UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR'S CAFÉ 52nd STREET, INC. and VICTOR'S CAFÉ, INC., d/b/a VICTOR'S CAFÉ, Plaintiffs, - against - THE TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendant.	Docket No.: 22-cv- 07223 (ALC)(SN)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION TO APPOINT APPRAISER

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Plaintiffs VICTOR'S CAFÉ 52nd STREET, INC. and VICTOR'S CAFÉ, INC., d/b/a VICTOR'S CAFÉ submit this memorandum of law in opposition of defendant's motion for an order to appoint a "competent and impartial" appraiser on Plaintiffs' behalf, together with any other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

This is a property insurance coverage action arising out of a fire at plaintiffs' restaurant on July 24, 2020. The only issue in dispute is the amount of business income loss suffered by plaintiffs as a result of the fire. Pursuant to the policy's insurance appraisal provision, either party has the right to demand an appraisal of any disputed damage. By letter dated July 25, 2022, the defendant formally denied payment of plaintiffs' business income claim rather than demanding an appraisal. **(Exhibit 6)**. As a result of the denial, plaintiffs commenced this suit by the filing of a summons and complaint. **(Exhibit 2)**. Defendant previously filed a motion to compel the appraisal which was granted by this Court. In accordance with the Court's Order, Plaintiff by letter dated May 23, 2023 identified its appraiser as David Zweighaft. Defendant has now moved for an Order appointing a "competent and impartial" appraiser on Plaintiffs' behalf. Defendant's motion should be denied for numerous reasons set forth below.

STATEMENT OF FACTS

Plaintiffs operate a restaurant named Victor's Café located at 236-238 W. 52nd Street, New York, New York. Travelers issued to plaintiffs a policy of insurance, bearing policy number 680-2188M159-20-42, with a policy period of May 7, 2020 to May 7, 2021. **(Exhibit 1)**. The Policy provides coverage for, inter alia, "direct physical loss of or damage to Covered Property" at the Premises, subject to the Policy's terms, conditions, limitations, exclusions, and other provisions.

On July 24, 2020, plaintiff's premises was damaged by a fire. Plaintiffs submitted a claim to Travelers under the Policy seeking to recover for damage to Business Personal Property, loss of Business Income, and Extra Expense sustained as a result of the fire. The loss of business income as calculated and being claimed is $1,019,378 **(Exhibit 2).** Travelers investigated the Claim and issued payments to Plaintiffs for Business Personal Property damaged by the fire. Travelers denied Plaintiffs' Business Income loss by letter dated July 25, 2022. **(Exhibit 6)**.

On July 22, 2022, plaintiffs commenced this lawsuit by filing a complaint in New York Supreme Court. **(Exhibit 2)**. The complaint alleges that Travelers breached the Policy and that plaintiffs are owed "$1,019,378 for Loss of Business Income plus an amount to be determined for loss and damage to Business Personal Property, with interest from July 24, 2020." Defendant removed the case to this Court and filed its answer and stated in paragraph 9, "Travelers admits that it did not issue any payment to Plaintiffs' for "Loss of Business Income," because Plaintiffs did not sustain any covered loss of business income as a result of the fire. Travelers denies that Plaintiffs are entitled to any further payments under the Policy and further denies any remaining allegations in paragraph 9." **(Exhibit 4)**.

ARGUMENT

I. Defendant's request that this Court appoint an appraiser in place of David Zweighaft as plaintiffs' appraiser is improper and premature.

David Zweighaft is the forensic accountant who analyzed plaintiffs' books and records to prepare the business income claim. He is not plaintiffs' employee, nor is he the accountant for the business. There is absolutely no evidence that he would be anything but impartial. The mere fact

that he prepared the claim does not make him partial. He was impartial when he was hired to prepare the claim, and he would be impartial during any appraisal process.

There is absolutely no statute or case law that allows a party to an insurance contract to seek a court order to disqualify an appraiser before the appraisal process is completed or, in this case, have a court appoint a different appraiser. Either party may object to the appraisal award and file a lawsuit to vacate the award. CPLR §7510: Confirmation of Award, provides that "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." CPLR §7511: Vacating or modifying award, provides for grounds to vacate an appraisal award which includes situations where there is a question of partiality.

Defendant has also provided the name of an appraiser that defendant "recommends," Chris Mortifoglio, CPA, CFE, Principal and Founder of Rockland Consulting Group, LLC, to serve as Plaintiffs' appraiser on this claim. None of the cases cited by defendant support their argument that this Court has any authority to appoint an appraiser on plaintiffs' behalf. Defendant has essentially fabricated this requested relief without any legal basis to make such an absurd and dubious request.

Additionally, the cost of having another forensic account perform the exact same services as Mr. Zweighaft would be astronomical and completely unfair to the plaintiffs. It would cost thousands of dollars to do exactly what was already done.

II. There is absolutely no evidence or reason to believe that Plaintiff's appraiser would be anything but competent and impartial.

David Zweighaft of RSZ Forensic Associates is a forensic accountant and partner with RSZ Forensic Associates, a New York City-based forensic accounting and litigation consulting firm. His

bio is attached as **Exhibit 7**. His firm was initially retained to analyze plaintiffs' books and records to independently calculate and prepare its loss of business income claim. Mr. Zweighaft nor RSZ never previously provided any accounting services for plaintiffs. There is absolutely no basis in law or fact that would render their services as anything by impartial. The act of independently calculating the claim, in and of itself is proof of impartiality.

The cases cited by defendant are either inapplicable or support plaintiffs' arguments rather than defendant's arguments. The Courts in *Pitta v. Hotel Ass'n of New York City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986) and *Cristina Blouse Corp. v. Int'l Ladies Garment Workers' Union, Local 162*, 492 F. Supp. 508, 510–11 (S.D.N.Y. 1980) addressed issues in an arbitration, a completely different process than an insurance appraisal contractual process.

In a New York case, not cited by defendant but directly on point, the Court in *Sun Ins. Office of London v. Ducas*, 52 N.Y.S.2d 9 (1944) held:

> This is a motion to declare an appraiser disqualified on the ground that he is not disinterested. The motion is denied. There is no showing whatsoever that the appraiser in question has any financial or other interest which would disqualify him. It is to be noted that, under the terms of the very order providing for the appointment of appraisers, the appraisers designated by the respective parties are to be paid by said parties, so that the mere circumstance that the appraiser in question is to be paid by the respondent is not enough to disqualify him. Petitioner apparently relies upon his claim that the appraiser had urged that the insurer pay the amount which he had found to be the damage suffered. Statement that the appraiser 'took charge of the claim' and acted as 'an advocate on behalf of Mr. Ducas' are mere conclusory characterizations. All that actually appears to have happened is that the appraiser urged his estimate of the amount of the damages upon the insurance company. It is quite natural for an appraiser to attempt to vindicate his own findings and attempt to have others agree with him. His mere doing so is insufficient, in and of itself, to disqualify him on the ground that he is not a disinterested appraiser. For aught that appears in the papers the appraiser to be designated by the insurance company and paid by the latter cannot reasonably be expected to be any more disinterested than the appraiser now sought to be disqualified.

The Court in *Tiger Fibers, LLC v. Aspen Specialty Ins. Co.*, 571 F.Supp.2d 712 (2008) not only addressed this issue of impartiality, but addressed that issue as it related to an accountant that prepared the insured's loss of business income claim and whether he could also act as the insured's appraiser. In that case, the insurance company's objection stemmed from the fact that Rollins [the forensic accountant] had previously been retained as Tiger's [the insured] primary business interruption expert and had prepared a report in 2007 estimating the damages suffered by Tiger as a result of the Lawrenceville plant fire, including the business interruption loss at issue. The Court would decide whether an appraiser is "disinterested" where, as with Walker, the appraiser's employer was separately retained to perform an initial estimate of the business interruption loss at issue. The Court held:

> The question whether Walker, as Tiger's nominated appraiser, meets the disinterestedness criterion requires a somewhat different analysis. As noted above, Walker is not employed by Tiger or any insurance company, but is instead a long-time employee of Rollins—the same firm Tiger retained to perform its initial damages assessment after the Lawrenceville plant fire. Put simply, because the question of disinterestedness pertains to the relationship between the appraiser and the parties in dispute, not the appraiser's partiality for or against any third party (in this case Rollins), any alleged bias Walker may have in favor of the conclusions reached by Rollins in its initial damages report is irrelevant. Indeed, as already discussed, the Virginia Code seeks to prevent nominated appraisers from being influenced by the respective parties, and Rollins clearly is not a party to this dispute. This being so, Walker, like Robson, is appropriately disinterested in accordance with the Virginia statute and Aspen's cross-motion for Walker's disqualification is properly denied.
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> **Id. at 718**

We agree that courts in other jurisdictions have recognized that interest in the outcome of a proceeding will disqualify an appraiser. However, *Central Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 261-62 (Iowa 1991) and *Allstate Ins. Co. v. Wojciechowski*, 1995 WL 283893, both

cited by defendant support plaintiffs' argument that their appraiser is disinterested. In both *Central Life* and *Allstate Ins. Co.,* the appraiser had a financial interest in the outcome of the appraisal. In our case, there is absolutely no financial interest. This distinction has been made by other courts as well.

In *Allstate Indemnity Company v. Gaworski*, 552 S.W.3d 180 (2018) the Court addressed the financial aspects of appraisers and held, "the record shows no employment or financial relationship between Pellet and Featherfall or Pellet and the Gaworskis. In addition, Pellet did not have any direct financial interest in the outcome. Thus, the trial court did not err in denying Allstate's motion to disqualify Pellet as an appraiser in this case."

The Court in *Brickell Harbour Condominium Association, Inc. v. Hamilton Specialty Insurance Company*, 256 So.3d 245 at 248-249 (2018) addressed numerous arguments on an almost identical issues:

> The Association contends that the Insurer's appointment of Randy Ison as its party-designated appraiser (of the three to conduct the appraisal) was a breach of the Policy requirement that each appraiser be "impartial." Mr. Ison is an employee of J.S. Held, a building consultant hired by the Insurer. There is no indication in the record, however, that Mr. Ison himself was directly paid by the Insurer, or that any part of Mr. Ison's or J.S. Held's compensation for work on the appraisal or the
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> Association's claim would include a contingent fee. The Association's argument that Mr. Ison should be disqualified because he's the boss of Mr. Flax (an employee of J.S. Held involved in actually considering the Association's claim) and "Mr. Flax is the subject of a fraud inquiry with the [Florida Department of Financial Services]" is transparently circular. The Association's public adjuster, having launched the "fraud inquiry," now claims its own action defeats Mr. Ison's impartiality.
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> There is little case law on this issue,and what little case law is available involves arbitrators rather than appraisers. The Association argues that the analogy fails because arbitrators have a code of ethics and appraisers do not. But tellingly, the appraisal provision in the Policy states that "Each party will: a. Pay its chosen

> appraiser; and b. Bear the other expenses of the appraisal and umpire equally." The tie-breaking third appraiser—often referred to as the "umpire" (as in the Policy before us) or "neutral"—provides the real impartiality. If an appraiser acts unprofessionally, skews what should be objective calculations regarding materials and labor costs, and puts the proverbial thumb on the scale, the umpire is the safeguard empowered to reject such efforts by siding with the other party-appointed appraiser. Alternatively, a professionally-qualified umpire may negotiate *249 one or both of the party-appointed appraisers into a reasonable compromise.
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> We conclude, after consulting our own decision in Rios v. Tri-State Insurance Co., 714 So.2d 547 (Fla. 3d DCA 1998), and the other authorities cited to us by the parties, that "impartiality" means something other than the "dictionary definition" as it relates to appraisers appointed and paid by the parties. In Rios, the policy provision required each party to select a competent "independent" appraiser.
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> Following a survey of decisions in other jurisdictions and a review of the Code of Ethics for Arbitrators in Commercial Disputes, this Court concluded that an appraiser's "direct or indirect financial interest in the outcome of the arbitration," including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser. This Court then ordered the appraisers to make the disclosures to each other and the parties as provided by the Code. Id. at 550.
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> We conclude that this remains a "workable approach to this issue," id., and encourage such disclosures in the present case before the confirmation of the appraisal. On the record before us, we agree with the trial court that the Insurer's appointment of Mr. Ison did not warrant disqualification.

There is no evidence plaintiffs' appraiser would be dishonest or lacks integrity. In *Dufrene v. Certain Interested Underwriters at Lloyd's of London*, 91 So.3d 397 (2012), the court held, "Federal courts have found that where a party challenges the use of a particular appraiser, evidence must be presented showing that the appraiser's honesty or integrity is suspect. *St. Charles Parish Hospital Service Dist. No. 1 v. United Fire & Casualty Co.*, 681 F.Supp.2d at 754. See also *Dawes v. Continental Ins. Co. of City of New York*, 1 F.Supp. 603, 605 (E.D.La. Oct. 22, 1932). We apply the same standard to the present case. The evidence in the record before us does not demonstrate a lack of impartiality or competence on Mr. Sturgess' behalf or that his honesty or integrity is suspect.

Accordingly, we find that the trial court did not err by failing to disqualify Mr. Sturgess from the appraisal process, and this assignment of error is without merit."

Simply because the assigned appraiser prepared the loss of business claim does not render him biased. Defendant is making a similar argument that court found unpersuasive in *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777 at 786-787 (2004):

> Upon reviewing the record before us, we find appellants have not presented summary judgment proof of Garibay's bias against the Franco family, thus no fact issue was presented. The showing of a pre-existing relationship, without more, does not support a finding of bias. See *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 255 (Tex.App.-Austin 2002, pet. granted, judgm't vacated w.r.m.); *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143–44 (Tex.App.-Houston [1st Dist.] 2002, no pet.). Here, the summary judgment evidence shows that Garibay was hired by Southland "to examine the premises" and "determine the cause of the damage, possibly from a reported sink drain line leak." Garibay was not an employee of Slavonic, and Garibay's report and conclusions regarding the cause of the plumbing leak were his own. There is no evidence suggesting that Slavonic influenced or exercised control over Garibay, that Garibay had a financial interest in Franco's claim, or that Garibay's previous inspection of the premises somehow factored into his damages valuation. Moreover, the final appraisal award was entered into by Kubala, Franco's appraiser, and the umpire. Viewing the evidence in the light most favorable to appellants, the evidence does not raise a fact issue as to Garibay being biased against appellants.

Conclusion

For the forgoing reasons, defendant's motion should be denied in its entirety, and the appraisal should proceed in accordance with the insurance policy appraisal provision.

Respectfully submitted,

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