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LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 16-01844-BRO-GJS	Date	November 14, 2016
Title	JOHN R. FUCHS ET AL V. STATE FARM GENERAL INSURANCE COMPANY		

Present: The Honorable	BEVERLY REID O'CONNELL, United States District Judge	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER RE DEFENDANT'S MOTION TO COMPEL INSURANCE POLICY APPRAISAL AND TO DISMISS OR STAY ACTION [32]

I. INTRODUCTION

Pending before the Court is Defendant State Farm General Insurance Company's ("Defendant" or "State Farm") Motion to Compel Insurance Policy Appraisal and to Dismiss or Stay Action. (Dkt. No. 32 (hereinafter, "Motion" or "Mot.").) After considering the papers filed in support of and in opposition to the instant Motion, the Court deems this matter appropriate for resolution without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, Defendant's Motion is **GRANTED in part**.

II. FACTUAL BACKGROUND

This dispute arises from the flooding that occurred in Plaintiffs' John R. Fuchs and Robyn R. Fuchs ("Plaintiffs residence on July 27, 2015 .") , The parties dispute (1) the valuation of certain damages to the Plaintiffs' water-damaged residence, (2) the extent of coverage under of Plaintiffs' homeowners insurance policy, and, (3) claims of breach of contract as well as the covenant of good faith and fair dealing.

1. The Parties

Plaintiffs, at all times relevant to this action, are and were individuals who own and reside at 17726 Calle de Palermo, Pacific Palisades, in the City of Los Angeles (the "Residence"). (Dkt. No. 32-3, (hereinafter, "Compl.") ¶ 1.) Plaintiffs are and were the

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insureds under a Homeowners Insurance Policy of State Farm General Insurance Company. (*Id.*)

Defendant State Farm General Insurance Company is a mutual insurance company headquartered in Bloomington, Illinois, that is authorized to do business, and does business, in the State of California. (Compl. ¶ 2.) Defendant provides automobile and property insurance, including homeowners insurance policies in California. (*Id.*) In line with its business and at all times relevant to this Action, Defendant provided homeowners insurance for the Residence. (Compl. ¶ 6.)

2. The Catastrophic Leak

On July 27, 2015, the Plaintiffs' Residence sustained severe water damage when a water supply hose to a second-floor toilet burst, flooding the first and second floors of the Residence. (Compl. ¶ 7.) Plaintiffs allege that the damage to the walls, ceilings, floors, subfloors, carpet, hardwood floor, cabinets, bookcases, file cabinets, furniture, draperies, electronics, and other real and personal property approximated $300,000. (Compl. at 16; Dkt. 38-1, Decl. of John Fuchs, ("Fuchs Decl.") ¶ 2; *see* Opp'n at 2.)

3. The Insurance Claim

After the catastrophic leak, Plaintiffs filed an insurance claim with State Farm. (Compl. ¶ 8.) Their State Farm agent, Rich Festa, referred them to Rainbow Restoration ("Rainbow") a company experienced in the removal of flood waters and water-damaged property. (*Id.*) Rainbow commenced demolition and removal work, which included removal of carpeting, subfloors, walls, ceilings, furniture, personal property, and other water-damaged property. (*Id.*) But after several weeks, mold began forming in the walls. (*Id.*)

A local, unnamed, claim representative was later appointed to Plaintiffs' claim, and made two or three visits to the Residence to inspect the damage and ongoing repair work. (Compl. ¶ 9.) Then, Defendant referred Plaintiffs to a general contractor known as Service Masters, based on Service Masters's prior experience working for State Farm to remediate mold and repair water-damages properties. (Compl. ¶ 10.) In August 2015, Service Masters provided estimates to Defendant for the initial repairs, and on September

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2, 2015, Defendant provided a breakdown for an initial payment of insurance proceeds of $27,037.43, characterizing Service Masters's planned work as work to the structure. (*Id.*) On or about September 4, 2015, Defendant mailed to Plaintiffs a check in that amount. (*Id.*) Then, in August 2015, Service Masters suspected that mold had started to form inside the walls; thus, Plaintiffs hired a mold testing company, which confirmed Service Masters's suspicion and estimated that mold remediation would cost $14,000. (Compl. ¶ 13.) Defendant refused to pay for the $14,000, instead advising Plaintiffs that the Insurance Policy contained a $5,000 mold exclusion. (*Id.*)

Beginning at the end of July 2015, and over the course of the next several months, Plaintiffs incurred various other costs, for which they sought reimbursement. Plaintiffs allege that Defendant "fail[ed] or refus[ed] to thoroughly investigate" and "refus[ed] to pay" Plaintiffs' claims in the following amounts: (1) $5,419.73 to replace and refinish the hardwood floor and framing associated with the damage to the shear wall, (Compl. ¶ 19(1)); (2) $2,579.56 for the repair of the water damage to the laundry room, (*Id.* ¶ 19(2)); (3) $23,925 for the cost of 319 hours of supervision of the work by Robyn Fuchs over a four-month period, (Compl. ¶ 19(3)); (4) $3,904.79 for the costs and expenses incurred when Plaintiffs vacated their Residence so the hardwood floor could be refinished, (Compl. ¶ 22); (5) $41,030.87 for the furniture, drapery fabrics, and other items that were damaged beyond repair in the flood, (Compl. ¶ 23); (6) at least $5,000[1] for the failure of the water heater and related damage, (Compl. ¶ 27(11)); (7) $48,629.83 for electronic equipment, (Fuchs Decl. ¶ 16); and, (8) $100,000 for Mrs. Fuchs's medical bills allegedly incurred due to exposure to mold, construction dust, toxins, and fumes that circulated throughout the Residence, as well as items that the contractors failed to finish, and emotional distress suffered by Plaintiffs, (Fuchs Decl. ¶¶ 17–18).

[redacted] *with* Fuchs Decl. ¶ 7 *and* Plaintiffs' Response

[1] Claims adjuster Normando Barron, allegedly advised Plaintiffs that the costs of water heater damage and replacement would not be covered by Defendant, because in his view, the leaks in the water heater could not have been caused by the failed pressure regulator. (Compl. ¶ 17.)

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to Special Interrog. Nos. 13, 14 at 30–32 ("Starting in September [2015], State Farm made several payments on Plaintiffs' Policy between September 8, 2015 and January 4, 2016, totaling $64,176.15.").) [redacted]

With respect to the additional, unpaid claims, Defendant has allegedly refused to acknowledge receipt of the claims, and also refused to pay or deny them in writing. (*Id.*) And Plaintiffs assert that "of [the] eight additional claims filed with State Farm from October 2015 through August 2016, none of them has been formally paid, denied or even disputed in writing." (Fuchs Decl. ¶ 19.) Five of those claims have allegedly been orally denied, "on the basis that *there is no coverage in [Plaintiffs'] Policy requiring State Farm to pay these claims*." (Fuchs Decl. ¶ 19 (emphasis in original).) In light of the alleged unreimbursed costs, and the alleged breaches of contract and covenant of good faith and fair dealing, Plaintiffs seek at approximately $300,000 in compensatory damages. (*See* Compl. at 16; *see also* Opp'n at 9 ("Plaintiffs have valued their claims at $262,229.13.").)

4. The Loss Settlement Provision In The Homeowners Insurance Policy

The homeowners insurance policy (the "Policy" or "Insurance Policy") contains a loss settlement clause providing for an appraisal process as detailed below:

Appraisal

> In case you and we shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing

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> for 15 days to agree upon the umpire, then, on your or our request, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located.
>
> Appraisal proceedings are informal unless you and we mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings.
>
> The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with us shall determine the amount of actual cash value and loss.
>
> Each appraiser shall be paid by the party selecting him or her and the expenses of appraisal and umpire shall be paid by the parties equally.
>
> In the event of a government-declared disaster, as defined in the Government Code, appraisal may be requested by either the insured or this company but shall not be compelled.

(Dkt. No. 32-2, Johnson Decl. ¶ 2, Ex. A, State Farm's Homeowners Insurance Policy (the "Policy") at 13.)

III. PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint in this action (the "Action") in the Superior Court of the State of California, County of Los Angeles, West District ("Los Angeles Superior Court") on February 11, 2016, alleging two causes of action: (1) Breach of contract; and, (2) Breach of the covenant of good faith and fair dealing. (*See* Compl.) Defendant answered the Complaint on March 16, 2016, raising twenty-five affirmative defenses. (Dkt. No. 1-2 ("Answer").) On March 17, 2016, Defendant removed the Action to this Court. (*See* Dkt. No. 1 ("Removal").) On June 2, 2016, this Court, on its

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own motion, vacated the scheduling conference set for Monday, June 6, 2016, and instead ordered the Action to Court Mediation Panel for mediation ("ADR Procedure 2"). (*See* Dkt. Nos. 15, 16.) The Action was assigned to panel mediator Caroline C. Vincent on July 25, 2016. (Dkt. No. 19.)

Then, on October 13, 2016, Plaintiffs filed their pending Motion for Summary Judgment as to First Cause of Action for Breach of Contract. (Dkt. No. 25 ("Pending MSJ").) Defendant has not opposed the Pending MSJ; instead, Defendant filed the instant Motion to Compel Appraisal on October 17, 2016. (Dkt. No. 32.) Subsequently, on October 24, 2016, Defendant filed its Motion for Summary Judgment as to All Causes of Action. (Dkt. No. 40 ("Def.'s MSJ").)

Plaintiffs opposed Defendant's Motion to Compel Insurance Policy Appraisal on October 24, 2016. (Dkt. No. 38 ("Opp'n").) Together with their opposition, Plaintiffs filed Evidentiary Objections to Declarations and Exhibits on Defendant's Motion. (Dkt. No. 38-5 ("Pls. Objs.").) On October 31, 2016, Defendant replied. (Dkt. No. 51 ("Reply").) Together with its Reply, Defendant filed its Evidentiary Objections to, and Request to Strike, Portions of the Declaration of John Fuchs. (Dkt. No. 51-13 ("Def. Objs.").) Finally, on November 1, 2016, Plaintiffs filed their Evidentiary Objections to, and Request to Strike, all of the evidence submitted by Defendant with its Reply. (Dkt. No. 52 ("Pls. Reply Objs.").)

IV. EVIDENTIARY OBJECTIONS

A. Defendant's Evidentiary Objections To John Fuchs's Declaration

Defendant State Farm separately filed evidentiary objections to Fuchs's Declaration. (*See* Def. Objs.) Defendant objected on the following grounds: lack of foundation/misstatement of evidence, lack of personal knowledge, relevance, and hearsay. The Court **OVERRULES** Defendant's objections on lack of personal knowledge and lack of foundation grounds; John Fuchs has personal knowledge of the Residence, the repairs after the flooding, Plaintiffs' interactions with Defendant's representatives, the and receipts Plaintiffs submitted. Moreover, the assertions in Fuchs's Declaration, while antagonistic to Defendant's position, are not necessarily misstatements of evidence on that basis. As such, the Court **OVERRULES** Defendant's objection on

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misstatement of evidence grounds. Finally, the Court **OVERRULES** Defendant's objections on hearsay grounds; the statements to which Defendant objects are statements made by Defendant's representatives;[2] as such, they are excepted from the hearsay rule as statements by a party opponent.

B. Plaintiffs' Evidentiary Objections To Johnson And Giovannone's Declarations

Plaintiffs object to paragraphs 1–11 of Johnson's Declaration, (Dkt. No. 32-1), on lack of personal knowledge, foundation, and hearsay grounds. (*See* Pls. Objs. at 4.) In particular, Plaintiffs contend that Johnson fails to "testify as to any basis why she would have personal knowledge concerning these events involving the plaintiffs, nor does she provide any foundation for the attached Exhibits C, D, G, H, I, and J." (*See id.* at 4–5.)

The Court finds that Ms. Johnson's statement that she is a "Team Manager for State Farm Fire & Casualty Company at State Farm General Insurance Company," (Dkt. No. 32-1, Johnson Decl. ¶ 1), suffices to establish her role as an employee of Defendant, with personal knowledge and foundation to testify about claim records maintained by Defendant. Moreover, the records referenced in Johnson's Declaration fall under the business records exception to the hearsay rule. Fed. R. Evid. 803(6). Thus, the Court **OVERRULES** Plaintiffs' objections to Johnson's Declaration.

Plaintiffs also object to paragraphs 8, 9, and 10 of Giovannone's Declaration on lack of personal knowledge, foundation, and hearsay grounds. (*See* Pls. Objs. at 2.) In particular, Plaintiffs assert that Giovannone "does not testify as to any basis for personal knowledge concerning the acts alleged by anyone at State Farm" and that it is "improper for Ms. Giovannone to testify as to any of these events without any personal knowledge or foundation for the testimony." (*See id.* at 2–3.) The Court does not rely on the

[2] For example, Defendant objects on hearsay grounds to Plaintiff John Fuchs's declaration that "Mr. Cross, who apparently purports to be some kind of plumbing expert, asserted to me in that phone conversation that the failure of the water heater was unrelated to the failure of the pressure regulator and that *this claim was not covered by our Policy because a separate $10,000 deductible applied*. (Def. Objs. at 6 (emphasis in original).) This is not hearsay as Mr. Cross was acting on behalf of the party opponent. *See* Fed.R.Evid. 801(d)(2)(C).

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paragraphs to which Plaintiffs object. As such, the Court **OVERRULES as moot** Plaintiffs' objections to Giovannone's Declaration.

C. Plaintiffs' Evidentiary Objections To Defendant's Evidence Supplied With The Reply

Plaintiffs further object to evidence offered by Defendant in the Reply, on the grounds that "the reply Exhibits 1 through 9, are an attempt to correct [a] deficiency in State Farm's moving papers" and "[a] moving party is not permitted to offer new evidence or arguments in its reply." (*See* Pls. Reply Objs. at 2.) The Court does not rely on the evidence presented by Defendant in the Reply; thus, the Court **OVERRULES as moot** Plaintiffs' objections thereto.

V. LEGAL STANDARD

The Federal Arbitration Act ("FAA") permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Additionally, the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The Court's role under the FAA "is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4; *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719–20 (9th Cir. 1999); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477–78 (9th Cir. 1991)). "While the first question is a matter of contract interpretation governed by state law without any presumption in favor of arbitrability, the second question falls under the [FAA's] clear policy favoring arbitration." *Platte River Ins. Co. v. Dignity Health*, No. C-12-2356 EMC, 2013 WL 1149656, at *4 (N.D. Cal. Mar. 19, 2013).

If a valid agreement exists and the dispute in question falls within the scope of the agreement, then the FAA "requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron*, 207 F.3d at 1130. The court must also stay any

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further proceedings until the arbitration has been completed. *See* 9 U.S.C. § 3 ("[T]he court . . . upon being satisfied that the issue involved . . . is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.").

VI. DISCUSSION

"The [party seeking arbitration] bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010) (quoting *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (Cal. 1997)). Plaintiff attaches a copy of the Policy to its Complaint and Defendant attaches a copy to its Motion. (*See* Removal; Policy.) The Policy's loss settlement provision provides in relevant part:

> In case [Plaintiffs] and [Defendant] shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on [Plaintiffs'] or [Defendant's] request, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located.
>
> Why duplicate the language?

(Policy at 13.) Importantly, the Insurance Policy also provides that "No action shall be brought unless there has been compliance with the policy provisions." (*See* Policy at 39.) Defendant argues that the appraisal provision in the Insurance Policy is an enforceable arbitration agreement, and that under the appraisal provision, Plaintiffs are bound to proceed through the administrative appraisal process in advance of seeking redress from this Court regarding their allegedly unreimbursed claims. (Mot. at 2.) Based thereon, Defendant requests that this Court compel appraisal, and dismiss or stay the pending proceedings before this Court. (*See id.*)

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Plaintiffs counter with three primary arguments for why this Court should not compel appraisal: (1) the appraisal clause does not encompass Plaintiffs' causes of action because their causes of action relate to issues of coverage rather than valuation of loss; (2) Defendant has waived its right to enforce the arbitration clause; and, (3) Defendant has failed to provide admissible evidence. (*See generally* Opp'n.)

A. Whether The Appraisal Clause Exists And Encompasses Plaintiffs' Claims

1. A Valid Appraisal Clause Exists

As addressed above, the Court must determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp.*, 207 F.3d at 1130. An agreement to conduct an appraisal contained in an insurance policy is binding, and considered in the same way as an arbitration clause. *Relentless, LLC v. Basin Marine, Inc.*, No. 10-1794 DOC VBKX, 2011 WL 2682691, at *1 (C.D. Cal. July 8, 2011) (citing *Louise Gardens of Encino Homeowners' Ass'n Inc. v. Truck Ins. Exch., Inc.*, 82 Cal. App. 4th 648, 658 (Cal. App. Ct. 2000); *see also Unetco Indus. Exch. v. Homestead Ins. Co.*, 57 Cal. App. 4th 1459, 1465–66 (Cal. App. Ct. 1997) ("Arbitration—and similarly appraisal . . . is a favored means of dispute resolution.") (internal citations omitted).

Consistent therewith, Defendant argues that "[a]ppraisals in California are generally subject to the rules governing contractual arbitration." (Mot. at 10.) In support, Defendant cites Cal. Civ. Proc. Code § 1280(a), which defines "agreement" to include "agreements providing for valuations, appraisals and similar proceedings . . . ." (*See* Mot. at 10 (citing § 1280(a)).) And Plaintiff concedes that the appraisal clause in fact exists in the Insurance Policy and that "an appraisal provision is in essence a demand for arbitration . . . ." (Opp'n at 14.) In light of the foregoing, the Court finds that a valid arbitration clause exists here.

2. The Appraisal Clause Encompasses Plaintiffs' Claims

Under the FAA, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is

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the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

a. Certain Claims Are Valuation Disputes

Plaintiffs vehemently contend that the arbitration clause does not encompass their claims because these relate to coverage, rather than valuation. (*See* Opp'n at 8; see also Fuchs Decl. ¶ 19.) In support, Plaintiffs explain that "*nowhere in its Motion, its supporting declarations or supporting exhibits, does State Farm set forth what its valuation is of each of Plaintiffs' claims . . . .*" (Opp'n at 8 (emphasis in original).) Plaintiffs argue that Defendant "did not set forth any lesser valuation to Plaintiffs" because "*State Farm never disputed the valuation of any of Plaintiffs' claims*." (Opp'n at 9 (emphasis in original).)

[redacted] *with* Fuchs Decl. ¶ 7 *and* Plaintiffs' Response to Special Interrog. Nos. 13, 14 at 30–32 ("Starting in September [2015], State Farm made several payments on Plaintiffs' Policy between September 8, 2015 and January 4, 2016, totaling $64,176.15.").)

[redacted]

Defendant maintains that in Plaintiffs' responses to Defendant's Special Interrogatories and Requests for Production, Set One, Plaintiffs contend that Defendant undervalued their damages. (Mot. at 9 (citing Giovannone Decl. ¶¶ 2, 4, 11; Exs. K, M).)

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The Court agrees that Plaintiffs' responses to Defendant's interrogatories support Defendant's argument that Plaintiffs seek not merely a determination of coverage, but also dispute the valuation accorded by Defendant to certain property damage to the Residence. For instance, Plaintiffs argue that "the claim for $5,419.73 for the additional costs of replacing and refinishing the hardwood floor . . . was and is reasonable and necessary to restore Plaintiffs' Residence back to the condition it was in before the flood." (Dkt. 32-13 at 24, Response to Special Interrogatory 7.) Further, Plaintiffs contend that "in December 2015, after Plaintiffs filed several *additional claims for water damage* remediation and repair . . . State Farm simply stopped making payments . . . ." (*See* Dkt. No. 32-13 at 33, Response to Special Interrogatory 14 (emphasis added).) And Plaintiffs attach receipts of various repair costs, purportedly to establish the damages of their breach of contract and covenant of good faith and fair dealing claims. (*See generally* Dkt. No. 38-2, Ex. 3.)

Because the additional claimed costs for water damage, flooring, and electronics[3] (among others), relate at least in part to damages for which Defendant has already paid amounts in reimbursement (such as laundry room repairs, services by Service Master, and Coverage B – Personal Property), the Court finds that Defendant's failure to reimburse Plaintiffs' additional claims for subject damages previously reimbursed is, in essence, a dispute as to the appropriate valuation of the damage underlying those payments. The damages Plaintiffs claim in the Complaint exist only insofar as Defendant is improperly refusing to reimburse Plaintiffs' claimed costs. Such impropriety hinges, in part, on whether the damages to the Residence exceeded the amounts already paid by Defendant to Plaintiffs.[4] If the value of the underlying, reimbursable damage is higher than presently estimated, as Plaintiffs assert through their filing of additional claims, then additional payments by Defendant may be appropriate. On the other hand, if Defendant's

[3] Plaintiffs' outstanding claim for an additional $48,629.83 for replacement of their electronic equipment, (*see* Dkt. 32-13 at 33), appears to necessitate an appraisal (or re-appraisal) of the actual value of personal electronics that Plaintiffs lost in the flooding, before the Court can determine whether the sum alleged to be unpaid is actually owed by Defendant to Plaintiffs.

[4] In contrast to Plaintiffs' position, the Court does not view a refusal to pay as an unambiguous failure to contest Plaintiffs' valuation; refusal to pay may also be a manifestation of Defendant's position that Defendant's valuation of certain lost, claimed property is equal to the amount that Defendant has paid to date.

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payments to date suffice to cover the underlying damages, then no additional payment is owed, and Defendant's present failure to pay additional amounts on particular claimed damages is justified.

Moreover, the Court construes any ambiguity in favor of arbitration. *See Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 931 (N.D. Cal. 2012) ("[T]o require arbitration, the allegations of the complaint need only 'touch matters' covered by the agreement containing the arbitration provision, and 'all doubts are to be resolved in favor of arbitrability.'" (quoting *Simula*, 175 F.3d at 721). In view of the foregoing, the Court finds that Plaintiffs' claims here "touch matters" covered by the Policy's appraisal clause. Thus, the appraisal clause here encompasses a number of Plaintiffs' claims.

b. Other Claims Exceed Mere Valuation Disputes, Extending Into Coverage Issues And Allegations Of Bad Faith

Separate and distinct from the valuation disputes, however, are Plaintiffs' claims for "medical bills and emotional distress," (Opp'n at 9), which appear to have been ignored by Defendant and presently remain entirely unreimbursed. And Plaintiffs' allegations that Defendant's representatives have "orally denied coverage" remain. (*See* Fuchs Decl. ¶ 19.) Plaintiffs also dispute a $5,000 reimbursement by Defendant for the mold remediation, (*see* Compl. ¶ 13), which is more akin to a coverage dispute than a valuation dispute.[5]

The Court agrees that the alleged oral denials of coverage as well as any failure to address medical bills and emotional distress exceed the parameters of a valuation dispute. Plaintiffs also seek recompense for alleged failure or refusal to thoroughly investigate, and refusal to pay Plaintiffs' claims. (*See* Compl. ¶ 35.) According to Plaintiffs, this failure or refusal was made in bad faith. (*Id.* at ¶¶ 27, 35.) These issues exceed disputes of actual value. Thus, Court finds that Plaintiffs' claims involve both valuation and

[5] Plaintiffs have offered evidence to show that the $5,000 disbursement approved by Defendant for mold remediation is based on a conception of coverage with which Plaintiffs vehemently disagree. (Opp'n at 4–5 (citing Fuchs Decl. ¶¶ 6, 7).) Plaintiffs maintain that the entire cost of the mold remediation should have been reimbursed by Defendant. (*Id.*)

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coverage disputes. Accordingly, the Court agrees with Defendant that the arbitration clause partially encompasses Plaintiffs' claims.[6]

B. Plaintiffs' Defenses

Plaintiffs raise a number of defenses against being compelled to proceed with appraisal pursuant to the Policy. First, Plaintiffs argue that Defendant's Motion is untimely, and that Defendant has therefore waived its right to appraisal. (Opp'n at 14.) Next, Plaintiffs claim that Defendant has failed to submit admissible evidence in support of its Motion.[7] (Opp'n at 18.) Again, under the FAA, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Mercury Constr. Corp.*, 460 U.S. at 24–25. For the reasons below, Plaintiffs' defenses are insufficient to prevent the Court from compelling appraisal here.

1. Waiver

Plaintiff argues that Defendant's Motion is untimely, and thus, Defendant has waived its right to arbitrate. (*See* Opp'n at 14.) "In the Ninth Circuit, arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that party inconsistent with such an existing right; and (3) there must be prejudice resulting from the waiving party's inconsistent acts." *United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002). "[A] party arguing waiver of the right to arbitrate 'bears a heavy burden of proof.'" *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 975–76 (C.D. Cal. 2012) (quoting *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009)). It appears that the first condition of constructive waiver is undisputed; both

[6] But insofar as the issues before the Court in the Complaint, this Motion, Plaintiffs' Pending MSJ, and Defendant's MSJ are unrelated to valuation, the Action will not be dismissed. *See* discussion *infra* Section VI.C.

[7] The Court disposes of this defense in its discussion of the parties' evidentiary objections. *See* discussion *supra* Section IV.

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Plaintiffs and Defendant were parties to the underlying Policy, which expressly reflects the appraisal clause. And Defendant makes no attempt to argue that it was unaware of its appraisal right. Thus, the Court will begin its analysis with the second condition, concerning inconsistent acts.

a. Whether Defendant Engaged in Acts Inconsistent with Its Right to Arbitrate

Plaintiffs maintain that Defendant "has *waived to* [sic] *right to compel an appraisal*, since this action is now only three and a half months from trial, after extensive litigation in this Court." (Opp'n at 17 (emphasis in original).) "There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate." *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016). However, "a party's extended silence and delay in moving for arbitration may indicate a 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims," which would be inconsistent with a right to arbitrate." *Id.* (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988)).

The Ninth Circuit has "[found] this element satisfied when a party chooses to delay his right to compel arbitration by actively litigating his case to take advantage of being in federal court." *Id.*; *see also Kelly v. Pub. Util. Dist. No. 2*, 552 Fed. Appx. 663, 664 (9th Cir. 2014) (finding this element satisfied when the parties "conducted discovery and litigated motions, including a preliminary injunction and a motion to dismiss"); *see also Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1067–68 (C.D. Cal. 2011) (finding this element satisfied when the defendant actively litigated the case by removing it to federal court, seeking a venue transfer, participating in meetings and scheduling conferences, negotiating and entering into a protective order, and participating in discovery that would not have been available under the arbitration agreement). "Additionally, although filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act, seeking a decision on the merits of an issue may satisfy this element." *Martin*, 829 F.3d at 1125.

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Here, Defendant waited approximately seven months between the time of Removal (March 2016) and the filing of its Motion (October 2016).[8] But Defendant has not actively engaged in litigation prior to the filing of the Motion to Compel to the extent necessary to constitute waiver because: (1) Defendant filed no motion to dismiss, (2) the Pending MSJ was filed by Plaintiffs rather than Defendant; (3) the negotiation of a protective order, alone, is insufficient to constitute action inconsistent with Defendant's right to appraisal; and, (4) Defendant filed its Motion for Summary Judgment after the Motion to Compel Appraisal, (*see* Def.'s MSJ). And Defendant argues that honest negotiations were still ongoing between the parties,

Importantly, valuation issues, which may be resolved by appraisal, and issues of coverage or bad faith, may proceed simultaneously. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. C 08-1365 CW, 2008 WL 2620900, at *11 (N.D. Cal. June 30, 2008) (allowing adjudication of non-valuation issues to run concurrently with appraisal); Relentless, 2011 WL 2682691, at *3 (denying motion to stay litigation while appraisal was proceeding and instructing that "appraisal must address only the factual issue of the amount of loss, but not insurance policy or legal issues."). Here, an appraisal is insufficient for Defendant to adequately defend against Plaintiffs' claims of bad faith and breach of contract, (although related). Thus, the Court finds that the negotiation of a protective order, and even the filing of a counter-motion for summary judgment, do not constitute acts inconsistent with Defendant's appraisal right. Therefore, the Court finds that the second prong is not satisfied.

[8] The Ninth Circuit recently held that a 17-month time lapse between the start of an action and the filing of a motion to compel arbitration supported a finding of conduct inconsistent with a right to arbitrate. *See Martin*, 829 F.3d at 1126. But other circuits have held that even shorter delays may weigh in favor of finding waiver. *See, e.g., Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 454–55 (3d Cir. 2011) (holding that a ten-month delay before moving to compel, while not dispositive, weighed in favor of waiver); *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir.2016) (finding prejudice after an eight month delay); *Kelly*, 552 F. App'x at 664 (finding prejudice when the defendants waited eleven months to compel arbitration); *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 949, 951 n.7 (1st Cir. 2014) (finding prejudice with a nine-month delay after the filing of the complaint).

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b. Whether Plaintiffs Were Prejudiced

Moreover, even if the second prong was met, the Court finds that the third prong is not met. "To prove prejudice, plaintiffs must show more than 'self-inflicted' wounds that they incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement." *Martin*, 829 F.3d at 1126. Rather, to establish prejudice, Plaintiffs must show that, due to Defendant's delay in seeking arbitration, the Plaintiffs have incurred costs they "would not otherwise have incurred," that they "would be forced to relitigate an issue on the merits" on which they already prevailed in court, or "that the defendant[] [has] received an advantage from litigating in federal court that [it] would not have received in arbitration." *See id.*

Plaintiffs claim that they have been prejudiced by Defendant's delay in seeking to compel arbitration because Plaintiffs were involved in discovery that "would not have been available in the appraisal process," and also spent extensive time, effort, and money ($75,000) in legal fees litigating the action (including negotiating a protective order). (Opp'n at 17.) As explained above, an appraisal proceeding is an insufficient (and inappropriate) forum for Defendant to defend against Plaintiffs' claims, which as Plaintiffs admit, exceed merely claims for valuation. As such, the discovery costs of which Plaintiffs complain would have arisen irrespective of whether an appraisal proceeding had been initiated earlier. And at this time, Plaintiffs would not be prejudiced by the threat of relitigating issues, because none have been litigated yet. Finally, Defendant has not received any clear advantage thus far, by litigating in federal court. *See Martin*, 829 F.3d at 1125.

Therefore, the Court finds that Plaintiffs have suffered no prejudice at this stage and the third prong is not met. *See Madrigal v. New Cingular Wireless Servs., Inc.*, No. 09-CV-00033-OWW-SMS, 2009 WL 2513478, at *14 (E.D. Cal. Aug. 17, 2009) ("Plaintiffs have not shown sufficient prejudice arising from . . . Defendants' 'delay' in moving to compel arbitration. The record does not reflect that Defendants have litigated their counterclaims, engaged in significant discovery (or any discovery), or caused Plaintiffs to incur excessive fees due to any 'delay' in seeking to compel arbitration.").

In view of the foregoing, the Court finds that Plaintiffs have failed to meet their burden of establishing waiver. And as explained above, Defendant's offered evidence, to

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the extent the Court relied upon it, is admissible. Thus, the Court finds that Plaintiff has failed to prove any of its proffered defenses; the appraisal clause is enforceable. Because the Court deems appraisal appropriate and necessary,[9] it hereby **ORDERS** that the appraisal occur within the next forty-five (45) days.

C. Stay or Dismissal

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Whether to stay an action depends on a court's exercise of judgment in balancing potentially competing interests. *Id.* (citing *Kan. City S. Ry. v. United States*, 282 U.S. 760, 763 (1931); *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379, 382 (1935)).

Among those interests to be weighed are "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Where separate proceedings relate to a case, "[a] trial court may . . . find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case . . . and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979).

As Plaintiffs assert, appraisers have no authority over coverage disputes. (Opp'n at 12–13.) Such disputes, as well as the allegations of bad faith, unfair dealing, and breach of contract, must be reserved for this Court. Because the Motion was filed eight months after Plaintiffs filed the Action, the Court here **DENIES** Defendant's Motion to Dismiss

[9] *See Enger v. Allstate Ins. Co.*, 407 F. App'x 191, 193 (9th Cir. 2010) ("Until an appraisal is completed, it is impossible to know whether Enger's claim in fact was undervalued, such that her claims for breach of contract, breach of the covenant of good faith and fair dealing, and Cal. Bus. & Prof. Code § 17200 et seq., are viable.")

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the proceedings, so as not to deny Plaintiffs the resolution of the coverage disputes, allegations of bad faith and related claims, which Plaintiffs have duly pursued in federal court. Moreover, the Court finds a stay to be unnecessary, because the appraisal is to be conducted expeditiously, and in advance of the disposition of the counter-motions for summary judgment. *See Relentless, LLC v. Basin Marine, Inc.*, No. 10-1794 DOC VBKX, 2011 WL 2682691, at *3 (C.D. Cal. July 8, 2011) (compelling an appraisal, yet finding a stay of the litigation to be unnecessary, given that the appraisal was to happen within 30 days).

VII. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion to Compel Appraisal and **DENIES** Defendant's Motion to Dismiss or Stay the proceedings. To permit the Court to monitor the advancement of the appraisal process, the Court **ORDERS** the parties to file periodic status reports regarding the appraisal. The first such report is to be filed **by 4:00 p.m. on Friday, November 18, 2016**. The parties shall file successive reports **every fourteen (14) calendar days thereafter**. Each report must indicate on the face page the date on which the next report is due. This Court retains jurisdiction over this action and this Order shall not prejudice any party to this Action.

IT IS SO ORDERED.

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