

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

Case No: \_\_\_\_\_

TOMMY MANION OF TEXAS, INC.,

Plaintiff,

v.

**JURY TRIAL DEMAND**

INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA

Defendant.

**COMPLAINT**

Plaintiff Tommy Manion of Texas, Inc., a Texas corporation, (“TMT”, "Manion" or “Plaintiff”), through its undersigned counsel, brings this action to recover a money judgment, declaratory orders, and other relief against Defendant Indemnity Insurance Company of North America, an out-of-state insurance company, (“Indemnity” or “Defendant”), and in support alleges:

**SUMMARY OF SUIT**

1. This is a suit brought by an insured against its insurance company for failure to honor its insuring agreements to cover and pay for property damages of almost \$1 million caused by a hail storm at the Ranch on or about May 15, 2013. This suit presents claims for breach of the insuring contract, violation of the Texas Prompt Pay Statute, and breach of various statutory and common law duties prohibiting an insurer from engaging in bad faith settlement practices,

including violations of the Texas Insurance Code, the Texas Deceptive Trade Practices Act, and an insurer's common law duty to act in good faith and to deal fairly in settling a claim with an insured. Based upon the foregoing breaches of contract, statutory duties, and common law duties, TMT brings this suit to obtain a money judgment to recover: (1) damages for failure to pay wrongfully denied policy benefits; (2) interest of 18% per annum for failure to honor the Prompt Pay Statute; (3) damages for bad faith settlement practices, including recovery for independent injuries suffered separate from the wrongfully denied policy benefits; (4) statutory treble damages under the Deceptive Trade Practices Act; (5) exemplary damages; (6) attorney's fees and costs; and (7) pre and post judgment interest.

### **PARTIES**

2. TMT is a Texas corporation with its principal place of business at Highway 377 North, Aubrey Texas, 76227. ("Manion Ranch").

3. Indemnity is a Pennsylvania corporation with its principal place of business at 436 Walnut Street, Philadelphia, Pennsylvania, 19106. Indemnity registered with the Texas Department of Insurance to transact business in Texas in September, 1987, and has been registered to do business in Texas continuously since then. Indemnity's registered agent for service of process is CT Corporation System, 350 North St. Paul Street, Dallas, Texas, 75201.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to section 1332 of title 28, U.S.C. because there is complete diversity of citizenship between the parties, and the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs.

5. This Court has personal jurisdiction over Indemnity because Indemnity is

admitted to do business in Texas, regularly conducts its business in Texas, the claims brought by this suit are based upon a policy issued to a Texas resident and conduct by the Defendant that took place in Texas, and Indemnity has a registered agent for service of process located in Texas.

6. Venue lies in this District and Division pursuant to section 1391(b)(2) of title 28, U.S.C. because Plaintiff resides, and the property which is the subject of this suit is found in this District and Division.

### **FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

#### **The Policy and the Hail Storm**

7. Indemnity sold and issued to TMT a farm owners policy of insurance, containing various coverages, bearing policy number FO-203116, (the “Policy” or the “Insurance Contract”). The policy period ran from 5/1/13 to 5/1/14, and was in full force and effect at all pertinent times. TMT was a named insured under the terms of the Policy and it is the owner of the property for which the claim against the Policy was made, and which underlies this suit.

8. The Policy provides insurance coverage for the well-known quarter horse operation at the Manion Ranch, consisting of multiple working ranch buildings, a home, living quarters for employees, horse barns, and other related structures.

9. On or about May 15, 2013, several buildings at the Manion Ranch sustained significant damage as the result of a hail storm, all of which were covered against such damage by the Policy.

#### **Ajuster Bates is Retained by Indemnity to Calculate the Losses to the Ranch Buildings**

10. In full compliance with the Insurance Contract, Plaintiff promptly provided

Defendant with written notice of its claim for insurance payments to compensate it for damage to the Ranch's buildings. Indemnity, in turn, quickly retained Team One Adjusting Services, a/k/a Team One Claims Services ("Team One"), as its agent to coordinate the assessment of the Claim. Team One then engaged Tim Bates, a professional adjuster, to adjust the loss. Bates began his work at the Manion Ranch on or about May 18, 2013, and in full compliance with the Policy, TMT permitted and cooperated with Bates' inspections of the damaged properties.

**Bates' Damages Assessment -- The Core of the Bad Faith Claims**

11. Bates worked on his assessment of damages to the Ranch buildings for several weeks beginning in May, 2013, and on or about June 23, turned in to Team One a complete written report believed to contain his various calculations, photos of the damaged buildings, and details of the damages to each building. Team One, in turn, is known to have forwarded it to Indemnity. That report, as prepared and signed by Bates:

(a) Assessed the amount of damages to the Ranch buildings covered by the Policy as being between \$900,000 and \$1 million. Plaintiff cannot plead the exact amount of damages found by Bates, or describe its contents with accuracy, since it does not have a copy of his report (although it has requested one, and the request was refused). At this point, TMT has no choice but to rely mostly upon hearsay information about Bates' report.

(b) Correctly appraised the metal roofs on all of the Ranch buildings, except for the show arena, as being constructed with either 22 and 24 gauge steel, all of such buildings having been built by the same contractor at approximately the same time. The show arena roof was built later by a different builder who used 26 gauge steel for the roof of that structure. The 26 gauge metal roof is lighter and much less expensive to replace than the 22 or 24 gauge roofs. This information is accurate since it either came from Bates himself, from Plaintiff's construction files, or from recent measurements of the thickness of the roofs of each Ranch building.

(c) Contained all of the information necessary for Indemnity and Team One to evaluate,

adjust, and timely pay, in good faith, the TMT claim in full, or within a few thousand dollars of "in full", leaving only minor adjustments to be agreed to as required and allowed by the Policy.

12. Indemnity, rather than adjusting and paying the claim in good faith as it was obligated by law and the Policy to do, concocted a scheme to trick and defraud TMT into accepting far less than the true amount of its claim. Defendant's scheme, which bore little downside for Defendant because of the lax sanctions for the failure of an insurer to promptly and in good faith adjust *bone fide* claims, was a carefully planned and instigated bad faith, fraudulent, and otherwise unlawful course of conduct which centered around the Bates report (notwithstanding the fact that Bates' report showed Indemnity to be clearly liable for TMT's claim), and which was designed and intended to:

(a) Falsely and wrongfully induce Manion to accept far less in settlement than the full value of its claim, and

(b) If the fraudulent negotiations were unsuccessful, then to force Manion to participate in the Policy's contractual appraisal process wherein Indemnity could pursue improper, uncontrolled arguments for improper coverage, improper liability causation, and improper contract interpretation arguments, all with the goal of convincing the appraisers into making an improper, lowball damages appraisal. Those arguments, which Indemnity has thus far used in the pursuit of its bad faith course of conduct, are that:

(i) There was no hail on the Manion Ranch on May 15, 2013, an argument irrevocably controverted by official weather reports, eyewitness accounts, Indemnity's own agents admissions, and the overwhelming evidence, and

(ii) That most of the damage to the roofs occurred in years past and was therefore not covered by the current policy, and

(iii) That most of the damage to the roofs was merely cosmetic, not structural, an argument which is contrary to the plain language of the policy and to the

admissions of Defendant's own vice-president, Cliff Parker, on July 3, 2013 that there is no exclusion in the Policy for cosmetic damages to metal roofs.

13. The means by which Indemnity set out to implement its wrongful course of conduct against TMT, and at least one other policyholder who lives nearby and also had a hail damage claim with Indemnity, was to:

(a) Intentionally conceal and misrepresent the amount of Bates' assessment of damages, and to alter and forge Bates' report, without his consent, to make it appear that the Ranch buildings' roofs were constructed of 26 gauge steel instead of the heavier, more expensive 22 and 24 gauge steel in order to understate the amount of the replacement cost of the roofs, and

(b) Present the altered Bates report to Manion's policy counsel, with Bates' typed signature intact, in mid-July, thus making it falsely appear that the altered report was genuine, and, at the same time, offer to pay less than \$90,000 for the claim, and

(c) Bolster the veracity of the altered Bates report in mid- July with a false "engineering report" showing the damaged roofs to be 26 gauge steel in an attempt to convince Manion to accept approximately 10% of the actual amount of the claim. At the time, Indemnity knew the actual amount of the claim from the Bates report which was in the Defendants' possession but which was concealed from Manion at all times.

(d) Increase the amount of the first fraudulent offer by approximately 40% in late September, 2013; label it as the final offer; and once again accompany the offer with yet another altered copy of Bates' report containing his typewritten signature, all without his consent.

(e) Refuse a request made on July 3 to Indemnity to give TMT a copy of the Bates report, and to continue to refuse to do so, even up to the date of the filing of this suit, and even though Defendant was giving TMT altered copies of the report.

(f) Falsely state in defense of the claim on several occasions that there was no hail on the Manion Ranch on May 15, 2013.

(g) Falsely state in defense of the claim on several occasions that all of the damaged

Ranch roofs in question were made with 26 gauge steel.

(h) Falsely state in defense of the claim on several occasions that the policy does not cover non-structural damages, when in fact the plain language of the Policy contains no such exclusion, and Indemnity's vice-president has admitted such to be the case.

(i) Set up a fake, bad faith "impasse" in the dealings between the parties by denying the claim in order to attempt to frighten and coerce Manion into accepting approximately 50% of the amount due in full payment. The impasse, which is also crucial to the issue of waiver of the Insurer's ability to use the appraisal process as part of its unlawful scheme, occurred by letter and tender to TMT's policy counsel on September 20, 2013 of far less than the amount actually due.

14. On September 13, 2013 Manion hired its own independent appraiser, Drew Aga at Paramount, to determine the amount of damages. That determination, which was completed in late September and submitted to Indemnity on September 25 showed the total of the covered losses to be \$904,975.05, of which \$453,157.05 is still unpaid. Such findings and analysis were incorporated into a full report by Aga and turned over to the Defendant. In verbally comparing their original reports, Bates and Aga found that they were nearly identical in damages and amounts. In comparing Aga's report with the altered version of Bates' report, the only material difference is that Defendant substituted 26 gauge steel roofing in the Bates report for the 24 gauge roofing he had used in the original report, the effect being to reduce the claim in the altered report by about \$450,000.

15. Indemnity's response to Paramount's report, in keeping with its' planned bad faith course of conduct, was to immediately demand that Manion submit to the use of the Policy's appraisal procedure, even though its own appraiser, Bates, had determined the damages to be approximately the same amount as did Paramount, a fact which Defendant has concealed even

until this day. Manion has refused to engage in the appraisal process, and thus subject the Ranch to Defendant's scheme, by refusing to respond to the Insurer's letter, a copy of which is attached to this Complaint as Exhibit "A."

**COUNT ONE**  
**BREACH OF THE INSURANCE CONTRACT**

16. Plaintiff incorporates and realleges paragraphs 1 – 15 in this Count One, as if set forth fully herein.

17. The Insurance Policy is a valid contract which was in existence at all material times, including May 15, 2013, the date the Manion Ranch incurred losses from a hail storm. Plaintiff has fully performed all of its obligations under the Insurance Contract, including the full and timely payment of all premiums due.

18. The Policy provides insurance coverage for physical loss or damage to dwellings, barns, outbuildings and other farm structures at the Manion Ranch, many of which suffered physical loss and damage as a result of the hail storm that hit the Ranch on or about May 15, 2013.

19. Plaintiff gave timely notice to Indemnity of its claim, provided all required information, and cooperated with Defendant's assessment of the claim.

20. However, Defendant has breached the Insurance Contract by failing to timely pay for all covered losses in an amount of approximately \$1 million, which amount will be shown with specificity at trial.

21. Plaintiff also seeks recovery from Indemnity of reasonable and necessary attorneys' fees incurred in prosecuting its claim pursuant to Section 38.001 of the Texas Civil

Practices & Remedies Code.

22. All conditions precedent to Plaintiff's bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**COUNT TWO**  
**VIOLATION OF THE TEXAS PROMPT PAY STATUTE**

23. Plaintiff incorporates and realleges paragraphs 1 through 22, as if set forth fully herein.

24. Pursuant to Section 542.060(a) of the Texas Insurance Code ("TIC), Plaintiff seeks recovery from Defendant of interest on the full amount of its claim, without deduction for any partial payments, at the rate of 18% per year from May 16, 2013 until the claim, or if applicable, a judgment, is paid in full.

25. Pursuant to section 542.060(b) of the TIC, Plaintiff also seeks the recovery from Indemnity of reasonable and necessary attorney's fees taxed as part of the costs of this case.

26. Defendant is liable to Plaintiff for "Prompt Pay" interest and reasonable and necessary attorney's fees because (a) Defendant is liable for a claim under a policy of insurance that it issued as alleged more specifically above, (b) Defendant did not comply with its TIC obligations as more specifically set forth herein, and (c) Defendant is an insurer authorized to engage in business as an insurance company, to provide insurance in the State of Texas as described in Sections 541.002(2) and/or 542.052 of the TIC.

27. Defendant failed to comply with Section 542.056 of the TIC because it failed to notify TMT in writing of its acceptance or rejection of the Claim within the time required by the TIC.

28. Defendant failed to comply with Section 542.058 of the TIC because it delayed payment on the Claim for more than 60 days after receiving notice of the claim under Section 542.055 of the TIC.

29. All conditions precedent to Plaintiff's bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**COUNT THREE**  
**CLAIM FOR STATUTORILY DEFINED UNFAIR SETTLEMENT PRACTICES**

30. Plaintiff incorporates and realleges paragraphs 1 through 29, as if set forth fully herein.

31. Plaintiff also sues Defendant for unfair settlement practices as prohibited by Chapter 541 of the TIC and related regulations adopted by the Texas Department of Insurance.

32. As described in more detail in this Complaint, Defendant engaged in a series of acts and practices amounting to bad faith settlement practices in violation of Chapter 541 of the TIC. More specifically, Defendant violated the following Sections of Chapter 541 of the Code ("TIC") and related regulations adopted by the Texas Department of Insurance:

(a) Sections 541.051(1), 541.060(a)(1), 541.061 of the TIC and 28 TAC, Section 21.203(1) prohibiting misrepresentations to a claimant regarding material facts relating to coverage.

(b) Sections 541.060(a)(2)A) and 542.003(b)4) of the TIC prohibiting the failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim.

(c) Section 541.060(a)(3) of the TIC and 28 TAC, Section 21.203(9) prohibiting the failure to promptly provide to a policy holder a reasonable explanation for the basis for a compromise settlement of a claim.

(d) Section 541.060(a)(4)(A) of the TIC and 28 TAC, Section 21.203(1)) for failing,

within a reasonable period of time, to affirm or deny coverage of a policy holder.

(e) Section 541.060(a)(7) of the TIC and 28 TAC, Section 21.203(15) for refusing to pay a claim without conducting a reasonable investigation of a policyholder's claim.

(f) 28 TAC, Section 21.203(18) for violating the Prompt Payment of Claims Statute as alleged in Count Two above.

(g) Breaching the common law duty of good faith and fair dealing as alleged below.

33. Plaintiff suffered damages as a proximate consequence of the above actions in violation of the TIC and related regulations, in an amount equal to the policy benefits wrongfully denied, all as set out in the holding in *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). Plaintiff seeks judgment of Indemnity for such damages.

34. Plaintiff also suffered damages as a proximate consequence of the above actions in violation of the TIC and related regulations in the form of an injury separate and independent from the policy benefits wrongfully denied. More specifically, as a direct consequence of Defendant's wrongful and bad faith settlement practices as more particularly described above, Plaintiff was required to hire and pay an attorney to address the particularized insurance coverage issues raised by Defendant's bad faith settlement practices. In addition, Defendant's failure to timely pay a fair settlement amount has caused Plaintiff to delay repairs to the hail damaged structures on the Manion Ranch, which delays have caused other damages to those structures, including damages to supports and foundations. Plaintiff seeks judgment of Indemnity for of all such actual damages suffered as a consequence of Defendant's violations of the TIC and related regulations, which damages exceed \$75,000 and will be shown with specificity at trial.

35. Pursuant to Section 541.152 of the TIC, Plaintiff also seeks recovery from Indemnity of all of its court costs and reasonable and necessary attorney's fees attributable to this claim.

36. Defendant knowingly committed the prohibited acts identified in this Count Three. Based upon such knowing violations and pursuant to Sections 541.002(1) and 541.152(b) of the TIC, Plaintiff also seeks judgment of Defendant of three times the amount of actual damages attributable to this claim.

37. All conditions precedent to bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**COUNT FOUR**  
**CLAIM FOR VIOLATION OF THE DECEPTIVE TRADE PRACTICES ACT**

38. Plaintiff incorporates and realleges Paragraphs 1 through 37, as if set forth fully herein.

39. Under Section 17.50(a)(4) of the Texas Deceptive Trade Practices Act ("DTPA"), the use or employment by any person of an act or practice in violation of the Texas Insurance Code is also a violation of the DTPA. The use of any unconscionable action or course of action is a violation of section 17.50(a)(3) of the DTPA. Defendant's course of conduct as alleged in Counts Two through Five of this Complaint is a violation of Section 17.50(a)(3) of the DTPA.

40. Plaintiff is a consumer entitled to maintain an action under the DTPA.

41. Defendant's violations of the DTPA were a producing cause of economic damages to Plaintiff, in an amount equal to the policy benefits wrongfully denied plus other separate and independent injuries alleged in this Complaint, including the cost of retaining an

insurance coverage expert lawyer (who is not an attorney in this case), and damages to the foundation and structural supports related to certain hail damaged structures at the Manion Ranch. Such damages are slightly more than \$1 million in policy benefits and more than \$75,000 in separate and independent injuries.

42. Pursuant to section 17.50(d) of the DTPA, Plaintiff also seeks recovery from Indemnity of its costs of court and its reasonable and necessary attorneys' fees attributable to this claim.

43. Each of the acts described above, together and singularly, was committed "knowingly" and "intentionally" and was a producing cause of Plaintiff's damages. Consequently and pursuant to section 17.50(b)(1) of the DTPA, Plaintiff also seeks judgment of Defendant of three times the amount of actual damages attributable to this claim.

44. All conditions precedent to bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**COUNT FIVE**  
**CLAIM FOR THE BREACH OF DUTY OF**  
**GOOD FAITH AND FAIR DEALING**

45. Plaintiff incorporates and realleges Paragraphs 1 through 44, as if set forth fully herein.

46. As an insurer in the State of Texas, Defendant owes Plaintiff, its insured, the duty to deal fairly and in good faith in the processing of a claim for insurance benefits. Defendant's violations of the TIC are also violations of Defendant's common law duty to deal with Plaintiff fairly and in good faith, such as Defendant's failure to timely pay Plaintiff's claim without a proper reason for so doing. Indemnity first delayed, then denied, a full and fair payment of the

Claim while using a variety of fraudulent and deceptive practices designed to cause Plaintiff to accept less than the full amount owed under the Insurance Contract. Defendant did so knowing that the Claim was covered by the Policy and how much was owed. It's intentionally deceptive use of an altered report prepared by its own adjuster is, standing alone, clear and convincing evidence that Defendant knew that it was acting in bad faith when first tendering less than 10% of the claim, and later tendering, as full payment, less than half of it's own adjuster's calculated damage loss estimate.

47. Defendant's breach of the duty of good faith and fair dealing caused Plaintiff to suffer damages as more particularly described in Count Four. That same breach was knowing, intentional, deceptive, fraudulent, malicious and done with the specific intent to injure Plaintiff, or alternatively, done with a conscious disregard of the rights and welfare of Plaintiff. As a result, Plaintiff seeks, and is entitled to recover, exemplary damages from Defendant in an amount to be determined by the trier of fact which amount Plaintiff alleges to be twice the amount of withheld policy benefits.

48. All conditions precedent to bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**COUNT SIX**  
**DECLARATORY JUDGMENT**

49. Plaintiff incorporates and realleges paragraphs 1 – 48, as if set forth fully herein.

50. As provided in 28 U.S.C. Sections 2201-2202, Plaintiff seeks an order of this Court declaring that it is not obligated to participate in the appraisal process as demanded by Defendant in its October 18, 2013 letter, a copy of which is attached to this Complaint.

51. There is an actual case or controversy regarding whether any part of this dispute is subject to the appraisal process as demanded by Defendant, and, absent an order of this Court to the contrary, Plaintiff respectfully refuses to participate in such process for the reasons set forth in this Complaint.

52. Declaratory relief is proper, because it will settle legal relations necessary to resolve the dispute surrounding the Claim for insurance benefits for damages suffered by Plaintiff during the May 15, 2013 hailstorm.

(a) **Defendant Has Waived the Appraisal Process**

53. Plaintiff seeks declaratory relief that Defendant has waived the right to compel Plaintiff to participate in the appraisal process by failing to timely invoke such process within a reasonable time after a *bone fide* impasse was reached between the parties. *Sanchez v. Property & Casualty Ins. Co.*, 2010 WL 414687 (S.D. Tex. 2010)

54. Although unbeknownst to Plaintiff at the time, the actual impasse between the parties arose in May, 2013 when Indemnity began its planned, unlawful, and intentional course of conduct which was designed to cheat Plaintiff out of its rightful insurance benefits through the concealment, misrepresentation, and alteration of the contents and substance of the Bates report in order to trick Plaintiff into accepting much less than it was entitled to recover from Defendant.

55. The Bates report is believed to have reported Defendant damages to the Ranch buildings in excess of \$900,000.00; that nearly all of such damages were covered by the Policy issued to Plaintiff by Defendant; and that Plaintiff was entitled to have its claim promptly paid in such amount.

56. The fraud, deception and bad faith set out in this Complaint which was practiced

upon the Plaintiff by Defendant for more than five months between the time of the actual impasse between the parties in May, 2013, and Defendant's demand in October, 2013 for the use of the appraisal process, was a waiver by Defendant of the right to compel the use of the appraisal process.

(b) **Defendant Improperly Seeks to Use the Appraisal Process to Determine Liability**

57. Defendant's demand for the use of the appraisal process should also be denied as having been waived because Defendant seeks to use the process for the improper purpose of resolving questions of liability (rather than damages) contrary to established case law, including particularly, *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 890 (Tex. 2009) (“*Johnson Decision*”) and *TMM Investments, Ltd. v. Ohio Casualty Ins. Co.*, 730 F.3d 466, 474 (5<sup>th</sup> Cir. 2013)(applying Texas law)(“*TMM Decision*”)(“*damage* questions [are] for appraisers and *liability* questions [are] for the courts[.]”).

58. The proper scope of the appraisal process is limited to determining damages, i.e. the amount of the loss, not issues of liability.

59. While distinctions between liability and damage may be blurred when considered in the abstract, the *Johnson Decision* (at 892) makes it clear that,

**“in actual cases, causation usually falls into one category or the other.”**

In this case, the alteration of the Bates report coupled with the use of the questionable Haag Engineering Report as bolster, establishes beyond a doubt that Indemnity intends to use the appraisal process as the means for resolving questions of liability by interjecting improper arguments into that process since there is nothing to prevent it from submitting such arguments

to the appraisers in the form of "briefs" or some other advocacy submission, or from having its own appointed appraiser make such arguments to the other appraisers.

60. The Engineering Report concludes in plain language that certain observed damage to TMT's roofs *resulted from footfall or mechanical contact*, causes which are not at issue in this case. Neither cause, if proved in this case, would invoke Defendant's coverage obligation; rather such evidence would tend to tilt the appraisal to a lesser-than-justified amount. The same as in the *Johnson Decision*, this is the precise kind of dispute that Defendant improperly wants to have interjected into the appraisal process. See the *Johnson Decision*, at 892, citing *Wells v. American Swiss Preferred Ins. Co.* where foundation damage claimed to be result of plumbing leaks (covered event) or earth settling (non covered event) liability issues were implicated, and the Court held that the use of the appraisal process was improper.

61. Unfortunately, there is nothing, absent an order of this Court, to prevent the Defendant from submitting improper arguments to the appraisers through vehicles such as the Engineering Report. There are no rules in the process itself which prohibits the unfettered submission of improper arguments to the appraisers, thus submitting them to the influence of arguments which should never reach their eyes or ears, and which cannot be regarded as harmless. For example, the Engineering Report maintains there was no hailstorm on May 15, a ridiculous suggestion, but one which cannot be left unanswered if raised because there would be no coverage for TMT's claim if no such storm occurred. This is only one of many examples of evidence of liability which can be improperly interjected into the appraisal process.

62. Another example from Defendant's own conduct in this matter is its argument in various documents that there is no coverage under the Policy for damage that does not impact the

functionality of the roof, i.e. "cosmetic damage" only. This argument is purely a question related to the scope of policy coverage from the language of the policy itself, i.e. a liability issue not properly addressed by the appraisal process.

(c) **Defendant's Unlawful and Unsavory Conduct**  
**Voids It's Right to Invoke the Appraisal Process**

63. Absent waiver, appraisals generally should go forward without preemptive intervention by the courts (*Johnson Decision*, at 895). However, that general rule does not apply when a party's fraudulent practices undermine the efficacy of the process. Under the Fifth Circuit's *TMM Decision* (at 472), the effect of the appraisal process is to estop the parties from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court. That decision (at 472) also notes that the damage award in the appraisal process will not be upheld if it is,

**“the result of fraud, accident, or mistake.”**

As presently postured, the appraisal process cannot be purged of Defendant's fraudulent and bad faith practices, and the trial of the issue of damages must be conducted under the auspices of this Court in order to insure a fair trial. Otherwise, the Defendant will be allowed to profit from its own wrongful conduct, a result which the law does not condone.

64. As noted in the *Johnson Decision* (at 894), the appraisal process is conducted without rules, attorneys, pleadings, subpoenas and hearings. In substance, the parties each appoint their own appraiser, those two appraisers select an umpire, and the umpire resolves any difference between the damage assessments of the two appraisers. Under this process, the umpire will not be afforded the opportunity to resolve discrepancies with the knowledge (which

he or she should surely have) that the Defendant's first, untainted damage assessment by Bates was more than twice the altered appraisal that Defendant now disingenuously presents as the real thing, when in fact it is nothing more than a fraud. Under any circumstance, this Court should order that the full, untainted Bates report be made part of the appraisal process, if such process is allowed to proceed. The appraisal process could never be fairly conducted without the use of the actual Bates report and a full explanation of the Defendants fraudulent and bad faith use of that report, matters best left to this Court by trial of the damages issues.

65. It is most efficient to have this Court determine the issue of Policy losses since it, not the appraisal panel, must also address the issue of damages under Plaintiff's bad faith claims. Such a procedure would save the parties the cost of the appraisers and the extra legal expenses in conducting two damages proceedings.

**(d) Remedies Sought Under Count Six**

66. Plaintiff asks this Court to declare that it is not obligated to first proceed with the appraisal process before prosecuting its Policy claims against the Defendant.

67. Plaintiff also seeks recovery from Indemnity of reasonable and necessary attorneys fees incurred in prosecuting its claim for declaratory relief, such attorneys fees being properly recoverable under the Texas Civil Practices & Remedies Code, Section 37.009, and/or applicable provisions of the Federal Declaratory Judgment Act, 28 U.S.C. Section 2202.

68. All conditions precedent to bringing this claim have occurred, will occur, or have been waived, including all required or proper notices and demands.

**PRAYER**

WHEREFORE, Plaintiff requests that Defendant be cited to appear and answer, and that

after trial of the merits, Plaintiff have and recover the following relief:

1. A declaratory judgment as prayed for above;
2. A money judgment against Defendant for all monies equal to the amount of policy benefits wrongfully denied, and damages separate and independent of the withholding of policy benefits as alleged more particularly above, and all other damages alleged above, including all actual, economic, statutory, treble damages, and exemplary damages, all as alleged more particularly above;
3. A money judgment against Defendant for reasonable and necessary attorneys' fees, court costs and all other costs of prosecuting this suit or incurred in relation to this litigation or the underlying dispute;
4. A judgment for pre-judgment and post-judgment interest, as allowed by law, at the highest rate allowed by law; and
5. All other and further relief, legal or equitable, general or special, to which Plaintiff may show itself to be justly entitled.

#### **JURY DEMAND**

Plaintiff respectfully demands a trial by jury.

#### **REQUEST FOR IMMEDIATE PRETRIAL CONFERENCE**

Plaintiff requests that this Court immediately order, without notice or hearing, either an immediate pre-trial conference for the purposes of conducting controlled settlement discussions, or the appointment of a mediator to conduct a mediation with the parties, their trial attorneys, Mr. Bates, and Mr. Aga (the adjusters) present, along with all of their appraisals and reports pertaining to the Claim at issue.

Dated: December 14, 2013

Respectfully submitted,

CULP & DYER, LLP  
222 E. McKinney  
Suite 210  
Denton, Texas 76201  
Telephone: (940) 484-2236  
Telecopier: (940) 484-4436

By: /s/Marc S. Culp  
Marc S. Culp  
State Bar No. 05212700  
Rachael L Brand  
State Bar No. 24085855

ATTORNEYS FOR PLAINTIFF, TOMMY  
MANION OF TEXAS, INC.

THOMAS & BLACKWOOD, LLP  
2911 Turtle Creek  
Suite 450  
Dallas, Texas 75219  
Telephone: (214) 953-0000

By: /s/Tom Thomas  
Tom Thomas  
State Bar No. 19870000

ATTORNEY FOR PLAINTIFF, TOMMY  
MANION OF TEXAS, INC.