1085 (S.D. Cal. 2002)) ("[P]rovided the requirements of Rules 13(f) and 13(h) are met, a court's decision whether to permit amendment of a pleading to add counterclaims or counterdefendants is governed by Rule 15(a).").

Because Brotherhood fails to even address the joinder requirements of Rule 13 as to Choate and Weeks, the Court need not proceed to analyze whether Brotherhood has established good cause to amend under Rule 15. Instead, the Court should deny Brotherhoods's Motion as to Choate and Weeks for failing to establish whether mandatory or permissive joinder applies to either under Rule13(h) and Rules 19 or 20.

C. Alternatively, Brotherhood Fails to Establish Good Cause to Amend Its Answer and Add Claims against Choate, or Weeks

Even assuming that Brotherhood could establish that joinder of Choate and Weeks was proper under Rules 19 or 20, it must also establish good cause under Rule 15. *See Accesa*, 2019 WL 10960486 at *10; *StoneCoat*, 2019 WL 9899507, *13 (E.D. Tex. 2019). A district court reviewing a motion to amend pleadings under Rule 15(a) considers five factors: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of amendment. *Smith v. EMC*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Brotherhood's "good cause" analysis under Rule 15 makes cursory mention to two factors. As discussed below, neither of these factors militates in favor of a good cause showing.

1. Brotherhood's Motion to Amend and Add Choate and Weeks Will Result in Undue Delay in Resolving this Case

The first factors discussed in Brotherhood's Motion involves undue delay. On this factor, Brotherhood states as follows:

> Furthermore, the filing of Brotherhood Mutual's Counterclaims and Third-Party Complaint will not delay the progress in this case. Discovery in this matter will not end until August 6, 2021, allowing the parties months to conduct any additional discovery necessitated by Brotherhood Mutual's newly asserted counterclaims and third-party claims.

(Doc. 36, ¶6.) This is an extremely unrealistic assessment by Brotherhood. Assuming that Choate and Weeks could be served with process, obtain counsel, and file answers by May 1, 2021—less than 30 days from today—they would only be left with three months to complete discovery by the current August 6, 2021 deadline. (Doc 27, ¶5.) Choate and Weeks would have even less time in which to designate experts. (*Id*.)

Given these short preparation periods, it is a virtual certainty that the counsel retained by Choate and Weeks will immediately ask the parties for an amended scheduling order pushing these deadlines and the trial setting out past their current dates. Thus, and contrary to Brotherhood's arguments to the contrary, adding Choate and Weeks would result in undue delay. This factor thus militates against a finding of good cause to grant Brotherhood's Motion.

2. Brotherhood's Motion to Amend and Add Choate and Weeks Will Result in Undue Delay in Resolving this Case

The other factor discussed in Brotherhood's Motion involves the "interests of justice." (Doc 36 at ¶7.) Here Brotherhood states as follows:

> The filing of Brotherhood Mutual's Counterclaims and Third-Party Complaint will also advance the interest of justice by allowing Brotherhood Mutual the opportunity to avail itself of critical causes of action known to be available to Brotherhood Mutual. The Federal Rules of Civil Procedure thus support the relief sought by Brotherhood Mutual's Motion for Leave. *See* Fed. R. Civ. P. 15(a)(2) (stating that "[t]he court should freely grant leave when justice so requires").

(*Id*.) Stated differently, Brotherhood is making a generic assertion that leave to amend under Rule 15 should be "freely grant[ed] when justice so requires." However, leave to amend "is by no means automatic." *Wimm v. Jack Eckerd Corp*., 3 F.3d 137, 139 (5th Cir. 1993) (quoting *Addington v. Farmer's Elevator Mut. Ins. Co*., 650 F.2d 663, 666 (5th Cir. Unit A July 1981)).

But Brotherhood's discussion of this factor simply assumes that leave to amend and add claims against Choate and Weeks is automatic because it advances no explanation as to how it will be prejudiced if its Motion is denied. Of course, denial of leave to file its third-party claims will not result in any prejudice to Brotherhood. This is because it can simply file the claims it seeks to add in this suit as an original action in another case. Given that Brotherhood can easily allege these same claims against Choate and Weeks in another case, it is easy to see why Brotherhood does not elaborate on this element. For these reasons, this factor also militates against a finding of good cause to grant Brotherhood's Motion.

3. Brotherhood's Request to Add Third-Party Claims Against Choate and Weeks Is Also Motivated by Bad Faith

Another factor bearing on Brotherhood's Motion, but which is not addressed by Brotherhood, is the matter of "bad faith or dilatory motive." *See Smith*, 393 F.3d at 595. On this element, however, Brotherhood's lead counsel, attorney Steven Badger, has demonstrated that he has an "axe to grind" with respect to Mr. Choate. Attorney Badger has made clear in other cases of his goal to discredit Mr. Choate as a biased appraiser who attempts to "rip off other uninformed insurance companies." (Ex. 26.)

Attorney Badger made his animus toward Choate very clear in a recent email involving an unrelated insurance claim with First Baptist's current counsel. (*Id*.) In the email, attorney Bennett Moss (an attorney at Zelle LLP) sent Robert Mongole (an attorney at MMA) correspondence

accusing Choate of lacking competence and partiality and demanded that MMA select a different appraiser for the claim. (*Id*.) Mongole politely declined, stating that "[w]e stand by the designation of Mr. Ray Choate as our client's appraiser and disagree that he is "not competent and impartial." (*Id*.) At that point, attorney Badger, who had been copied on the email chain, interjected the following:

> You are missing the point here and your tit-for-tat approach to our objection to Ray Choate is silly. We are not objecting to Choate because he works only for insureds. If that was our basis, we would never agree to a public adjuster as an appraiser given that public adjusters work only for insureds. Nor would we ever agree to the short list of the same policyholder attorney selected appraisers that we see over and over and over and over. We accept public adjusters and the other usual policyholder appraisers all the time as opposing appraisers. We do so because they have not shown themselves to be biased. So if all you have on Mr. Grantland is that he only works for insurance carriers, that just aint enough. Conversely, ***we are objecting to Ray Choate because time and time again he has demonstrated a clear bias against insurance companies. He has demonstrated this bias through his online postings, public statements, grossly (some would say fraudulently) excessive estimates, baseless opinions in trials, curious financial arrangements with attorneys when hired as an appraiser, and involvement in various improper schemes designed to improperly extract money from insurance companies (schemes which your firm named partners are well aware of). And I could go on and on. My Ray Choate's file is large.***
>
> With that said, likewise I "would encourage you and your client" to reconsider your position. I am happy for us to file competing motions to strike each other's appraisers and lay all this out in a brief. ***In fact, I would be tickled-pink to have an opportunity to do this.*** It would give me something fun to do over the holiday week. In the past, other lawyers have been wise enough to withdraw Choate's name when we raised our objections. Choate can continue to play his games ***and try to rip off other uninformed insurance companies***. But it aint gonna happen any longer with my clients. There is nothing "amicable" when Ray Choate is involved. Let us know what you plan to do. We will respond accordingly.

(*Id*.)

MMA's Mongole responded to attorney Badger's diatribe by stating that "I don't have any evidence of Mr. Choate's bias," and that he stood by Choate's designation in that claim. (*Id*.) Incensed at this response, attorney Badger then stated the following:

> You don't have any evidence of Mr. Choate's bias? Now that made me chuckle out loud. ***Are you familiar with the Odessa matter your firm is handling where he was the appraiser? That matter alone should tell you all you need to know***. And that's just the tip of the iceberg. As I said, my file is large. In fact, I also just got TDI's entire file on Choate. It was so big it cost me a lot to pay for the TDI to copy it. And I can assure you -- with 100% absolute confidence -- that you have nowhere near the evidence about Mr. Grantland that I have about Mr. Choate. Go ahead and call my bluff on that one. Finally, as to our stated basis for objecting to Choate, we tried to keep it simple expecting you would agree to name someone else. I can assure you ***my bases for objecting to Mr. Choate go far far beyond him being a public adjuster***. Anyway, it seems as though you are going to stick with your designation. I'll proceed accordingly. As I said, this is a motion I will take pleasure in writing myself.

(*Id*., emphasis added.)

This email exchange evidences that attorney Badger has strong personal feelings about Choate both personally and professionally. He has taken a personal interest in attempting to destroy Choate's credibility by accusing Choate of "play[ing] his games and try[ing] to rip off other uninformed insurance companies." Badger's feelings about Choate "go far far beyond him being a public adjuster," so much so that Badger has acquired the Texas Department of Insurance's "entire file on Choate" in an apparent attempt to disqualify Choate as an appraiser in all insurance claims.

What this shows is that attorney Badger's attempt to amend Brotherhood's petition has little to do with any claims Brotherhood seeks to assert against Choate. Rather, Brotherhood's Motion is motivated by Badger's personal animus toward Choate and to intimidate other umpires such as Weeks and teach them a lesson about crossing Mr. Badger's clients. This bad faith weighs heavily against Brotherhood's Rule 15 Motion to amend and add its third-party claims against Choate and Weeks. Accordingly, the Court should deny Brotherhood's Motion to the extent it seeks to add third-party claims against Choate and Weeks.

III. PRAYER

Given the above, First Baptist respectfully requests that the Court deny Brotherhood's

Motion. First Baptist also requests any additional relief to which it may be entitled.

Respectfully submitted,

/s/ James M. McClenny

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served upon all counsel of record on April 10, 2021, via the Court's ECF and/or email in accordance with the Federal Rules of Civil Procedure

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