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Envelope No. 80830394
By: Brenda Espinoza
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CAUSE NO. 2021-70308

KYLE J. MCPIKE, *Plaintiff,*	§	**IN THE DISTRICT COURT OF**
	§	
	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
HOMEOWNERS OF AMERICA INSURANCE COMPANY,	§	
	§	
Defendant.	§	**215th JUDICIAL DISTRICT**

PLAINTIFF'S OPPOSED MOTION TO DISQUALIFY DEFENDANT'S APPRAISER KEVIN HROMAS

COMES NOW, Plaintiff Kyle McPike, and files this Opposed Motion to Disqualify Defendant's Appraiser Kevin Hromas due to his disqualifying bias, lack of neutrality, and bad faith conduct, as expressly prohibited by the insurance policy.

I. Certificate of Conference

On October 4, 2023, undersigned counsel sent the attached letter to counsel for Defendant, making them aware of the egregious conduct of their biased appraiser Kevin Hromas, and providing them with the opportunity to voluntarily withdraw him from the process.[1] Defendant ignored that correspondence. Undersigned followed-up with counsel for Defendant on October 18, 2023, by email.[2] Defendant ignored that correspondence as well, and to-date has not responded to Plaintiff. Plaintiff must therefore assume Defendant opposes the relief sought herein and in further breach of the policy wishes to continue to utilize a biased appraiser who is disqualified per the plain language of the policy.

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[1] *See* Exhibit A, Letter to Defendant's counsel regarding Kevin Hromas dated October 4, 2023.
[2] *See* Exhibit B, Email to Defendant's counsel dated October 18, 2023.

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II. Summary of the Issue

Appraisal is a tool used to determine "the amount of the insured's loss." It does so without regard to liability or coverage. The policy in this case requires the appraisers be "competent, independent, impartial, and disinterested" and further requires that they are "unbiased … and act fairly, without bias and in good faith."[3] Here, instead of acting as an unbiased, impartial appraiser, as required by the policy, Defendant's biased appraiser Kevin Hromas has pre-determined (without ever actually evaluating the amount of Plaintiff's loss) that based on *his* interpretation of a policy provision (outside the scope of appraisal), and *his* interpretation of an appellate decision in an unrelated matter (even further outside the scope of appraisal), that, in his words, Mr. McPike "won't get a dime more than what HOA has already paid."[4] Based that, Mr. Hromas has refused to further work on the appraisal. He has further levied insults against undersigned counsel stating that undersigned is "pissing in the wind" related to this claim. Mr. Hromas's conduct, particularly his pre-determination that Mr. McPike "won't get a dime more" and refusal to do his job as an appraiser, is sufficient to demonstrate that he is biased, partial, and acting in bad faith. His further insults to undersigned counsel as "pissing in the wind" put his conduct beyond the pale. Mr. Hromas is disqualified from acting as an appraiser in this matter.

III. Facts and Procedural History

On February 15 and 16, 2021, Kyle McPike's ("Plaintiff") property sustained severe damages as a result of leakage from frozen pipes following Winter Storm Uri. Plaintiff timely filed a claim with its insurer, Defendant Homeowners of America Insurance Company ("Defendant"). Defendant, wrongfully, and in breach of the policy and the Texas Insurance Code, determined that the damages were subject to the policy's $10,000 sublimit (which applies only to the perils of

[3] *See* Defendant's Motion for Summary Judgment, Exhibit A, Policy at p. 14.
[4] *See* Exhibit C, Affidavit of David Poynor and Exhibit C-1 thereto.

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"discharge" and "overflow" but not "leakage,") and issued payment only as to that amount, denying coverage for the remaining amounts.

Plaintiff filed the instant suit on October 26, 2021, and Defendant answered on November 29, 2021. On March 2, 2022, Defendant filed its Motion for Summary Judgment, arguing that it had no liability as a matter of law because it paid the full amounts owed due to the application of the $10,000 sublimit.[5] On March 28, 2022, Plaintiff filed its cross-motion for Summary Judgment, arguing that the sublimit did not apply to leakage, that Defendant wrongfully applied the policy provision, and was in breach of both the policy and the applicable provisions of the Texas Insurance Code.[6] On April 4, 2022 this Court Denied Defendant's Motion for Summary Judgment,[7] and accordingly on May 16, 2022, Granted in all things Plaintiff's Motion for Summary Judgment, finding that Defendant wrongfully applied the sublimit, and was in breach of the policy and the Texas Insurance Code as a matter of law, and that Plaintiff's claim was covered in full and not subject to a sublimit.[8]

Following the Court's finding that Defendant violated the terms and conditions of the policy and the Texas Insurance Code, Defendant sought to invoke the appraisal provision of the policy to ascertain the amount of Plaintiff's loss, which would establish damages owed to Plaintiff as a result of Defendant's breach of the policy. *See TMM Investments, Ltd. V. Ohio Cas. Ins. Co.*, 730 F.3d 466, 472 (5th Cir. 2013) ("The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court."). Here, liability has been determined by Court Order. The sole question remaining is how much (over and above the $10,000 sublimit) Defendant owes Plaintiff, both for

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[5] *See* Exhibit D, Defendant's Motion for Summary Judgment
[6] *See* Exhibit E, Plaintiff's Cross-Motion for Summary Judgment
[7] *See* Exhibit F, Order Denying Defendant's Motion for Summary Judgment
[8] *See* Exhibit G, Order Granting Plaintiff's Cross-Motion for Summary Judgment

the covered damages under the policy, as well as for Defendant's breach of the contract and violations of the Texas Insurance Code.[9]

i. Brief History of Appraisal In Texas

"Appraisal" is a term of art used to describe an alternative dispute resolution mechanism that is virtually ubiquitous in Texas insurance policies. *See State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888-89 (Tex. 2009)("Virtually every property insurance policy for both homeowners and corporations contains a provision specifying appraisal as a means of resolving disputes about the 'amount of loss' for a covered claim."). Appraisal, being a creature of contract, is governed by the language of the policy. *In re: Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 407 (Tex. 2011). Appraisal is used to determine the amount of the insured's loss. "The policy directs the appraisers to decide the 'amount of loss,' not to construe the policy or decide whether the insurer should pay." *Johnson*, 290 S.W.3d at 890. "[T]he policy requires each party to select a 'competent, disinterested appraiser,' not a lawyer or insurance expert." *Id.*[10]

Essentially, upon a disagreement as to the amount of the loss, either party to the contract may invoke the appraisal provision. In that instance, both sides are required to designate "competent" or "disinterested" appraisers (as shown below the particular policy's language can vary), who attempt to determine the amount of loss, irrespective of coverages or liability. *Id*. If they fail to agree, then they may choose, or if they cannot agree, a Court with jurisdiction may appoint, a third person, called an Umpire, and agreement by any two of the three is binding as to all parties as to the amount of the loss. *Id*. at 887-888.

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[9] Appraisal in this case would only partially determine Plaintiff's damages, and would specifically be limited to breach of contract. The Court and/or jury would determine the remaining damages owed for Defendant's insurance code violations.

[10] Notably, Mr. Hromas is a lawyer (though not a licensed attorney) and holds himself out to be an insurance expert. *See Mt. Hawley Ins. Co. v. JBS Parkway Apartments, LLC*, 2020 WL 6821329 *5 (Order Granting in Part Plaintiff's Motion to Exclude Expert Testimony of Kevin Hromas as "improper".). *See also* CV of Kevin Hromas stating "Mr. Hromas is a retained expert in insurance litigation through-out the US" attached hereto as Exhibit H.

ii. The Applicable Appraisal Provision in This Case

Insurers in Texas are able to craft their own appraisal provisions, creating differences in the language governing the process. Here, Defendant's appraisal language goes beyond the standard-form Texas appraisal language. The standard appraisal language, contained in most policies, is as follows:

> **Appraisal**. If you and we fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal. If either makes a written demand for appraisal, *each shall select a competent, disinterested appraiser*. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire … The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss.

Johnson, 290 S.W.3d. at 887-888 (emphasis added).

The policy at issue in this case, goes further than the standard form language, requiring the parties appoint "**qualified**" appraisers, and defining "**qualified**" beyond merely "competent and disinterested" as the standard form requires:

> **E. Appraisal**
>
> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a **qualified** appraiser and notify the other of the appraiser's identity within 15 days after receiving a written request from the other. The two appraisers will choose a **qualified** umpire… The two appraisers will separately set the amount of loss, stating the actual cash value and loss to each item, if the appraisers fail to agree, they will submit their differences to the umpire. …
>
> An Itemized decision agreed to by any two of these three and filed with us will set the amount of loss. Such award shall be binding on you and us. Within thirty (30) days following receipt of a signed award, we will pay the award according to the terms of the policy subject to the deductible less any prior payments on the claim.
>
> The following conditions apply to appraisal:

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a. The term "**qualified**" means *competent, independent, impartial, and disinterested appraiser* or umpire. The appraisers and umpire should be competent with respect to identification of damage, and insofar as they are *unbiased and free of control*, to arrive at their own evaluation of the loss. The appraisers and umpire should have knowledge in identifying damage and act *fairly, without bias and in good faith*. The umpire, appraisers, and their employers, may not have an interest in the property that is the subject of the claim or have a financial interest that is conditioned on the outcome of the appraisal or the claim. The umpire may not be a relative or employee, may not have made or received substantial referrals of business to or from you or us (or representatives of you or us).

…

g. The appraisers and umpire are not authorized to determine coverage, exclusions, forfeiture provisions, conditions precedent, or any other contractual issues that may exist between you and us, and the appraisal decision is not binding on these issues.[11]

iii. Kevin Hromas is Overtly Biased

The Texas Supreme Court admonished that a party's chosen appraiser should not be "a lawyer or insurance expert." *Id*. Defendant's chosen appraiser, Kevin Hromas, is both a lawyer and a self-professed insurance expert.[12] That, in and of itself, would not necessarily disqualify Mr. Hromas from acting as Defendant's appraiser under this policy's controlling language. Nor does the fact that Mr. Hromas has been hired by Defendant numerous times to act as their appraiser serve to disqualify him under this policy. *See Holt v. State Farm Lloyds*, 1999 WL 261923 *10 (N.D. Tex. 1999)("While the mere fact that one appointed by the insurer as an appraiser has acted in a similar capacity on other occasions for the insurer, does not, as a matter of law, disqualify such an appraiser…").

However, Mr. Hromas's conduct in *this* appraisal, in particular his flagrant disregard for the policy's prohibition against deciding issues of coverage, his overt statements against the

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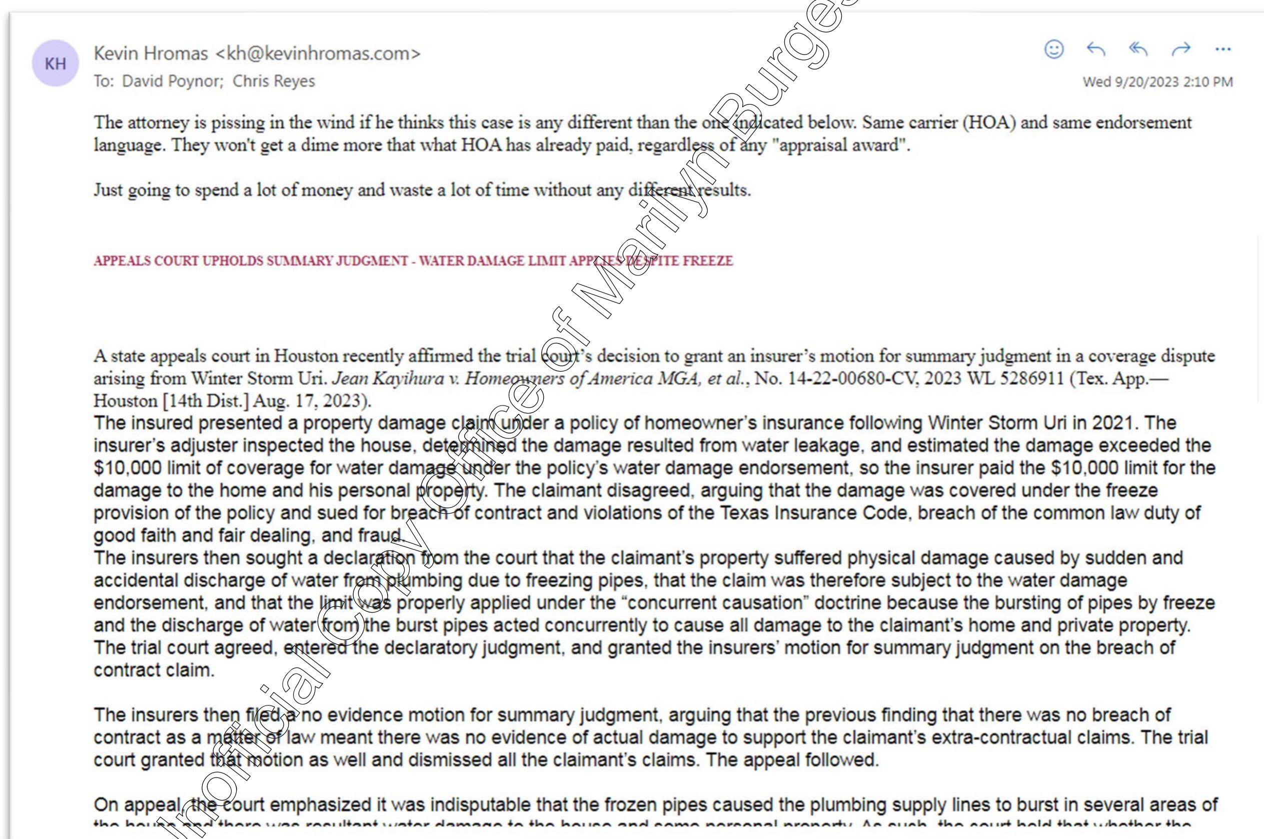
[11] *See* Defendant's Motion for Summary Judgment, Exhibit A, Policy p. 14-15 (emphasis original as to "**qualified**" and added as to definitions).
[12] *See* Exhibit H, Hromas CV.

insured (and insured's counsel), and the overall biased manner in which he is conducting this appraisal demonstrate that he is not **qualified** to act as an appraiser in this case.

To-date, Mr. Hromas has never evaluated or determined the amount of Plaintiff's loss.[13] Moreover, Mr. Hromas, an appraiser who is not authorized to determine coverage or contractual issues, has expressly pre-determined that, based on *his* view of the coverage and contractual issues, and *his* reading of an appellate decision, Mr. McPike "won't get a dime more than what HOA has already paid…".[14] On September 20, 2023, after essentially refusing to work on the appraisal, Mr. Hromas sent the following email to Plaintiff's appraiser David Poynor[15]:



KH Kevin Hromas <kh@kevinhromas.com>
To: David Poynor; Chris Reyes
Wed 9/20/2023 2:10 PM

The attorney is pissing in the wind if he thinks this case is any different than the one indicated below. Same carrier (HOA) and same endorsement language. They won't get a dime more that what HOA has already paid, regardless of any "appraisal award".

Just going to spend a lot of money and waste a lot of time without any different results.

APPEALS COURT UPHOLDS SUMMARY JUDGMENT - WATER DAMAGE LIMIT APPLIES DESPITE FREEZE

A state appeals court in Houston recently affirmed the trial court's decision to grant an insurer's motion for summary judgment in a coverage dispute arising from Winter Storm Uri. *Jean Kayihura v. Homeowners of America MGA, et al.*, No. 14-22-00680-CV, 2023 WL 5286911 (Tex. App.—Houston [14th Dist.] Aug. 17, 2023).
The insured presented a property damage claim under a policy of homeowner's insurance following Winter Storm Uri in 2021. The insurer's adjuster inspected the house, determined the damage resulted from water leakage, and estimated the damage exceeded the $10,000 limit of coverage for water damage under the policy's water damage endorsement, so the insurer paid the $10,000 limit for the damage to the home and his personal property. The claimant disagreed, arguing that the damage was covered under the freeze provision of the policy and sued for breach of contract and violations of the Texas Insurance Code, breach of the common law duty of good faith and fair dealing, and fraud.
The insurers then sought a declaration from the court that the claimant's property suffered physical damage caused by sudden and accidental discharge of water from plumbing due to freezing pipes, that the claim was therefore subject to the water damage endorsement, and that the limit was properly applied under the "concurrent causation" doctrine because the bursting of pipes by freeze and the discharge of water from the burst pipes acted concurrently to cause all damage to the claimant's home and private property. The trial court agreed, entered the declaratory judgment, and granted the insurers' motion for summary judgment on the breach of contract claim.

The insurers then filed a no evidence motion for summary judgment, arguing that the previous finding that there was no breach of contract as a matter of law meant there was no evidence of actual damage to support the claimant's extra-contractual claims. The trial court granted that motion as well and dismissed all the claimant's claims. The appeal followed.

On appeal, the court emphasized it was indisputable that the frozen pipes caused the plumbing supply lines to burst in several areas of

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[13] *See* Exhibit C, Affidavit of David Poynor and Exhibit C-1 thereto.
[14] Notably, Mr. Hromas seems to be substituting his own judgement as an unlicensed lawyer, for that of this honorable Court, who has already ruled on this very issue.
[15] *See* Exhibit C, Affidavit of David Poynor and Exhibit C-1 thereto.

Mr. Hromas, who is required by the policy to be "independent, impartial, and disinterested" and required by the policy to "act fairly, without bias, and in good faith" further stated that "the attorney [undersigned counsel] is *pissing in the wind* if he thinks this case is any different than the one indicated below. Same carrier (HOA) and same endorsement language."[16]

Without reading the email further, these two sentences demonstrate that Mr. Hromas is disqualified from acting as an appraiser in this case. First, there is no credible argument Mr. Hromas is acting "fairly, without bias, and in good faith" while insulting undersigned counsel as "pissing in the wind." That statement, standing alone, demonstrates his disqualifying bias. Moreover, and equally as concerning is the fact that Mr. Hromas, who is a lawyer but not a licensed attorney, [17] appears to be relying upon and citing to an entirely unrelated case, regarding application of an endorsement in that case to support his pre-determined decision as to the outcome of this appraisal. Whether an endorsement does or does not apply, relates specifically to "coverage, exclusions, conditions, forfeiture provisions, conditions precedent," or "other contractual issues" that may exist between the parties, which the policy specifically excludes from the appraisal process.

Reading further, Mr. Hromas's egregious statements continue with his assertion that "They [Plaintiff Kyle McPike] won't get a dime more than what HOA has already paid, regardless of any 'appraisal award.'"[18] This too, is sufficient in and of itself to disqualify Mr. Hromas. Similar to Mr. Hromas's insult to undersigned counsel as "pissing in the wind" there is no credible argument that Mr. Hromas is acting fairly, impartially, neutrally, or in good faith with his pre-determined view that Mr. McPike "won't get a dime more than what HOA has already paid" especially in light

[16] *Id* (emphasis added).
[17] Undersigned searched the Texas Bar's registry of licensed attorneys and Mr. Hromas's name was not present as an attorney licensed in this state.
[18] *Id*.

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of the fact that he has never performed his own evaluation of the amount of Plaintiff's loss, which is his *only* job under the policy.

Next, Mr. Hromas, who is an unlicensed lawyer, says "A state appeals court in Houston recently affirmed the trial court's decision to grant an insurer's motion for summary judgment in a coverage dispute arising from Winter Storm Uri."[19] He then includes language regarding application of a $10,000 freeze sublimit in that case. Purportedly, this is in support of his belief that Undersigned counsel is "pissing in the wind" and that Mr. McPike "won't get a dime more than what HOA has already paid." Regardless, this citation is extremely concerning. First, because it directly relates to coverage, contractual issues, and matters completely separate from the appraisal per the policy's own requirements. Second, because it demonstrates that Mr. Hromas is considering matters far beyond the amount of Plaintiff's loss due to leakage, all to support his pre-conceived position that undersigned counsel is "pissing in the wind" and that Mr. McPike "won't get a dime more than what HOA has already paid."

Mr. Hromas is not qualified to act as an appraiser in this case. Moreover, any subsequent award that is the result of Mr. Hromas's involvement will be incurably tainted due to his overt bias and consideration of matters of coverage and contract, well outside the authority given under the policy.

IV. Arguments & Authorities

It is well-settled that Courts in Texas have "inherent authority to manage their dockets." *In re Mesa Petroleum Partners*, 538 S.W.3d 153, 159 (Tex. App. – El Paso 2017). Numerous courts in Texas have heard motions to strike or disqualify appraisers, with none noting that the requested relief is outside the Court's authority to grant. *See ex. Devonshire Real Estate & Asset*

[19] *See* Exhibit C, Affidavit of David Poynor and Exhibit C-1 thereto

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Management, LP v. Am. Ins. Co., 2013 WL 1212430 (N.D. Tex. 2013), *Holt v. State Farm Lloyds*, 1999 WL 261923 (N.D. Tex 1999). In fact, some courts of appeal have held that where a party, upon obtaining evidence showing an appraiser's disqualification, fails to raise the issue until after an award is entered, that party may have waived their right to bring the challenge later. *Allison v. Fire Ins. Exchange*, 98 S.W.227, 253 (Tex. App. – Austin 2002)(holding that a party must challenge an appraiser prior to entry of an appraisal award, or otherwise may waive their right to challenge the award once entered on those grounds).

The insurance policy governs the requirements regarding appraisers. *Devonshire Real Estate & Asset Mgmt. v. Am. Ins. Co.*, 2013 WL 1212430 *1 (N.D. Tex. 2013). A party moving to strike an appraiser must present evidence of partiality or personal interest. *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 255 (Tex. App. – Austin 2002), *see also Am. Cent. Ins. Co. v. Terry*, 298 S.W.658, 662 (Tex. Civ. App. 1927)(noting in *dicta* that the fact that the appraiser had been selected by the insurer "many times before" was insufficient on its own to establish partiality "in the absence of some act or conduct tending to exhibit his serving the insurer's interest as a partisan would.").

Here, the requirements as listed in the policy go beyond those in a typical Texas standard form policy and set forth a higher standard of impartiality and neutrality than the standard appraisal clause language. Compare the appraisal clause language at issue in *Devonshire*, requiring merely a "competent and disinterested" appraiser versus the language applicable in this case, defining **qualified** as "competent, independent, impartial, and disinterested." While perhaps under the standard language, Mr. Hromas is competent, and because he purportedly does not have a financial interest in the outcome, satisfies the requirement of "disinterested" as Texas Courts have interpreted it, the inquiry does not end there. Here, because of this particular policy's language, the Court must further consider whether Mr. Hromas is "independent" "impartial" "unbiased" and

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acting "fairly, without bias, and in good faith" a considerably higher and more stringent standard than the typical Texas appraisal clause.

This language is clear. In order for an appraiser to be **qualified**, they must at all times be competent, independent, impartial, and disinterested. They must be unbiased, and at all times act fairly and in good faith. The lack of any one of these qualities, according to the policy, is itself a sufficient condition to render that appraiser not **qualified** under this policy's clear language. Here, Mr. Hromas's unequivocal statement that Plaintiff "will not get a dime more than HOA has already paid", his insult to undersigned counsel as "pissing in the wind," with his extremely improper reliance on case law to discuss coverage issues far afield of his authority granted by the policy demonstrate that he is not impartial, that he is biased, that he has pre-determined the outcome of this process, and that he is not acting in good faith. The fact that Mr. Hromas has refused to further work on the appraisal based on his subjective belief that undersigned counsel is "pissing in the wind" and his subjective belief that Mr. McPike "won't get a dime more than what HOA has already paid" further underscores his bad faith conduct. Simply put, no appraiser acting in an unbiased, neutral, impartial, good faith manner would make these statements or take these positions. That Mr. Hromas does, with blatant and callous disregard for the policy's requirements, disqualifies him from further involvement in this claim.

i. *Any award entered with Mr. Hromas's continued involvement will be invalid.*

In Texas, appraisal awards are upheld unless one of three circumstances exists: (1) the award was made without authority; (2) the award was the result of fraud, accident, or mistake; or (3) the award was not made in substantial compliance with the terms of the contract. *TMM Investments, LTD. v. Ohio Cas. Ins. Co.*, 730 F.3d 466, 472 (5th Cir. 2013). Here, any award entered with the involvement of Mr. Hromas (bearing his signature or not), would satisfy conditions (1)

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and (3) and be invalid. Here, it is clear that not only is Mr. Hromas considering coverage issues, endorsement issues, and caselaw, but he is *arguing* those issues to Plaintiff's appraiser. This policy is clear, the appraisers "are not authorized to determine coverage, exclusions, conditions, forfeiture provisions, conditions precedent, or any other contractual issues that exist between you and us" meaning Mr. Hromas's overt consideration and argument surrounding these issues clearly go beyond the authority given him by the policy. Moreover, because of Mr. Hromas's blatant bias, as evidenced by his statements that Undersigned is "pissing in the wind" and that Mr. McPike "won't get a dime more than HOA already paid" he is not a qualified appraiser as defined by the policy. Therefore, any award involving an appraiser who is not qualified cannot be "in substantial compliance with the policy."

Thus, judicial economy would require disqualification of Mr. Hromas and an order requiring Defendant select an unbiased, impartial, and fair appraiser is warranted. Otherwise, the parties will continue to waste further resources setting an invalid award aside at the completion of the process. An order requiring Defendant select an unbiased, impartial, and fair appraiser would ensure the process may proceed, thus satisfying the goal of appraisal and conserving precious judicial resources.

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V. Conclusion & Prayer

Defendant, in writing this policy, intended to craft an appraisal provision with a higher and stricter standard for appraiser conduct than the typical policy language. Here, the parties intended, as evidenced by the contract's language, that any appraisal be conducted by neutral, non-biased, disinterested individuals acting in good faith and considering *only* the damages to the property. Instead of abiding by that language, Defendant's designated a clearly biased appraiser, who by making such crass and abhorrent statements has disqualified himself from further involvement in

this appraisal. Mr. Hromas's continued presence would serve only to waste the parties' time and resources, as any subsequent award would be incurably tainted, and invalid on its face.

Mr. Hromas, based on his interpretation of matters having nothing to do with the amount of Plaintiff's loss, has (1) refused to further act as an appraiser; (2) pre-determined that Plaintiff "will not get a dime more than what HOA has already paid;" and (3) demonstrated an obvious bias against Mr. McPike and his representatives, who Mr. Hromas unequivocally believes are "pissing in the wind." If this conduct does not constitute bias, partiality, and acting in bad faith, then such words have no meaning under Texas law.

Respectfully submitted,

GREEN KLEIN WOOD & JONES

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ATTORNEYS FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all counsel of record in accordance with the Texas Rules of Civil Procedure on this 20th day of October 2023.

Ronald Hornback
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ATTORNEYS FOR DEFENDANT

/s/ Hunter M. Klein
HUNTER M. KLEIN

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Filing Description: Plaintiff's Opposed Motion to Disqualify
Status as of 10/23/2023 8:45 AM CST

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12/29/2023 4:17 PM
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Envelope No. 82966296
By: Tammie Young
Filed: 12/29/2023 4:17 PM

NO. 2021-70308

KYLE J. MCPIKE,	§	**IN THE JUDICIAL COURT OF**
Plaintiff,	§	
	§	
V.	§	
	§	**HARRIS COUNTY, TEXAS**
HOMEOWNERS OF AMERICA	§	
INSURANCE COMPANY,	§	
Defendant.	§	**215TH JUDICIAL DISTRICT**

DEFENDANT HOMEOWNERS OF AMERICA INSURANCE COMPANY'S SUPPLEMENTAL MOTION TO RECONSIDER APRIL 8, 2022 AND MAY 16, 2022 SUMMARY JUDGMENT ORDERS, REQUEST FOR FoF/CoL AND RESPONSE TO PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANT'S APPRAISER

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, HOMEOWNERS OF AMERICA INSURANCE COMPANY ("HOAIC"), files and serves upon Plaintiff, Kyle J. McPike ("McPike" and/or "Plaintiff"), this Supplemental Motion to Reconsider denial of Defendant's Motion for Summary Judgment by order dated April 8, 2022, to Reconsider grant to Plaintiff of partial summary disposition by order dated May 16, 2022, its further request for Findings of Fact and Conclusions of Law,[1] and Defendant's Response to Plaintiff's Motion to Disqualify Defendant's Appraiser. In support of same, Defendant would respectfully show the Court as follows:

I. BACKGROUND AND SUMMARY.

1. Plaintiff filed this action on October 26, 2021, and Defendant answered, via verified denial raising conditions precedent not met and its plea in abatement on November 29, 2021. On March 2, 2022, Defendant moved for summary judgment on coverage grounds, setting same on submission, via March 8, 2022 notice for hearing, on April 4, 2022. On March 28, 2022, Plaintiff filed a Cross-Motion for Summary Judgment, with the sole item of evidence of a verification from

[1] *See* TEX. R. CIV. P. 297 and June 13, 2022 filed request for same.

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Plaintiff. By Plaintiff's April 19th notice of submission, Plaintiff's cross-motion was set May 16, 2022.

2. On April 4, 2022, the Court signed an order denying HOAIC's Motion for Summary Judgment. On April 14, 2022, Defendant promptly filed its Motion to Reconsider (to which this is supplemental) and, alternatively, to compel policy compliance in appraisal and for abatement for the appraisal being compelled, setting same for hearing June 2, 2022. That same date, Plaintiff filed his April 14, 2022 Motion to Compel Required Disclosures, setting same for oral hearing May 19th, to which Defendant responded May 16, 2022,[2] and Plaintiff replied the following day.

3. On May 11, 2022, Defendant responded to Plaintiff's Cross-Motion for Summary Judgment,[3] stating (among other things):

> On November 29, 2021, Defendant filed its Plea in Abatement, Verified Denial, Affirmative Defenses, and Original Answer to Plaintiff's Original Petition, with supporting affidavit, specifically raising conditions precedent within Plaintiff's Policy that remain unmet. Specifically, as averred, did not provide requested documents or invoke/complete appraisal.[4]
> ***
> As an initial matter, even were Plaintiff's Motion supported by evidence on which he bears the burden at trial, the Court is precluded from granting summary disposition by one simple, clear and indisputable fact – Plaintiff has failed to meet conditions precedent within the contract under which he sues. Per above, irrespective of an overlapping coverage dispute, this Policy mandates that insured must provide requested documents (that he did not) and invoke/complete appraisal on the amount-of-loss dispute evident here – HOAIC contending $10,000.00 limited coverage and Plaintiff claiming $167,092.40 in property damage.[5]

Plaintiff, on May 13, 2022, replied, moving to strike Defendant's response, which raised the same issues Defendant raised in its November 29, 2021 answer, its March 2, 2022 Motion for Summary

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[2] By its response to Plaintiff's compel, Defendant pointed out the plea in abatement in its answer, the failure of conditions precedent to which Defendant averred by verified denial and the Policy provisions specifically mandating, before Plaintiff brought this suit, he was required to provide certain documents and invoke and complete appraisal. Defendant incorporates by reference herein, as if set out in full, its May 16, 2022 filing, with exhibits.

[3] Exhibit A to Defendant's June 13, 2022 Supplemental Motion to Reconsider.

[4] *Id*., at ¶ 8.

[5] *Id*., at ¶ 10.

Judgment, and its April 14, 2022 Motion to Reconsider. On May 16, 2022, the Court issued an order striking Defendant's response as well as a separate order, without oral argument from either party, granting "in all things" judgment on Plaintiff's Cross-Motion for Summary Judgment – to which this reconsideration further responds.

4. On May 19, 2022, in the oral hearing appearances of both counsel before this Court, Plaintiff's Motion to Compel was "denied at this time as premature." On May 27, 2022, the Court's trial coordinator's docket reflected the scheduling conference setting for that date was passed by the Court for "CASE DISPOSED."[6] Similarly, the docket sheet reflects the case status as "Disposed (Final)." *Id*. Finally, the docket chronology of the Court reflects the May 16, 2022 summary judgment order as "FINAL SUMMARY JUDGMENT SIGNED (Final Order)." *Id*. This remains the cause posture and status to this date. *Id*.

5. In summary, first, Defendant demonstrated by competent summary judgment evidence its entitlement to summary judgment as a matter of law on the application of the $10,000 "Limited Water Damage Coverage" endorsement. That disposition is warranted now by subsequent appellate rulings binding on this Court. Second, Plaintiff did not demonstrate entitlement to summary judgment on coverage or the first-party claims on which he moved. This is particularly so where, as Defendant pled repeatedly, Plaintiff had not met conditions precedent to sue, much less obtain the relief the Court granted. Third, the Court's docket entries notwithstanding, the May 16, 2022 order, that Defendant contends improperly granted Plaintiff summary disposition, does not indicate it is a final order, disposing of all claims and all parties. Fourth, Plaintiff's requested relief of appraiser disqualification is moot on the proper summary disposition Defendant sought

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[6] Exhibit B to Defendant's June 13, 2022 Supplemental Motion to Reconsider; **EXHIBIT A** hereto, true and correct copies, as of December 29, 2023, of this case' disposition.

(and for which reconsideration is sought)[7] and in accord with precedent binding on this Court. Fifth, Plaintiff's "evidence" is, on objections herein, insufficient to meet his burden for the disqualification relief sought. Sixth and finally, case law reflects, pre-appraisal award, that the determination of bias or lack of impartiality is a question of fact for a jury. To each in turn.

II. SUMMARY OF THE ARGUMENT.

6. This case is not final and/or "disposed," even on the improper denial/grant of summary judgments. Plaintiff's summary judgment obtained only pertained to causation and coverage – the issue on which the Court improperly denied Defendant disposition. **This impropriety is reflected in the Fourteenth Court of Appeals' August 17, 2023 opinion and order[8] upholding the June 22, 2022 summary disposition on identical coverage grounds (the application of the Limited Water Damage Endorsement) in *Kayihura* – on which the Texas Supreme Court just denied review on December 22, 2023**.[9] As expressed above, three other courts addressing this same coverage question granted Defendant summary disposition – in Kayihura, in Bennett,[10] and in Altornett.[11] This is the only case in which Plaintiff sought counter-disposition and prevailed. In short, the decision in *Kayihura* controls disposition here.[12] Thus, this pleading raises the

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[7] As detailed more fully herein, Defendant has, on three prior occasions from other courts, obtained summary disposition of the coverage question presented to this Court. Since then, all three went to appeal. One (Bennett) was voluntarily disposed upon issuance of the *Kayihura* opinion. *Altornett* remains before the First Court of Appeals. *Kayihura*, however, was properly affirmed by the Fourteenth Court of Appeals (binding this Court to its ruling on the coverage disposition Defendant sought) . . . with the Texas Supreme Court denying review on **December 22, 2023**.
[8] **EXHIBIT B**, a true and correct copy of *Kayihura v. Homeowners of America MGA, Inc.*, No. 22-00680, 2023 WL 5286911 (Tex. App.—Houston [14th Dist.] August 17, 2023, pet. den.) for convenience of the Court.
[9] **EXHIBIT C** hereto, true and correct copies of the underlying June 22, 2022 summary judgment motion on coverage, the Court of Appeals opinion (without "do not publish"), and the Texas Supreme Court's December 22, 2023 denial of review of the appeal sought. To the extent leave is necessary to late-file this response, Defendant so requests, based on the Texas Supreme Court's recent disposition which controls the disposition herein.
[10] **EXHIBIT D** hereto, true and correct copies of the underlying August 21, 2021 summary judgment motion on coverage, the trial court's April 3, 2023 grant of that summary disposition, and the Fourteenth Court of Appeals' September 21, 2023 dismissal of that appeal (on counsel's reading on *Kayihura*).
[11] **EXHIBIT E** hereto, true and correct copies of the underlying October 3, 2022 summary judgment order and status of appeal before the First Court of Appeals.
[12] *Kayihura*, 2023 WL 5286911, at *4-5.

> The crux of Kayihura's argument is based on his interpretation that the endorsement applied to one type of peril—accidental discharge of water—but did not apply to a particular peril — freezing —

reconsideration in light of the *Kayihura* precedent binding on this Court and in response because the proper disposition moots Plaintiff's relief sought herein – a disqualification of an appraiser.

7. Even were mootness not applicable and the Court were to deny reconsideration, Plaintiff's evidence (even were objectionable evidence considerable) does not meet his burden of proof to pre-emptively entice this Court into interfering in appraisal (that process also being moot on proper summary disposition) on a fact question within the province of the jury. This is not a *Daubert* challenge. No award has issued to attack and Plaintiff has not sought testimony of Defendant's appraiser nor compelled his appearance at hearing by subpoena to attempt to meet his burden. In short, on proper grant of Defendant's coverage summary judgment, Plaintiff's disqualification relief is moot. If reconsideration is denied, Plaintiff still fails to meet any evidentiary burden to show lack of being "qualified" – as that term is defined within this insurance contract and under the law.[13] Accordingly, Defendant requests the Court withdraw its two prior summary judgment order, grant Defendant the final summary disposition the law entitles it to, and deny Plaintiff relief on either/both mootness and/or failure to meet his burden to disqualify.

III. ARGUMENTS AND AUTHORITIES.

8. With this response/supplemental motion to reconsider, Defendant incorporates by reference all pleadings (and attendant evidence) herein referenced and, specifically, the April 14, 2022 motion its supplements, as well as its: (1) November 29, 2021 verified denial and plea in abatement; (2) March 2, 2022 Motion for Summary Judgment with attendant evidence; (3) its May 11, 2022 Response to Plaintiff's Cross-Motion for Summary Judgment; (4) its May 16, 2022 Response to Plaintiff's Motion to Compel; and (5) its June 13, 2022 Supplemental Motion to

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> that caused damage to his home. **<u>But we read the endorsement as unambiguously applying to a particular type of *damage*—water damage—applicable to coverage for dwelling, other structures, and personal property</u>**.

[13] Exhibit A to Defendant's answer and subsequent summary judgment motion.

Reconsider, with its request for findings of fact/conclusions of law. Defendant further incorporates the record of the May 19, 2022 hearing.

A. Finality in case disposition.

9. As an initial matter, post-summary judgment orders, this matter was abated for an appraisal process forced by the Court's denial of disposition on coverage grounds. However, the Court's docket has, as referenced in June 13, 2022 pleading and herein, labeled this matter as disposed by final summary judgment order. Given the grant of Plaintiff's summary judgment did not dispose of all claims (e.g., for damages), it was only a partial interlocutory disposition – on the coverage grounds that *Kayihura* addressed subsequently.

B. Plaintiff's relief sought is moot under reconsideration granted.

10. As briefed in Defendant's March 2, 2022 Motion for Summary Judgment, the "Limited Water Damage Coverage" endorsement to Plaintiff's Policy limited Defendant's liability to $10,000 for "***direct physical damage caused by sudden and accidental discharge*** . . . ***of water*** . . . ***from within a plumbing*** . . . ***system***."[14] The Policy specifically states, "*The* ***total limit of liability for water damage*** *to covered property* ***is $10,000****. This limit* ***applies to all damaged covered property under Coverage A, B, C, and E combined***." *Id*. Defendant demonstrated by competent summary judgment evidence to have paid this applicable limit to Plaintiff, complying with its indemnity obligations in full. Plaintiff admitted as much in its argument that this was a "'leak, which is precisely what occurred here, ***water*** escaping through an opening, ***causing damage*** to the property."[15] Now, *Kayihura* disposes of the coverage arguments over whether freezing and/or leak are some sort of carve out from "water damage." As this Court's higher found, they are not.

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[14] Exhibit C to Defendant's June 13, 2022 Supplemental Motion to Reconsider, copying from Exhibit A to Defendant's Answer and Motion for Summary Judgment.
[15] Plaintiff's March 28, 2022 Response to Defendant's Motion for Summary Judgment, at Page 9 (emphasis added).

Because they are not, Defendant HOAIC was entitled to summary disposition on coverage for the application of the Limited Water Damage Endorsement and its payment up to that limit . . . which, in turn, moots appraisal and the relief Plaintiff seeks here. Interpreting the coverage as the Fourteenth Court of Appeals has results in no need for appraisal at all, with HOIAC having exhausted the Policy limit already (as proved long ago via its summary judgment).

C. Objectionable evidence to Plaintiff's Motion and Defendant's Motion to Strike.

11. Plaintiff files a lot of nothing to support his high burden to preemptively strike an appraiser as partial/biased – the only "evidence" being a single email from Mr. Hromas to Mr. Poynor (to the extent Plaintiff's counsel's letter is considered evidence, we have a lawyer-witness problem). Defendant objects to the following evidence and moves to strike same from the record:

a. Exhibit C is Plaintiff's counsel's designated appraiser's affidavit. First, Mr. Poynor avers his conclusion (the Court can read the email itself) that communications (not provided to the Court) reflect Mr. Hromas "was refusing to work further on the appraisal." Defendant moves to strike this conclusory statement as unsubstantiated supposition without evidentiary basis. Next, at paragraph 5 ("he told me" and "told me"), Mr. Poynor puts words into the mouth of a nonparty in classic hearsay, without exception. Defendant moves to strike paragraph 5 of Exhibit C, excepting that averring to C1 being an email he received from Mr. Hromas and the allegation of no receipt of Mr. Hromas' estimate.

b. Exhibits D through G are not evidence but pleading and orders of this Court, missing those incorporated herein by reference above.

c. Exhibit H is some piece of paper which purports to be a resume/curriculum vitae for Mr. Hromas. While that paper shows him qualified under the Policy terms, it is plain hearsay,

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with no affiant to tell where the document came from or from whom. Defendant moves same be stricken.

D. Plaintiff's evidence fails to meet his burden to show no issue of material fact on a jury question.

12. Even were the Court to read the movant's single piece of admissible evidence, the Hromas email filed by Plaintiff as C1, in a light most favorable to movant (clearly not the burden), Plaintiff cannot prevail. Indeed, Mr. Hromas states, in contrast with the characterization Mr. Poynor makes of some unstated refusal to participate, "Just going to spend a lot of money and waste a lot of time without any different results."[16] That sounds to me like Mr. Hromas pontificating on a case (that is the basis for the reconsideration sought here) and future monies/time being spent. Also, Mr. Poynor avers to not having received Mr. Hromas' estimate of damages . . . but does not aver on his own account the date that he provided Mr. Hromas his assessment of damages and position. Finally, to the extent this appraiser "I'll show you mine when you show me yours" nonsense has delayed this appraisal, the simple expedient is invoking the services of the umpire either agreed by these two or the seeking of judicial appointment to move things along under the Policy terms.

13. In candor, much of the case law attacking an appraiser is in the context of post-appraisal contests to set an award aside. And, as an initial matter, that is the correct timing to do so, as the Texas Supreme Court itself has said. "[E]ven if an appraisal award is flawed, that can be easily remedied by disregarding it later. Thus, when insureds objected to appraisal procedures that were allegedly "inaccurate, unreliable, and biased," we held in 2002 that the **appraisal should go forward** and the results could be challenged later if the insureds were dissatisfied."[17] What Plaintiff seeks now is a preemptive (after many months of appraisal) court interjection to further

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[16] Plaintiff's Exhibit C1.
[17] *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009) (citing *Gulf Ins. v. Pappas,* 73 S.W.2d 145, 146–47 (Tex. Civ. App.-San Antonio 1934, writ ref'd).

delay what Plaintiff could fix by invoking the services of the umpire. The Court should not be pulled into that fray without legal basis to do so – and some evidence to justify it.

14. Plaintiff puts on no evidence of some control being exercised by Defendant HOAIC over Mr. Hromas . . . no financial incentive . . . no long-standing/pre-existing direct relationship . . . nothing. The case law on these, post-appraisal bases to seek award set-aside is well-settled. And, importantly, there is no award issued (or conduct in the issuance of it) that Plaintiff could point to for evidence of some bias . . . just an invitation to this Court to improperly intervene without evidence to support that.

15. In *Gen. Star Indem. Co. v. Spring Creek Village Apts. Phase IV, Inc.*, 152 S.W.3d 733, 738 (Tex. App.—Houston [14th Dist.] 2004), the Court found "General Star raised a genuine issue of material fact with regard to whether Spring Creek's appraiser was impartial in compliance with the insurance policy" where insured's appraiser had a contingent fee arrangement incentivizing a higher award. Note that the Court did not strike/disqualify that appraiser (with a clear lack of impartiality for a contingent interest legally prescribed) . . . but called it a question of material fact.

16. In *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 144 (Tex. App.—Houston [1st Dist.] 2002, on insured's allegations of bias for the relationship between the carrier appraiser and the insurer, the Court found there was "no evidence that the [insurer] directed the [appraiser] to reach any conclusions."

17. In *Franco v. Slovanic Mut. Fire Ins. Assoc.*, 154 S.W.3d 777, 780-81 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the insured also claimed that the insurer's appraiser was biased – since, prior to being selected as the insurer's appraiser, he worked as an investigative engineer for the insurer on the same matter, conducted an investigation on the insured's home, examined the premises to determine the cause of the damage, and later issued an engineering report to the insurer

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regarding his findings. In its holding, the Court found "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 . . . 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." *Id*. at 786-87. The dearth of evidence is likewise here . . . nothing to reflect bias for the carrier or against Plaintiff.

18. Hromas has no improper fee interest in the appraisal outcome (and certainly not one show with evidence). There is no evidence of lack impartiality or bias in this appraisal – where there is no award yet and Plaintiff does not even aver that his appraiser has provided his estimate/position to Hromas. Finally, there is nothing (and there could be nothing) to show Defendant HOAIC is exercising control over its independent appraiser. So, assuming the Court were to not reconsider and grant HOAIC summary disposition (mooting Plaintiff's relief and appraisal altogether), and assuming the Court were to overrule valid objections to Plaintiff's evidence, the only substantive evidence is an email from Mr. Hromas, postulating about the *Kayihura* case. So what if Mr. Hromas uses colorful language that upsets Plaintiff's counsel on chances of recovery. That does not obviate the need for Plaintiff to meet an evidentiary burden to show bias – a fact question he does not even attempt to meet (i.e., with a subpoena of Hromas to testify in open court). In short, Defendant is fine with lifted abatement to hear these motions, to clear up the finality of judgment issue as well as get the reconsideration for a proper disposition here.

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PRAYER

Defendant Homeowners of America Insurance Company prays the Court grant its Motions to Reconsider (as further supplemented herein), withdraw its order denying its Motion for

Summary Judgment as well as that granting Plaintiff's Cross-Motion for Summary Judgment, and render HOAIC case-dispositive summary judgment on the coverage grounds for which it demonstrated entitlement . . . and for which *Kayihura* mandates. Alternatively, HOAIC prays that the Court deny Plaintiff's relief sought of appraiser disqualification and the Court enter and file its findings of fact and conclusions of law within the period specified as previously requested timely. HOAIC prays further for such other and further relief to which it may be justly entitled.

Respectfully submitted,

THE MONSON LAW FIRM, LLC

By: _/s/ Ronald L. Hornback_

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record electronically and/or by e-service, email, regular or certified mail, return receipt requested, facsimile and/or hand delivery on this the 29th day of December, 2023.

/s/ Ronald L. Hornback
RONALD L. HORNBACK

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Filing Code Description: No Fee Documents
Filing Description: Defendant's Supplemental Motion to Reconsider April 8, 2022 & May 16, 2022 Summary Judgment Orders, Request for FoF-CoL and Response to Plaintiff's Motion to Disqualify Defendant's Appraiser
Status as of 12/29/2023 4:47 PM CST

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CAUSE NO. 2021-70308

KYLE J. MCPIKE, ***Plaintiff,***	§ § § §	**IN THE DISTRICT COURT OF**
v.	§ §	**HARRIS COUNTY, TEXAS**
HOMEOWNERS OF AMERICA INSURANCE COMPANY, ***Defendant.***	§ § §	**215th JUDICIAL DISTRICT**

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANT'S APPRAISER KEVIN HROMAS

COMES NOW Plaintiff Kyle McPike and files this Reply in Support of Plaintiff's Motion to Disqualify Defendant's Appraiser Kevin Hromas, and would respectfully show the Court as follows:

First, the entirety of Defendant's arguments regarding the purported findings of *Kayihura*, including its supplement to its Motion to Reconsider, relate to matters and issues not before the Court regarding the instant Motion to Disqualify. Defendant seems to be arguing that because the Court *should* reconsider its prior rulings (it should not), and because (in Defendant's view) the Court *should* reverse its decisions both to deny Defendant's Summary Judgment and grant Plaintiff's Motion for Summary Judgment, the entire issue of Mr. Hromas being overtly biased and acting in bad faith in violation of the policy is mooted.

However, that entire argument presupposes Defendant's Motion to Reconsider is valid and meritorious. It is not, however as the issue is not currently docketed for any sort of hearing, Plaintiff is not required to respond herein, and declines to do so. The focus of this inquiry, and the subject of the hearing set to occur on January 4, 2024, relates to whether Mr. Hromas, in pre-determining the outcome of this appraisal based on *his* view of caselaw, has supplanted his own judgment for that of this Court's, and thus rendered himself disqualified pursuant to the policy. Defendant has

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not set their Motion for Reconsideration for hearing, nor has Defendant moved to continue the hearing on the instant motion. Thus, the entirety of that section is red herring.

The thin remainder of Defendant's response fails almost entirely to address the actual merits of the issue. Tellingly, Defendant's "so what"[1] attitude permeates, and informs the lack of response beyond assertions regarding how things "sound"[2] to Defendant, or more appropriately Defense counsel. Defendant does not dispute the fact that Mr. Hromas *has* pre-determined the outcome, nor do they dispute that Mr. Hromas is refusing to participate in the appraisal due to that pre-determined outcome.

Defendant indicates that this issue could be cured by "invoking the services of the umpire"[3] yet this blasé assertion further demonstrates Defendant's failure to grasp the gravity of the situation and underscores their "so what" attitude. Either the language of the policy matters, or it does not. While Defendant's position (as supported by their Umpire suggestion) seems to be the latter, Plaintiff 's (and Texas law's) position is the former. On the Umpire issue, this policy is clear: "The two appraisers will set separately set the amount of loss, stating the actual cash value and loss to each item. If the appraisers fail to agree, they will submit their differences to the umpire."[4] Thus, two things must occur *before* an umpire can be involved (1) the appraisers separately set the amount of loss, stating the actual cash value and loss to each item; and (2) they must fail to agree. Here, (2) cannot be occur, because Mr. Hromas has refused to fulfill obligation (1). Mr. Hromas has refused to act as an appraiser, rendering (1) impossible to perform while he remains involved. Defendant cannot, as it continues to do, selectively enforce only the terms and conditions of the policy that benefit Defendant. Moreover, Courts must construe the entire insurance policy, read all

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[1] Defendant's Response ¶ 18. "So what if Mr. Hromas uses colorful language that upsets Plaintiff's counsel on chances of recovery."
[2] Defendant's Response ¶ 12 "That sounds to me like Mr. Hromas pontificating on a case ...
[3] *Id*. at ¶ 13.
[4] *See* Defendant's Motion of Summary Judgment, Exhibit A, Policy at p. 14.

of its parts together, and seek to give effect to all of its provisions so that none will be meaningless. *Gilbert Texas Const., LP v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010).

Next, Defendant provides citation to three cases in support of their position that biased Mr. Hromas should remain: *Gen. Star Indemn. Co. v. Spring Creek Village Apts. Phase IV, Inc.*; *Gardner v. State Farm Lloyds*; and *Franco v. Slavonic Mut. Fire Ins. Assoc.*. In each citation arguing that the Court in those cases declined to find the appraiser was biased. In fact, those cases *support* Plaintiff's position. The appraisal language at issue for *Spring Creek Village*, *Gardner*, and *Franco*, all followed the standard Texas form appraisal language, requiring merely "a competent and disinterested appraiser" or a "competent and impartial" appraiser, nothing more.[5] Regarding Mr. Hromas's "interest", Plaintiff agrees, it does not appear Mr. Hromas's compensation is tied to the outcome, and regardless Plaintiff has no evidence Mr. Hromas's compensation is tied to the outcome, and has therefore not alleged that he is "interested" as Texas law construes that term (though his apparent desire not to participate in the process in order to save his client money is suspect). Moreover, Plaintiff has not alleged that Mr. Hromas is not "competent." Under the language and analysis of those three cases, the inquiry would likely end there.

However for this case, the inquiry does not end there. Defendant intended that *their* appraisal language go further than Slavonic Mutual, State Farm Lloyds, and General Star Indemnity. Instead of requiring merely competence and lack of interest, as those carriers did, Defendant *added* additional safeguards to ensure an absolutely fair, impartial, and unbiased process. Here, in order for an appraiser to be "qualified," that appraiser must be "competent,

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[5] *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 141-42 (Tex. App. – Houston [1st Dist.] 2002)("Each will then select a competent, independent appraiser…")(emphasis added).

Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 780-81 (Tex. App. – Houston [14th Dist.] 2004)("each shall select a competent and disinterested appraiser…")(emphasis added)

Gen. Star Indem. Co. v. Spring Creek Vill. Apartments Phase IV, Inc., 152 S.W.3d 733, 737 (Tex. Appl – Houston [14th Dist.] 2004)("each party will select a competent and impartial appraiser…")(emphasis added).

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independent, impartial, and disinterested" they must be "unbiased and free of control" and finally must "act fairly, without bias, *and in good faith*."[6]

Here, Defendant has no substantive response (nor can it have), to Mr. Hromas's predetermination of the outcome, insults to counsel, and improper reliance on case-law and coverage issues, which the policy expressly forbids. There is no credible argument that such conduct is "unbiased" "impartial" or done "fairly" and "in good faith." The cases cited by Defendant demonstrate the lowest level of requirement for an appraiser. This policy sets a much higher bar. Whether Mr. Hromas would have been acceptable according to the language of those policies is immaterial. The question is whether Mr. Hromas's conduct has rendered him unqualified under *this* policy's significantly more stringent language.

Lastly, Defendant's "so what" attitude is apparent in its argument that the proper course is to have the Court ignore Mr. Hromas's disqualification now, continue the process, and wait for Plaintiff to set the award aside at some later date. First, that argument is fatally flawed because it removes from the Court its ability to manage its own docket. Here, Mr. Hromas is refusing to participate in the appraisal, i.e. he is refusing to state the amount of the loss. Thus, an umpire is not appropriate, leaving the appraisal in an incurable limbo-state in perpetuity at the mercy of a biased appraiser. As much as he may wish to be, unlicensed lawyer Kevin Hromas is not judge in this case, and though he may wish it so, it cannot be that he has the power to prolong this appraisal indefinitely, as Defendant seems to prefer.

Moreover, such an approach would result in nothing more than an incredible waste of the parties' and the Court's resources. Plaintiff's recommendation is to stop the bleeding now, disqualify biased Mr. Hromas (as the Court has the power to do), and ensure the process proceeds orderly, fairly, and in compliance with the policy. Or, follow Defendant's recommendation, which

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[6] *See* Defendant's Motion of Summary Judgment, Exhibit A, Policy p. 14-15 (emphasis added).

is to permit a poisoned process to continue indefinitely, further delaying the justice owed Kyle McPike. Defendant all but concedes that an award from a panel on which Mr. Hromas sits (even as a non-signatory) is incurably tainted, and at the very least would require extensive discovery, including subpoenas and depositions, to ascertain just how far Mr. Hromas's bias and bad faith goes. While Defendant might prefer this result, justice does not. Mr. Hromas should be disqualified from this process.

Respectfully submitted,

GREEN KLEIN WOOD & JONES

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CERTIFICATE OF SERVICE

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Envelope ID: 83029247
Filing Code Description: Motion (No Fee)
Filing Description: Plaintiff's Reply in Support of Plaintiff's MTD Def's Appraiser Kevin Hromas
Status as of 1/3/2024 1:14 PM CST

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