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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

K4 DEV, LLC,

Plaintiff,

v.

ACE AMERICAN INSURANCE COMPANY; and DOES ONE through FIFTY,

Defendants.

Case No.: 8:25-cv-01540 FWS (ADSx)

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ORDER COMPELLING APPRAISAL (ARBITRATION) AND FOR STAYING LITIGATION

Complaint Filed: 3/18/2025
Scheduling Conference: 10/02/2025

Date: 10/02/2025
Time: 10:00 a.m.
Assigned to: Hon. Fred W. Slaughter

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Plaintiff K4 Dev, LLC's (K4) motion to compel appraisal (arbitration) should be denied because the insurance policy allows appraisal only where there is a dispute as to the *amount* of the loss – not as to the *existence* of coverage. An appraisal panel would exceed its authority if it were to render an award that necessarily includes (a) whether the delay in opening endorsement applies, and (b) whether any "delay" was caused by two water intrusions events.

I. BACKGROUND

This is a builder's risk matter in which K4 seeks insurance coverage associated with two water intrusion events occurring in May and July 2021 at a hotel construction project in Denver, Colorado. To date, Defendant ACE American Insurance Company (ACE) paid $1,238,460.58 to K4 under the insurance policy at issue. The crux of this dispute – the over $5.7 million question according to K4 – is whether coverage exists under the insurance policy's Delay in Opening Endorsement. That endorsement only covers the actual loss of business income or additional expenses because of a delay *caused* by a covered peril. It does not cover delays *independent* of a covered loss.

K4 claims that two water events delayed the hotel's opening by 144 days. ACE determined that while the water events caused significant damage to the hotel construction project, the achievement of the temporary certificate of occupancy (TCO) for the project—which is necessary to open—was driven by other contract work and not the water events. Accordingly, there is no coverage under the Delay in Opening Endorsement because the delay in opening of the hotel was not caused by the water events.

II. SUMMARY OF ARGUMENT

K4 contends that because the parties have a difference in valuation arising out of the alleged delay in opening of the hotel, appraisal should be compelled. But K4's attempt to reduce this to simply a numbers issue ignores the coverage issues that make this dispute inappropriate for appraisal. K4's claim for delay in opening coverage requires an evaluation as to *coverage* – a matter that exceeds an appraisal panel's

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authority. The parties agreed to appraise only the amount of the "LOSS" – not "DELAY" or coverage under the Delay in Opening Endorsement. This difference in the clear and unambiguous wording in the policy precludes appraisal for the issues K4 presents.

III. APPLICABLE FACTS

On May 26 and May 29, 2021, and July 6, 2021, water intrusion events occurred during the construction of a Hyatt hotel in Denver, Colorado. (*See* Compl. ¶ 8 [D.E. 1-2].) K4, the owner of the hotel property, then sought coverage for property damage and damages resulting from a delay in opening under the policy issued by ACE, policy number I00059941 001 (the Policy). (*Id.* at ¶ ¶ 2, 4, 9.)

ACE promptly responded to and began investigating the water events. To date, ACE paid $1,238,460.58 to K4 for property damage, demolition, and mitigation caused by the water events. But the parties primarily dispute coverage under the Policy's Delay in Opening Endorsement, which provides, in part:

> **INSURING AGREEMENT**
>
> 1. Subject to all terms, conditions, limitations and exclusions of this Endorsement, and of the Policy to which it is attached, the Company will pay the actual Loss of RENTAL INCOME, Loss of BUSINESS INCOME and/or SOFT COSTS/ADDITIONAL EXPENSES sustained during the PERIOD OF INDEMNITY as a result of a DELAY in completion of the INSURED PROJECT described on the Policy Declarations, or as amended by Endorsement, when such DELAY is caused by an OCCURRENCE or series of OCCURRENCE(S), resulting in physical LOSS to insured property by an insured peril.
>
> 2. The Company shall also indemnify the NAMED INSURED for expenditures during the PERIOD OF INDEMNITY that are necessarily incurred for the purpose of reducing any loss amount under this endorsement, but only to the extent that such loss amount otherwise payable under this endorsement is thereby reduced.
>
> * * *
>
> **ADDITIONAL EXCLUSIONS**
>
> The Company shall not be liable for any increase in DELAY caused by or resulting from:

* * *

10. Any deviation from the original SCHEDULED DATE OF COMPLETION or revisions thereto, and which is independent of an insured LOSS which gives rise to a DELAY, whether occurring prior to or after an OCCURRENCE.

* * *

DEFINITIONS

For purposes of this endorsement, the following definitions shall apply in addition to those set forth in the Policy:

1. SCHEDULED DATE OF COMPLETION

The later of the completion date scheduled in the construction contract and stated on Page 1 of this Endorsement, or the date the INSURED PROJECT would have been completed for commencement of commercial operations or use and occupancy if a LOSS had not occurred.

* * *

3. DELAY

The period of time between the SCHEDULED DATE OF COMPLETION and the actual date on which commercial operations or use and occupancy can commence with the exercise of due diligence and dispatch.

(Carpenter Decl., Ex. A, ACE_014844-46.) The Policy provides by endorsements a 28-day "WAITING PERIOD" per occurrence and a maximum 365-day "PERIOD OF INDEMNITY." (*Id.* at ACE_014846, ACE_014868.)

K4 claims that prior to the water events, the hotel construction project was scheduled to be substantially complete by September 11, 2021, and open for business on September 30, 2021. (*See* Pl. Br. at 3, 13-17, 26-28 [D.E. 14-1].) But K4 claims that because of the water events, the opening of the hotel was delayed until February 22, 2022 – a total of 144 days. (*See* Pl. Br. at 4, 17-19 [D.E. 14-1]; Compl. ¶ 11 [D.E. 1-2].)

ACE retained J.S. Held LLC (Held) to assist in its investigation of the delay in opening portion of the claim. (Carpenter Decl., Ex. B.) Held concluded that "the achievement of the project TCO was driven by the completion of storm water systems, smoke control systems, and the installation of doors, along with other incomplete

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contract work, and not the May 29, 2021 and July 6, 2021 losses." (*Id.* at ACE_003978.) Held also found that "[e]ven if alternative methods of completion were available for these items, there still was additional work that would have caused the project to finish past the claimed TCO date of September 11, 2021 that was not related to the loss." (*Id.*) As the Policy only covers the actual loss of business income and/or additional expenses sustained as a result of a delay caused by a covered loss, and does not cover any deviation from the original scheduled date of completion that is independent of a covered loss that gives rise to a delay, ACE respectfully denied coverage for the delay portion of K4's claim. (*Id.*)

While the parties continued to discuss the claim, K4 through counsel ultimately demanded appraisal. (Gumbiner Decl., Ex. 4.) The appraisal provision, found in the main section of the Policy on property damage, provides, in part:

> 11. Appraisal
>
> If the NAMED INSURED and the Company fail to agree on the amount of the LOSS, each upon written demand of either the NAMED INSURED or the Company made within sixty (60) days after receipt of proof of LOSS by the Company, shall select a competent and disinterested appraiser. The appraisers shall then select a competent and disinterested umpire. . . .

(Carpenter Decl., Ex. A, ACE_014832.) "LOSS" is defined in the Policy as "[a]ccidental loss or damage." (*Id.* at ACE_014840.)

ACE rejected K4's demand for appraisal as the dispute did not involve the amount of the loss. Rather, it involved whether coverage was triggered under the Delay in Opening Endorsement. (Gumbiner Decl., Ex. 5; *see* Compl. ¶ 12 [D.E. 1-2] ("…Insurers denied Plaintiff's claim for Delay in Opening losses claiming that Insurers' expert had determined that the water losses did not delay the opening of Plaintiff's hotel….").)

After litigation commenced, ACE independently learned that K4 filed suit against the hotel construction project architect, DLR Group, Inc., in state court in

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Colorado. (Wilson Decl., Ex. C.) In its Complaint against the architect, K4 alleges that:

- The architect amended the construction documents twice, and continued to make changes throughout the course of the hotel construction project;
- Those amendments and changes included the smoke control system, the grand staircase, and storm drain pipe location; and
- The delays associated with the incomplete drawings led to delays and corresponding cost increases for K4.

(*Id.*) These items were identified by Held as the cause of the delay in opening the hotel. (Carpenter Decl., Ex. B, ACE_003978, ACE_003979-4012.)

IV. LEGAL STANDARD

Under California law,[1] an agreement to conduct appraisal in an insurance policy is subject to the California Arbitration Act ("CAA"). *See Louise Gardens of Encino Homeowners' Ass'n., Inc. v. Truck Ins. Exchange, Inc.*, 83 Cal.App.4th 648, 658 (2000). As insurance policies also fall within the scope of the Federal Arbitration Act ("FAA"), this Court's "basic role … is to determine '(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (*en banc*) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1129, 1130 (9th Cir. 2000)). "It is axiomatic that arbitration is a creature of contract and a party cannot be compelled to arbitrate absent a valid agreement to do so." *GE RealProp, LP v. Seneca Ins. Co.*, No. CV 20-4430-DMG (Skx), 2021 WL 1558936, at *4 (C.D. Cal. Jan. 13, 2021) (citing *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648-49 (1986)).

[1] While K4 states that "[t]he parties here appear to agree that California Laws govern this dispute," *see* Pl. Br. at 8 [D.E. 14-1], the loss involved is not a fire and Policy is for a construction risk located in Denver, Colorado with endorsements on "Colorado Changes." But for the purposes of this motion only, *see Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920 (2001) (noting that "a separate conflict of laws inquiry must be made with respect to each issue in the case"), ACE does not challenge K4's assumption as to the application of California law.

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V. APPRAISAL IS INAPPROPRIATE

A. Appraisal Is Only for a Dispute as to the Amount of the "LOSS"

"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. If the policy language is clear and explicit, it governs. When interpreting a policy provision, courts must give its terms their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Walsh Shea Corridor Constructors v. ACE Am. Ins. Co.*, No. 2:24-cv-04515-AH (AJRx), 2025 WL 1723150, at *3 (C.D. Cal. June 5, 2025) (internal quotations and citations omitted).

In the main section of the Policy on property damage, the parties agreed that if they "fail to agree on the amount of the LOSS," each can make a written demand for appraisal. (Carpenter Decl. Ex. A, ACE_014832.) "LOSS" is defined in the Policy as "[a]ccidental loss or damage." (*Id.* at ACE_014840.) But coverage under the Delay in Opening Endorsement concerns costs associated with "DELAY." (*Id.* at ACE_014844). "DELAY" is defined as "[t]he period of time between the SCHEDULED DATE OF COMPLETION and the actual date on which commercial operations or use and occupancy can commence with the exercise of due diligence and dispatch." (*Id*. at ACE_014846.)

No amount of "LOSS" needs to be calculated until it is first determined that there is coverage under the Delay in Opening Endorsement. This distinguishes this case from the cases cited by K4, which involve the value of property damage. *See generally Lee v. California Cap. Ins. Co.*, 237 Cal.App.4th 1154 (2015) (involving the value of property damage following a fire under a fire policy issued pursuant to Cal. Ins. Code § § 2073, 2071); *Kirkwood v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 193 Cal.App.4th 49 (2011) (involving amount of depreciation for personal property destroyed in a fire under a fire policy issued pursuant to Cal. Ins. Code § § 2073, 2071). While K4 cites to *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.*, 92 Cal.App.4th 866, 895 (2001), that case deals with claims different than those asserted

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by K4, but nonetheless agrees that appraisal is appropriate only if there is a disagreement on the value of property.

Though K4's motion seeks appraisal to determine the amount of repair costs and "Claim Expenses," the Complaint is devoid of any reference to a dispute or request for appraisal for those items. (*See generally* Compl. [D.E. 1-2].) In fact, the Complaint is clear when it asserts that Plaintiff only "demanded Appraisal (arbitration) under the Policy to resolve the dispute as to the number of dates of delay and measurement of the amount of loss for that delay." (Compl. ¶ 14 [D.E. 1-2].) Moreover, K4's letter demanding appraisal only identifies a dispute as to the number of days of delay. (*See* Gumbiner Decl., Ex. 4 [D.E. 14-3].) Contrary to the Complaint and demand for appraisal, only the Declaration of Mont Williamson submitted with K4's motion self-servingly suggests a dispute on these items. *See Anderson v. City & Cnty. of Can Francisco*, 169 F. Supp. 3d 995, 1024 (N.D. Cal. 2016) ("The district court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible evidence." (citing cases therein)).

Accordingly, under the plain and unambiguous words in the Policy, appraisal is not appropriate to determine whether a "delay" exists. This makes sense given that coverage and causation – issues intertwined with delay in opening coverage – are not subject to appraisal.

B. The Court – Not an Appraisal Panel – Must Resolve Causation

In the insurance context, the role of an appraiser is constrained to "appraising 'the loss, stating separately actual cash value and loss to each item," and appraisers have no power to decide whether coverage exists. *See*, 193 Cal. App. 4th at 57-59 ("The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy." (internal citations and quotations omitted)).

"California law clearly establishes that appraisers may not determine

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causation." *Guarachi v. Aspen Specialty Ins. Co.*, 2021 WL 6427658, *6 (C.D. Ca. July 16, 2021); *see Lee*, 237 Cal. App. 4th 1173 ("By contrast, the *cause* of any damage does not bear upon the amount that may be required to repair or replace the item …" (emphasis in original)). In fact, an appraisal panel would exceed its authority (thereby requiring an award to be vacated) if it determined the cause of damage to certain items: "By deciding causation issues instead of just limiting itself to valuing the items within the scope of loss presented by the insured, the appraisal panel exceeded its authority by making determinations that certain claimed losses were not covered by the insured's policy." *Lee*, 237 Cal. App. 4th at 1168 (citing and discussing *Kacha v. Allstate Ins. Co.*, 140 Cal. App. 4th 1023, 1036 (2006)). *But see Devonwood Condo. Owners Assoc. v. Farmers Ins. Exchange*, 162 Cal. App. 4th 1498, 1506-07 fn. 4 (2008) (appraisal does not preclude further litigation on other issues between the parties to an insurance policy); *Lee*, 237 Cal. App. 4th at 1173 (allowing an appraisal panel to assign a value of zero to items of loss if inspection reveals the items are undamaged or never existed as the *existence* and *nature* of the claimed item directly bear upon the amount to repair or replace).

Here, the Delay in Opening Endorsement only covers the actual loss of business income or additional expenses sustained as a result of a delay *caused by* a covered peril and does not cover any deviation from the scheduled date of completion that is *independent* of a covered loss. *See* Roger D. Branigin & Daniel N. West, *Coverage for Delay and "Soft Costs" Under Builder's Risk Policies: Avoiding the Pitfalls*, 31 No. 7 Constr. Litig. Rptr. 1 & n.61 (July/August 2010); Neal J. Sweeney et. al, *Construction Law Update* § 3.05 (Aspen 2010) (typical delay in completion endorsements provide coverage only for those construction delays that cause the date of anticipated completion of a construction project to be postponed to a later time—the date of actual completion). Thus, the critical issue for the Court – not an appraisal panel – to resolve is whether either water loss event *caused* a delay in the date the project would have been completed had the loss or losses not occurred. In order to

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do that, it is necessary to determine, among other things, as required under the Policy:

1. The date the hotel construction project would have been completed for commercial operations or use and occupancy if the loss(es) had not occurred;
2. The period of time between the extended date of completion had no loss(es) occurred and the date on which commercial operations or use and occupancy could have commenced with the exercise of due diligence and dispatch;
3. When the period of indemnity starts and ends;
4. Whether there was an increase in delay caused by changes made in the design, plans, or specifications;
5. Whether there were any deviations from the pre-loss scheduled date of completion that were independent of the loss(es) and which resulted in delay; and
6. The number of occurrences – e.g., one or two – that resulted in damage.

(*See* Carpenter Decl., Ex. A, ACE_014843-47.)

Based upon a review of the information made available by K4, Held determined that "the achievement of the project TCO was driven by the completion of storm water systems, smoke control systems, and the installation of doors, along with other incomplete contract work and not the May 29, 2021, and July 6, 2021 losses." (*See* Carpenter Decl., Ex. B, ACE_003978.) And, tellingly, K4 alleged in the Complaint filed against the hotel architect that contract work associated with the architect caused delays and corresponding cost increases for K4. (Wilson Decl., Ex. C.)

Accordingly, this dispute presents much more than a numbers issue, despite K4's limited reading of ACE's correspondence. The coverage issues identified above must first be resolved before it can be determined whether a covered delay occurred. An appraisal panel would need to resolve coverage and causation issues to render an award in this matter, which is in excess of its authority.

C. Lack of Discovery from K4 Makes Appraisal Difficult

Even if appraisal – in whole or in part – was ordered, outstanding discovery

from K4 makes proceeding with appraisal difficult. The appraisal process is significantly limited and more informal than arbitration. *See Kirkwood*, 193 Cal. App. 4th at 57-58. Appraisal "calls for an informal appraisal proceeding, unless the parties mutually agree otherwise, with no depositions, interrogatories, and the like, no formal rules of evidence, and no court reporter." *Id*. at 58.

In *Lee*, a case cited by K4, the trial court continued the insured's motion to compel appraisal to allow the parties to conduct discovery – mainly, re-inspection of the property and a response to the public adjuster's presentation of the claim – and submit supplemental briefing prior to ordering the ill-fated appraisal. *See* 237 Cal. App. 4th at 1161.

To date, K4 has failed to produce critical information concerning the cause of the claimed delay. By way of example, ACE requested that K4 produce all litigation documents and discovery associated with K4's action against the architect. While K4 offered to provide a link to access the relevant documents associated with its litigation for the same delay claim against the architect, to date it has failed to do so. (Wilson Decl. ¶ ¶ 4-9.)

In addition, given the nature of the dispute between the parties, the appraisal panel would benefit from having written discovery and testimony from K4 and others associated with the hotel construction project. Following the conference scheduled pursuant to Fed. R. Civ. P. 26, ACE anticipates serving additional requests for production, interrogatories, and notice to take depositions on K4 and subpoenas for documents and testimony on non-parties. Obtaining full and complete discovery first would allow the appraisal panel, if ordered, to have a better understanding of the progress of the hotel construction project before and after the water events, along with all support associated K4's claim.

Accordingly, to the extent the Court is inclined to consider an appraisal – even a limited one – the motion should be continued for K4 to first provide full and complete discovery.

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VI. CONCLUSION

An appraisal panel does not have the authority to resolve a dispute concerning coverage and causation. Both the clear and unambiguous language in the Policy and the communications between the parties show that this matter is more than the parties simply reaching different amounts as to the costs associated with K4's claim. As such, K4's motion to compel appraisal (arbitration) should be denied. To the extent appraisal (in whole or in part) is ordered, this Court should continue this motion to require K4 to first provide full and complete discovery.

Dated: September 11, 2025

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