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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Keith A. Henderson, et al.,

No. CV-23-00670-PHX-DMF

10 Plaintiffs,

11 **ORDER**

12 v.

13 Liberty Mutual Insurance Company, et al.,

14 Defendants.

15 This matter is before the Court on Plaintiffs' Renewed Motion to Compel Appraisal
16 (Doc. 6).¹ Plaintiffs request that the Court order that the Court order appraisal and stay this
17 action pending appraisal (*Id.*). The sole named and remaining defendant, Liberty Mutual
18 Insurance Company ("Defendant Liberty Mutual"),² responded in opposition (Doc. 16),
19 and Plaintiffs replied (Doc. 20). Defendant Liberty Mutual thereafter filed a Motion
20 Requesting Leave to File Sur-Reply to Plaintiffs' Reply in Support of Motion to Compel
21 Appraisal (Doc. 22), and a response in opposition was filed (Doc. 23). The Court granted
22 Defendant Liberty Mutual's motion for sur-reply in part, giving each party an opportunity
23 to submit a sur-reply (Doc. 24). Defendant filed a sur-reply (Doc. 25). The time for
24 Plaintiffs to file a sur-reply has expired without Plaintiffs filing any sur-reply. Plaintiff's
25 Renewed Motion to Compel Appraisal (Doc. 6) is ripe.

26 ¹ Plaintiffs filed their complaint and contemporaneous motion to compel appraisal in the
27 Maricopa County Superior Court, and Defendant Liberty Mutual Insurance Company
removed the case to this Court (Doc. 1).

28 ² Defense counsel has repeatedly informed that Defendant Liberty Mutual may be
misnamed in the litigation (*see* Doc. 1 at 1, footnote 1; Doc. 16 at 2, footnote 1).

1 After careful review of the parties' filings pertinent to Plaintiffs' motion, the
 2 caselaw cited by the parties, and other applicable law, the Court will grant Plaintiffs'
 3 Renewed Motion to Compel Appraisal (Doc. 6) in part as stated herein insofar as the
 4 appraisal pertains to the cost of foundation and foundation related repairs. Plaintiffs'
 5 Renewed Motion to Compel Appraisal (Doc. 6) is otherwise denied. This Court action will
 6 otherwise proceed, including to determine causation and coverage regarding foundation
 7 and foundation related repairs. A stay of this Court action is not appropriate outside of a
 8 stay based on an interlocutory appeal of this Order. *See Coinbase, Inc. v. Bielski*, 143 S.
 9 Ct. 1915, 1919 (2023).

10 **I. SUMMARY OF LEGAL STANDARDS**

11 Arbitration agreements are enforceable pursuant to Arizona law, A.R.S. § 12- 1501,
 12 and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* The parties agree that under
 13 Arizona law, "appraisal is analogous to arbitration" and "principles of arbitration law"
 14 should be applied to proceedings involving appraisals. *Meineke v. Twin City Fire Insurance*
 15 *Co.*, 181 Ariz. 576, 580 (App. 1994).

16 Arbitration is "an expeditious and inexpensive method of dispute resolution" and
 17 public policy favors arbitration. *Id.* at 580-81 (internal quotation marks and citation
 18 omitted). Therefore, doubts as to whether or not a matter is subject to arbitration should be
 19 resolved in favor of arbitration. *New Pueblo Constructors, Inc. v. Lake Patagonia*
 20 *Recreation Ass'n*, 12 Ariz. App. 13, 16 (1970). Likewise, doubts as to whether an issue is
 21 subject to appraisal should be resolved in favor of appraisal. *See Carbonneau v. Am. Fam.*
 22 *Mut. Ins. Co.*, No. 06-1853-PHX-DGC, 2006 WL 3257724, at *2 (D. Ariz. Nov. 9, 2006).

23 The FAA "mandates that district courts shall direct the parties to proceed to
 24 arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*
 25 *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3 and 4). Further,
 26 "agreements to arbitrate must be enforced, absent ground for revocation of the contractual
 27 agreement." *Id.* Nevertheless, a court "cannot expand the parties' agreement to arbitrate in
 28 order to achieve greater efficiency [and] the [FAA] 'requires piecemeal resolution when

1 necessary to give effect to an arbitration agreement.”” *Tracer Research Corp.*, 42 F.3d
 2 1292 1294 (9th Cir. 1994) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*,
 3 460 U.S. 1, 24–25 (1983)) (emphasis in original).

4 An appraisal will not determine coverage because, under Arizona law, an appraiser
 5 determines loss amount, not coverage. *Hanson v. Com. Union Ins. Co.*, 150 Ariz. 283 (App.
 6 1986). Plaintiffs specifically agree that under *Hanson*, “appraisal is not appropriate to
 7 determine coverage issues” (Doc. 20 at 6).

8 **II. DISCUSSION**

9 Defendant Liberty Mutual issued homeowners’ insurance Policy Number H3V-268-
 10 295599-60-9-9 (the “Policy”) to Plaintiffs for their residence located in Peoria, Arizona
 11 (Doc. 1-3 at 5-6 ¶ V; Doc. 12 at 3 ¶ 5). Plaintiffs assert that their residence incurred damage
 12 on or about July 7, 2021, “when their kitchen refrigerator water filter supply line burst”
 13 (Doc. 1-3 at 6 ¶ VII). Defendant Liberty Mutual describes:

14 This case arises out of Plaintiffs’ claim for insurance coverage made under
 15 their homeowners’ insurance policy issued by Liberty, Policy number H3V-
 16 268-295599-60-9-9 (“the Policy”) for damages to Plaintiffs’ residence after
 17 a water loss that occurred on or about July 7, 2021, when their kitchen
 18 refrigerator water filter supply line failed. *See* Complaint at ¶¶ VII - VIII.
 19 After the loss, Liberty inspected the residence, provided water mitigation and
 20 restoration services, completed several estimates of the cost to repair the
 21 covered damage, and provided Plaintiffs with alternative living expenses.
 22 Liberty has since compensated Plaintiffs for all damage caused by the water
 23 loss. The only remaining dispute in this case is whether the foundation of
 24 Plaintiffs’ home was damaged by the water loss, and therefore, covered under
 25 the Policy.

26 (Doc. 16 at 2).

27 Defendant Liberty Mutual does not contend that the Policy failed to provide
 28 coverage for water damage to the foundation, but rather that the foundation’s condition
 29 was not caused by the water from the failure of the refrigerator water filter supply line
 (Doc. 16; Doc. 16-1). Defendant Liberty Mutual hired a structural engineer whose opinion
 supports Defendant Liberty Mutual’s position that the foundation’s condition was not
 caused by the water from the failure of the refrigerator water filter supply line (Doc. 16 at

1 2-3; Doc. 16-1 at 2-31).

2 Plaintiffs hired a different structural engineer whom Plaintiffs describe as
3 supporting Plaintiffs' contention that the slab foundation cracks "ensued from the subject
4 water leak" (Doc. 20 at 3; Doc. 20-1 at 57-58).³ Plaintiffs wrote to Liberty Mutual with a
5 demand for appraisal (Doc. 20-1 at 64).

6 The appraisal provision of the Policy provides:

7 **6. Appraisal.** If you and we fail to agree on the amount of loss, either may
8 demand an appraisal of the loss. In this event, each party will choose a
9 competent and impartial appraiser within 20 days after receiving a written
10 request from the other. The two appraisers will choose a competent and
11 impartial umpire. If they cannot agree upon an umpire within 15 days, you
12 or we may request that the choice be made by a judge of a court of record in
13 the state where the "residence premises" is located. The appraisers will
14 separately set the amount of loss. If the appraisers submit a written report of
an agreement to us, the amount agreed upon will be the amount of loss. If
they fail to agree, they will submit their differences to the umpire. A decision
agreed to by any two will set the amount of loss.

15 Each party will:

16 a. Pay its own appraiser; and
17
18 b. Bear the other expenses of the appraisal and umpire equally.

19 (Doc. 16-1 at 77).

20 The parties do not dispute that the Policy is a valid agreement. Defendant Liberty
21 Mutual does not assert that Plaintiffs waived their right to an appraisal. Rather, the parties
22 disagree as to whether the Policy's appraisal provision applies to the parties' dispute
23 concerning Plaintiffs' insurance claim pertaining to foundation and foundation related
24 damage. Defendant Liberty Mutual asserts that the "only remaining dispute between the
25 parties in this case is one of coverage, and therefore, appraisal is not appropriate" (Doc. 16
26 at 2). Defendant Liberty Mutual argues:

27 Despite Liberty [Mutual]'s denial of coverage for any repair at all to the

28 ³ Defendant disputes that Plaintiffs' expert report supports Plaintiffs' position that the
foundation problems were caused by the water leak (Doc. 25 at 2-3).

1 foundation, Plaintiffs have nonetheless demanded that the cost to repair the
 2 foundation be submitted to appraisal. Liberty [Mutual] has declined to agree
 3 to appraisal because Liberty [Mutual] has denied coverage for any and all
 4 repairs to the foundation. Thus, there is no dispute as to the cost of repairs;
 rather, the dispute is whether there is any coverage for the foundation

5 (*Id.* at 3)

6 Defendant Liberty Mutual relies on *San Souci Apartments v. National Sur. Corp.*,
 7 No. CV-12-02389-PHX-GMS, 2013 WL 428091 (D. Ariz. Feb. 4, 2013), to support its
 8 opposition to Plaintiffs' motion to compel appraisal. In describing a similar appraisal
 9 provision to the one at issue here, the Court in *San Souci* recognized that under Arizona
 10 law, an appraisal clause is not applicable to questions of coverage:

11 The appraisal provision states, in pertinent part, "if we and you disagree on
 12 the amount of loss, either may make written demand for an appraisal of the
 13 loss." (*Id.* at 3.) The provision describes an impartial process involving two
 14 appraisers and an umpire to settle differences in the valuations of the property
 15 damage. (*Id.*) Arizona Courts have determined that an appraisal clause only
 16 allows the parties to determine the amount of damage through an appraisal
 17 and not to resolve questions of coverage through such a proceeding. *Hanson*
 18 *v. Commercial Union Ins. Co.*, 150 Ariz. 283, 723 P.2d 101, 104 (Ct. App.
 19 1986).

20 *Id.* at *2.

21 In *Hanson v. Com. Union Ins. Co.*, the Arizona Court of Appeals adopted language
 22 from a California opinion stating that "[a]lthough arbitrators are frequently, by the terms
 23 of the agreement providing for arbitration, particularly in construction contracts, given
 24 broad powers [citation omitted], appraisers generally have more limited powers." 150 Ariz.
 25 at 285–86 (citations and internal quotation omitted). The Arizona Court of Appeals further
 26 concluded that "the appraisers were authorized to determine only a question of fact,
 27 namely, the actual cash value of the insured building." *Id.* at 286. Thus, in *San Souci*
 28 *Apartments*, the Court concluded that the "issue of whether the roof tiles were damaged by
 the hail storm and whether the source of the damage is outside of the policy limits is not a
 dispute about the amount of loss that all parties agree to be covered" and was not within
 the scope of the appraisal provision. 2013 WL 428091 at *2.

1 As noted by another judge of this Court, “there is a dichotomy between the issue of
 2 coverage and the issue of valuation of a covered loss[.]” *Denby v. Am. Fam. Ins.*, No. CV-
 3 17-02648-PHX-SMB, 2019 WL 4081143, at *4 (D. Ariz. Aug. 29, 2019) (internal citation
 4 and quotations omitted). While “how much it was going to cost to complete the necessary
 5 repairs” is “a matter regularly decided through the appraisal process[,]” Arizona law allows
 6 an insurer to challenge in court proceedings the amount of loss if it believes the amount
 7 includes losses not covered by the policy. *Id.* Even in ordering appraisal per an insurance
 8 contract provision, Senior District Judge Campbell also recognized “that appraisers cannot
 9 determine scope of coverage and Defendant will remain free to litigate coverage and
 10 causation.” *Casitas Del Sol Condo. Owners Ass'n v. State Farm Fire & Cas. Co.*, No. CV-
 11 22-00685-PHX-DGC, 2022 WL 3082528, at *3 (D. Ariz. Aug. 2, 2022).

12 Here, in best light to Plaintiffs at this stage, the dispute between the parties centers
 13 on which structural engineer’s opinion, Plaintiffs’ structural engineer or Defendant’s
 14 structural engineer, is correct regarding the cause of the foundation problems for which
 15 Plaintiffs seek compensation from Defendant. Arizona law does not contemplate an
 16 appraiser’s central role as arbiter of which structural engineer’s opinion is correct.
 17 Appraisal is not appropriate to determine whether or not the refrigerator line leak caused
 18 the foundation problems or whether those problems resulted from other, unrelated causes.

19 Nevertheless, on the record before the Court, the Court cannot conclude that there
 20 is no dispute between the parties concerning the cost of repairs to the foundation and related
 21 repairs. Defendant has not clearly stated that it will accept Plaintiffs’ loss amount for
 22 foundation and foundation related repairs if coverage is established. Under the insurance
 23 contract written by Defendant, Plaintiffs are entitled to an appraisal regarding the cost of
 24 foundation and foundation related repairs. The Court will compel an appraisal consistent
 25 with the terms of the Policy and consistent with the “strong preference in favor of allowing
 26 [Plaintiff] to invoke the appraisal clause.” *Ori v. Am. Family Mut. Ins. Co.*, No. CV-05-
 27 00697-PHX-ROS, 2005 WL 3079044, at *4 (D. Ariz. Nov. 15, 2005).

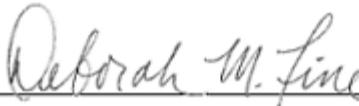
28 Thus, the Court will grant Plaintiffs’ Renewed Motion to Compel Appraisal (Doc.

1 6) in part as stated herein insofar as the appraisal pertains to the cost of foundation and
2 foundation related repairs. Plaintiffs' Renewed Motion to Compel Appraisal (Doc. 6) is
3 otherwise denied. This Court action will otherwise proceed, including to determine
4 causation and coverage regarding foundation and foundation related repairs. A stay of this
5 Court action is not appropriate outside of a stay based on an interlocutory appeal of this
6 Order. *See Coinbase*, 143 S. Ct. at 1919. If Plaintiffs file an interlocutory appeal of this
7 Order, they should simultaneously file a motion to stay pending such interlocutory appeal,
8 which the Court intends to grant. *Id.*

9 Accordingly,

10 **IT IS HEREBY ORDERED** granting in part Plaintiffs' Renewed Motion to
11 Compel Appraisal (Doc. 6) insofar as the appraisal pertains to the cost of foundation and
12 foundation related repairs and otherwise denying Plaintiffs' Renewed Motion to Compel
13 Appraisal (Doc. 6); a stay is denied absent an interlocutory appeal of this Order.

14 Dated this 8th day of August, 2023.

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17 Honorable Deborah M. Fine
18 United States Magistrate Judge
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