APPENDIX

Table of Contents

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50740

D.C. Docket No. 5:17-CV-17

CBX RESOURCES, L.L.C.,

Plaintiff - Appellant

v.

ACE AMERICAN INSURANCE COMPANY; ACE PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

Before BARKSDALE, STEWART, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the appeal is dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on May 13, 2020

Attest:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 12, 2020

Lyle W. Cayce
Clerk

No. 18-50740

CBX RESOURCES, L.L.C.,

Plaintiff - Appellant

v.

ACE AMERICAN INSURANCE COMPANY; ACE PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendants - Appellees

Appeal from the United States District Court
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Before BARKSDALE, STEWART, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

Appellant finds itself in the so-called "finality trap." *Williams v. Taylor Seidenbach, Inc.*, --- F.3d ---, 2020 WL 2111307, at *1 (5th Cir. May 4, 2020) (en banc). After losing on its claim for a declaratory judgment that ACE American Insurance Company had a duty to defend, CBX Resources dismissed its Texas Insurance Code claims without prejudice. Because those statutory claims were not resolved on the merits, CBX "is entitled to bring a later suit on the same cause of action." *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978). As a result, there is not yet a final appealable judgment. *Id.*; *see also Marshall v. Kan. City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004) (per curiam) ("[A] party cannot use voluntary dismissal *without* prejudice as an end-run around the final judgment rule to convert an otherwise

non-final—and thus non-appealable—ruling into a final decision appealable under § 1291.").

We held this case in abeyance because our full court was reconsidering the finality trap in a different case. *See generally Williams*, 2020 WL 2111307. That decision has now issued, and we did not end up overruling our decades-old caselaw holding that there is not an appealable final judgment when some claims are dismissed without prejudice. *Id.* at *3, *6. Instead, we concluded that appellate jurisdiction existed in *Williams* because the appellant had obtained a Rule 54(b) partial summary judgment on the claims it sought to appeal. *Id.* at *4–6. CBX has not asked for such a partial summary judgment, which is a discretionary matter for the district court. *See* FED. R. CIV. P. 54(b).

Williams, then, does not free CBX from the trap. So we consider its arguments for why the trap does not apply in the first place. It first submits that the concern about dismissals without prejudice being "manipulative" attempts to manufacture appellate jurisdiction while a plaintiff keeps its future options open should not apply to a suit brought against a single defendant. *Marshall*, 378 F.3d at 500. In such a suit, CBX explains, a merits dismissal of some claims will have preclusive effect on other claims even if they were dismissed without prejudice. That is because res judicata bars not just claims that were resolved in a prior suit, but also claims that could have been resolved. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised* in that action." (emphasis added)). Preclusion does not arise, however, when a plaintiff loses on the merits to one defendant but dismisses claims without prejudice against another defendant who is not in privity with the party that obtained the favorable judgment. *See Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (discussing the privity requirement for res judicata).

There are at least two problems with CBX's attempt to limit the "finality trap" to cases with multiple defendants. First, it is looking at the concern about manufacturing jurisdiction only from the perspective of an appellate decision that affirms the with-prejudice dismissal of certain claims. When the appellate court reverses, there is no preclusion and the plaintiff on remand can seek to reallege the claims that it had dismissed without prejudice. That tactic, what CBX apparently hopes to do with its statutory claims if we were to reverse the district court's "no duty to defend" decision, is the "end-run" around the final judgment rule to obtain a "quasi-interlocutory" appeal that our cases are concerned about. *See Marshall*, 378 F.3d at 500 (noting that allowing a plaintiff to appeal when it dismisses some claims without prejudice allows him to "hav[e] his cake (the ability to refile the claims voluntarily dismissed) and eat[] it too (getting an early appellate bite at reversing the claims dismissed involuntarily)").

The even bigger problem for CBX is that our rule originated in a single defendant case just like this one. *See Ryan*, 577 F.2d at 300. To be sure, many cases applying the *Ryan* rule have multiple defendants, one or more of which was dismissed without prejudice while at least one defendant prevailed on the merits. *See, e.g.*, *Williams*, 2020 WL 2111307, at *1–2; *Luvata Grenada, L.L.C. v. Danfoss Indus. S.A. de C.V.*, 813 F.3d 238, 239 (5th Cir. 2016); *Marshall*, 378 F.3d at 496–98. But *Ryan* itself was an employment dispute with a single plaintiff suing a single defendant, his employer. 577 F.2d at 300; *see also Marshall*, 378 F.3d at 500 ("[T]he *Ryan* rule operates *when a plaintiff has filed multiple claims against a single party*, or against multiple parties, and the district court has dismissed some but not all of the claims." (emphasis added)). Precedent thus forecloses CBX's argument that the finality trap does not apply in single defendant cases where res judicata might eliminate concerns about a second suit.

Precedent is also the stumbling block for CBX's suggestion that its Rule 41(a) dismissal without prejudice of the statutory claims "may be wholly ineffective" because that rule does not allow a partial dismissal of claims. *Ryan* recognizes that Rule 41(a) should not be available to dismiss only some claims a plaintiff has against a defendant. 577 F.2d 302 n.2; *see also Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 720 (5th Cir. 2010) ("Rule 41(a) dismissal only applies to the dismissal of an entire action—not particular claims.").[1] But *Ryan* did not allow the plaintiff to undo the improper Rule 41(a) dismissal he had asked for. 577 F.2d at 300–02; *see also McCaig v. Wells Fargo Bank (Tex.), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015) ("A party cannot complain on appeal of errors which he himself induced the district court to commit." (quotations omitted)). In any event, if the Rule 41(a) dismissal were undone, that would not give us appellate jurisdiction. It would instead highlight what *Ryan* recognizes: that CBX's statutory claims have not yet been resolved.

CBX's final jurisdictional argument is that the district judge made "clear his intention that an appeal of his rulings be available immediately." But any intention to issue a "partial final judgment under Rule 54(b)" must be "unmistakable." *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc) (per curiam). And that unmistakable intent must be found in the judgment itself or in documents that it references; "we can look nowhere else to find such intent, nor can we speculate on the thought process of the district judge." *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 539 (5th Cir. 1999). We do not see any

[1] In contrast to our caselaw not allowing Rule 41(a) dismissals of some claims against a single defendant, we have allowed full dismissals of all claims against a defendant even when other defendants remained in the suit. *Williams*, 2020 WL 2111307, at *2; *see also Plains Growers, Inc. ex rel. Florists' Mut. Ins. Co. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 253 (5th Cir. 1973).

indication—let alone unmistakable intent—that the district court entered a partial final judgment under Rule 54(b) before this appeal was filed.

At this point in the litigation there is not a final appealable judgment. The appeal therefore is DISMISSED for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, vs. ACE AMERICAN INSURANCE COMPANY, ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § § § §	NO. 5:17-CV-17-DAE

ORDER: (1) GRANTING ACE'S MOTION FOR PARTIAL SUMMARY JUDGMENT; (2) DENYING CBX'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (3) OVERRULING OBJECTIONS

The matters before the Court are (1) Plaintiff CBX Resources, LLC's ("CBX") Motion for Partial Summary Judgment (Dkt. # 16), (2) Defendants Ace American Insurance Company ("Ace American") and Ace Property and Casualty Insurance Company's ("Ace Property") (collectively, "Defendants" or "Ace") Motion for Partial Summary Judgment on Ace's Duty to Defend (Dkt. # 17); and (3) CBX's Objections to and Motion to Strike Evidence in Support of Defendants Motion for Partial Summary Judgment (Dkt. # 22).

On October 12, 2017, the Court held a hearing on these matters. CBX was represented by Mark Fassold; Defendants were represented by Manuel

Mungia and Daniel Lane. After careful consideration of the memoranda in support of and in opposition to the motions, and in light of the parties' arguments at the hearing, the Court, for the reasons that follow, **GRANTS** Ace's motion for partial summary judgment, **DENIES** CBX's motion for partial summary judgment, and **OVERRULES** CBX's objections and motion to strike evidence.

FACTUAL BACKGROUND

CBX was the lessee of the Hibdon Lease, a mineral tract located in Zavala County, Texas. (Dkt. # 16 at 7.) As lessee, CBX arranged for the drilling and operation of the Picosa Creek 1V Well ("the Well") to be performed by Espada Operating, LLC ("Espada"). (Id.) In 2011, Espada drilled the well bore, placing almost 900 feet of surface casing and more than 5,700 feet of production casing into the Well, and installed a fracking system into the production casing. (Id.) On October 25, 2011, Espada attempted to pressurize the fracking system; a few months later, on January 25, 2012, Espada attempted to pull the production casing out of the well bore. (Id.) In pulling out the production casing, Espada discovered a fracture of about 3,400 feet in the Well. (Id.) Espada determined that the production casing below the fracture could not be recovered from the well bore. (Id.) Because the casing was irremovable, the well bore could not be restored, resulting in the plugging and abandonment of the Well. (Id.)

Espada was a named insured on a Commercial General Liability ("CGL Policy") issued by Ace American, with a coverage period from April 2, 2011, through April 2, 2012. (Dkt. # 16 at 7.) The CGL Policy was accompanied by an "Underground Resources and Equipment Coverage Endorsement," which replaced and/or added exclusions in the CGL Policy, while adding certain definitions to the CGL Policy. (Id.) Espada was also a named insured on an Umbrella Policy issued by Ace Property, which covered the same policy period of April 2, 2011, through April 2, 2012. (Id.)

PROCEDURAL BACKGROUND – STATE COURT CASE

On February 21, 2013, CBX brought suit for damages arising from its total loss of the use of the Well against several defendants—but not Espada—in the 293rd Judicial District Court of Zavala County, Texas ("underlying case"). (Dkt. # 16 at Ex. C.) In October 2013, CBX amended its state court petition, adding Espada as a defendant, and appending a Certificate of Merit of a licensed engineer who described Espada's role in the failure of the Well. (Id. at Ex. D.) According to CBX, Espada filed its original answer on November 19, 2013, represented by counsel retained by Ace American after Espada tendered the defense of the lawsuit

to Ace.[1] (Id. at Exs. E, L.) The state court set a trial in this case for February 9, 2016. (Id. at Ex. F.)

On August 7, 2015, CBX filed its second amended petition, itemizing alleged damages to its tangible property including: drilling operations, surface casing, unrecovered production casing, the Well and the well bore, the oil and gas itself, and the lease. (Dkt. # 16 at Ex. G.) On August 13, 2015, Espada filed a third party petition, suing three separate parties. (Id. at Ex. H.) Espada's third party petition stated that it "alleges that a catastrophic failure of the casing occurred down hole in the Well," and that the "Well allegedly could not be repaired and was plugged and abandoned." (Id.)

On September 22, 2015, CBX served a Stowers demand upon Espada through its counsel, seeking to fully and unconditionally release its claims for an amount within the limits of the policies issued to Espada by Ace American and Ace Property. (Dkt. # 16 at Ex. I.) By its terms, the Stowers demand was set to expire on October 23, 2015, at 5:00pm. (Id.)

However, on October 15, 2017, the Claims Director for Ace American, Matthew Spector, sent a withdrawal letter to Espada. (Id. at Ex. K.) The letter indicated that Ace American intended "to cease the retention of defense counsel effective fourteen days from that date of [the] letter," or, on October 29,

[1] According to Ace, however, Espada had ceased doing any business operations sometime in 2012, due to a lack of funding. (See Dkt. # 17 at 5–6.)

2015. (Id.) Mr. Spector's letter characterized CBX's claims as non-professional liability negligence claims. (Id.) On November 30, 2015, approximately 71 days before the February 9, 2016 trial setting, the state court granted Espada's defense counsel's motion to withdraw as counsel. (Id. at Exs. L, M.)

A pre-trial hearing was held in the state court case on February 1, 2016; Espada failed to appear at the hearing. (Dkt. # 16 at Ex. N.) Because of Espada's failure to appear at the hearing, CBX requested the state court enter judgment in CBX's favor against Espada.[2] (Id.) The Court ordered that judgment be entered in CBX's favor and set the matter for February 10, 2016, to hear evidence in support of damages. (Id.) On February 10, 2016, the state court heard evidence from CBX's witnesses and exhibits in support of its claim. (Id. at Ex. O.) The state court entered judgment, finding that Espada was negligent and awarded damages and post-judgment interest payable to CBX by Espada. (Id. at Ex. N.) According to CBX, the judgment became final and is no longer appealable. (Dkt. # 16 at 10.)

On November 1, 2016, the state court entered an Order for Turnover Relief ("turnover order"), transferring ownership of Espada's causes of action

[2] CBX had apparently settled with the other defendants in the case. (See Dkt. # 17 at 8–9.)

against Ace American and Ace Property to CBX.[3] (Dkt. # 16 at Ex. P.) The turnover order also compelled Espada to execute an assignment of those claims to CBX; according to CBX, Espada has complied with that portion of the turnover order. (See id. at 11; Ex. P.)

PROCEDURAL BACKGROUND – FEDERAL COURT CASE

On January 10, 2017, CBX filed suit in this Court against Ace American and Ace Property. (Dkt. # 1.) Its first amended complaint alleges claims against Defendants for (1) breach of the Stowers duty to reasonably settle claims within the scope of coverage and for an amount within the limits of the applicable policy; (2) bad faith; (3) breach of contract; (4) deceptive insurance practices; and (5) declaratory judgment regarding Defendants' duties to defend and indemnify Espada in the underlying case. (Dkt. # 33.)

Pursuant to the Court's scheduling order entered in this case on April 13, 2017, the parties were allowed to file partial motions for summary judgment regarding Ace's duty to defend the underlying case based on the terms and conditions of the CGL Policy and the Umbrella Policy. (Dkt. # 14.) In accordance with that Order, CBX filed the instant motion for partial summary judgment on May 19, 2017. (Dkt. # 16.) Ace filed its own motion for partial summary judgment on the same day. (Dkt. # 17.) Both parties filed responses in

[3] Espada's causes of action against Ace American and Ace Property arise from their refusal to defend and indemnify Espada. (See Dkt. 16 at 11, Ex. P.)

opposition to the respective motions on June 16, 2017. (Dkts. ## 20, 21.) The parties filed replies on June 30, 2017. (Dkts. ## 27, 29.) On June 16, 2017, CBX filed an objection to, and a motion to strike, evidence in support of Ace's motion for partial summary judgment. (Dkt. # 22.) Ace filed a response in opposition on June 30, 2017. (Dkt. # 28.) The pending motions are addressed below.

APPLICABLE LAW

A movant is entitled to summary judgment upon showing that "there is no genuine dispute as to any material fact," and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"

Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

ANALYSIS

CBX argues in its motion that as (1) the owner of Espada's causes of action against Ace by the turnover order, (2) the assignee of Espada's causes of action against Ace, and (3) the judgment creditor by right under the CGL Policy, it is entitled to partial summary judgment declaring that Ace American had a duty to defend Espada pursuant to the CGL Policy, and Ace Property had a duty to defend Espada pursuant to the Umbrella Policy, through trial of the underlying case. (Dkt.

16.) Ace's motion for partial summary judgment asserts that neither Ace American nor Ace Property had any duty to defend Espada in the underlying case for either the CGL Policy or the Umbrella Policy. (Dkt. # 17.) Because both CBX and Ace's motions for partial summary judgment concern the same issue, the Court will consider them together. (See Dkts. ## 16, 17.)

A. Texas Law

The Court must "apply Texas law as interpreted by Texas state courts." Gilbane Bldg. Co. v. Admiral Ins. Co., 664 F.3d 589, 593 (5th Cir. 2011) (quoting Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d 487, 491 (5th Cir. 2000)). Under Texas law, "insurance policies are construed according to common principles governing the construction of contracts, and the interpretation of an insurance policy is a question of law for a court to determine." Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC, 620 F.3d 558, 562 (5th Cir. 2010). The Court must interpret the contract to discern the intention of the parties as it is expressed in the policy. Id. Whether a contract is ambiguous is also a question of law. Id. (citing Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998)). An ambiguity is not present simply because the parties advance conflicting interpretations, but exists "only if the contractual language is susceptible to two or more reasonable interpretations." Id. (citing Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003)).

"Under Texas law, an insurer may have two responsibilities relating to coverage—the duty to defend and the duty to indemnify." Gilbane, 664 F.3d at 594 (citing D.R. Horton – Tex., Ltd. v. Markel Int'l Ins. Co., 300 S.W.3d 740, 743 (Tex. 2009)). An insurer's duty to defend is determined by the application of the eight-corners rule. GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305, 308 (Tex. 2006). "The rule takes its name from the fact that only two documents are ordinarily relevant to the determination of the duty to defend: the policy and the pleadings of the third-party claimant." Id. (citing King v. Dall. Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002)). All doubts regarding the duty to defend are resolved in favor of the duty, and the pleadings are construed liberally. Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487, 491 (Tex. 2008). "If a complaint potentially includes a covered claim, the insurer must defend the entire suit." Id. (citation omitted).

Under Texas law, the insured has the burden to prove that coverage exists. Wallis v. United Servs. Auto. Ass'n, 2 S.W.3d 300, 303 (Tex.App.—San Antonio 1999, pet. denied). The insurer must establish that one or more policy exclusions apply. Federated Mut. Ins. Co. v. Grapevine Excavation, Inc., 197 F.3d 720, 723 (5th Cir. 1999). Once the insurer proves that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion. Id. The parties may satisfy their respective burdens by pointing to

evidence in the record that creates a genuine issue of material fact for trial. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992).

B. Whether Ace American Had a Duty to Defend Under the CGL Policy

Ace American contends that it had no duty defend Espada under the CGL Policy because the exclusion in paragraph J(5) bars coverage for CBX's underlying claims against Espada. (Dkt. # 17 at 12.) Ace American also argues that the CGL Policy's Professional Services Exclusion bars any coverage for the underlying case. (Id. at 19.)

1. Ace American's CGL Policy Provisions

In relevant part, the CGL Policy provides as follows:

SECTION I-COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period.

(Dkt. # 8-1 at 4.)

"Property Damage" is defined by the CGL Policy to mean:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Id. at 18.) An "occurrence" is defined by the policies to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id. at 17.)

The coverage provided under the Insuring Agreement also contains various exclusions. Specifically, the CGL Policies provide:

2. Exclusions

This insurance does not apply to: . . .

j. Damage To Property

"Property damage" to: . . .

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; . . .

(Dkt. # 8-1 at 7.)

The CGL Policy was also accompanied by an "Exclusion – Engineers, Architects or Surveyors Professional Liability" ("Professional Services Exclusion"), as well an "Underground Resources and Equipment Coverage Endorsement" ("UREC Endorsement"). (Dkt. # 8-1 at 39, 53.) The Professional Services Exclusion provides, in relevant part, that coverage is precluded for "property damage . . . arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity." (Id. at 39.)

The UREC Endorsement addresses "'property damage' included within the 'underground resources hazard' or the 'underground equipment hazard' and arising out of the operations performed by [the Named Insured] or on [the Named Insured's] behalf." (Id. at 53.) "'Underground resources hazard' includes 'property damage' to . . . [o]il, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water," and "[a]ny well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on." (Id. at 54.) "'Underground equipment hazard' includes 'property damage' to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water." (Id.)

2. Exclusions to the CGL Policy

There is no dispute by Ace that CBX experienced "property damage" caused by an "occurrence," as defined in the CGL Policy, as a result of Espada's work on the Well. (See Dkt. # 20 at 5–6.) Instead, Ace argues that the CGL Policy contains two exclusions that trump CBX's claims against Ace American. (Dkt. # 20 at 6, 8; Dkt. # 17 at 17, 24.) In support of its summary judgment motion, Ace contends that the "damage to property" exclusion and the "Professional Services Exclusion" exclude coverage for property damage as a result of Espada's defective work. (Dkt. # 20 at 6, 8; Dkt. # 17 at 17, 24.)

a. "Damage to Property" Exclusion

Paragraph j(5) states that Ace American will not cover "property damage to . . . "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations." (Dkt. # 8-1 at 7.) Construing the plain meaning of provision j(5), Texas courts have determined that "the use of the present tense indicates that the exclusion applies to circumstances where the contractor or subcontractors are currently working on the project." CU Lloyd's of Tex. v. Main St. Homes, Inc., 79 S.W.3d 687, 696 (Tex. App.—Austin 2002, no pet.) (emphasis in original); see also Mid–Continent Cas. Co. v. JHP Dev., Inc., 557 F.3d 207 (5th Cir. 2009).

The parties do not appear to dispute that the alleged property damage to the Well occurred during Espada's performance of the construction operations. (See Dkt. # 17 at 18; Dkt. # 21 at 11.) Instead, the dispute is whether paragraph j(5) excludes coverage only for damage to the production casing and/or the completion liner of the Well, but not physical injury to, and loss of use of, the Well in its entirety. (See Dkt. # 17 at 18; Dkt. # 21 at 11.) To answer this question, the Court must consider the parties' opposing definitions of "that particular part" as stated in the exclusion. See Basic Energy Servs., Inc. v. Liberty Mut. Ins. Co., 655 F. Supp. 2d 666, 676–77 (W.D. Tex. Sept. 18, 2009), vacated, (Jan. 21, 2010) (considering the definition of "that particular part" in deciding whether CGL Policy's exclusions in paragraphs j(5) and j(6) excluded coverage).

CBX alleges that the "that particular part" language serves to exclude coverage from only the specific part of the property on which Espada was working; CBX interprets this to be the production casing and/or the completion liner of the Well. (Dkt. # 21 at 11.) In support, CBX argues that its second amended petition in the underlying case clearly alleges damage to property that occurred only during Espada's performance of operations on the production casing of the Well and/or the completion liner of the Well. (Id.; Dkt. # 21-8.) CBX contends that, even if paragraph j(5) excludes damage to the production casing and/or the completion liner of the Well, it does not exclude damage to the remaining components of the

Well. (Dkt. # 21 at 11.) CBX argues that it has alleged other damage not within this scope of this exclusion, including damage to tangible property that is still covered by Ace American's CGL Policy, including (1) drilling operations, (2) surface casing, (3) unrecovered production casing, (4) the well and the wellbore, (5) the oil and gas itself, and (6) the lease. (Dkt. # 16 at 8.)

Ace American, on the other hand, argues "that particular part" means not only the production casing and/or the completion liner, but the entire well. (Dkt. # 29 at 6.) In other words, because all the parts are necessary to the whole, the exclusion bars coverage for the whole well rather than just a component of it. Under this reading of the exclusion, the Well is a singular unit and, therefore, CBX would be barred from recovering any damages. Ace American contends that Espada was not hired to work on a discrete component of an already completed well, but was instead hired to drill, operate, and construct the entire well, and in the course of its operations, Espada damaged the entire well. (Id. at 5–6.)

In support of its position, CBX cites cases where parties were contracted to perform work on discrete components of previously completed projects, such as wells, but not to oversee and construct the entire project. See, e.g., Basic Energy, 655 F. Supp. 2d at 668 (refusing to apply same exclusion on basis that insured was hired only to replace an oil pump and tubing on a previously constructed well); Underwriters at Lloyd's London v. OSCA, Inc., 2006 WL

941794, at *18–19 (5th Cir. 2006) (per curiam) (unpublished) (interpreting Louisiana law); Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365, 371–72 (5th Cir. 2008) (holding that when the insured was hired for "engineering of an in-flight entertainment/cabin management system," exclusion only "exclude[d] coverage for the damage to the IFE/CMS itself (or, perhaps, the electrical system) but not the rest of the Aircraft and the ensuing loss of use damages"). However, these cases are inapposite to the facts in this case. Unlike these cases, Espada was contracted to perform work during, and to oversee, construction of the entire well—not just the production casing and completion liner within an already completed well.

The Fifth Circuit has noted that "casing is not a component of a well that functions independently, and without which the rest of the well could continue to function." Cook v. Admiral Ins. Co., 438 F. App'x 313, 318 (5th Cir. Aug. 19, 2011) (quotation marks omitted) (considering CGL Policy exclusion precluding coverage for "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it"). Therefore, by damaging the casing and/or the liner of the Well, Espada "caused defects in the construction of the well as a whole." See id. at 318–19 (quotation marks omitted). "These circumstances are distinguishable from those of defective repair work (performed after a well is constructed) that causes damage only to the casing, a

pre-installed component of the finished well." Id. at 319 (citing OSCA, Inc., 2006 WL 941794, at *18–19). The Fifth Circuit distinguished cases "in which the insured's work was to be performed on a discrete independent component of a whole piece of property, and its defective work on that one component caused damage to other components of the whole property." Id. at 318 n.20 (citing Gore, 538 F.3d at 371–72).

"By contrast, here there was no domino effect of damage to the entire well triggered by [Espada's] defective work on one independent working part of the well; rather, [Espada's] work was performed during the overall drilling and completion operation of the [W]ell and thus caused damage to the entire [W]ell when [its] work was incorrectly performed." See id.; cf. Mid-Continent Cas. Co. v. Krolczyk, 408 S.W. 3d 896, 905 (Tex. App.—Hous. [1st Dist.] 2013, pet. denied) (refusing to apply exclusion to whole of a large road construction project due to its unique aspects and components).

Indeed, CBX's pleadings in its state court second amended petition support such a conclusion. CBX alleges that: (1) Espada was hired to drill and operate the Hibdon lease; (2) Espada and/or its subcontractors drilled the Well's well bore; (3) Espada and/or its subcontractors placed over 5,000 feet of production casing and a fracking completion system into the Well; (4) Espada and/or its subcontractors attempted to pressurize the completion system; (5) the

production casing was fractured at about 3,400 feet; and, as a result of the fractured casing; (6) the Well was plugged and abandoned. (Dkt. # 21-8 at 3–4.)

Accordingly, the Court finds that the property damage alleged by CBX, including the physical injury to, and loss of use of, the Well falls within the "property damage" exclusion in paragraph j(5) and is excluded from coverage under the CGL Policy unless, as CBX contends, the UREC Endorsement supersedes this exclusion.[4]

b. UREC Endorsement

CBX contends that, even if paragraph j(5) excludes coverage for property damage to property other than the Well's production casing or completion liner, the exclusion is superseded by the UREC Endorsement to the CGL Policy. (Dkt. # 21 at 14.) Ace American, on the other hand, argues that the UREC Endorsement does not conflict with paragraph j(5)'s exclusion. (Dkt. # 17 at 20.)

[4] CBX also argues that damage occurred to other tangible property, separate from the Well, including the lease, actual oil and gas, and its drilling operations. (Dkt. # 27 at 10.) CBX argues that coverage for these component parts of the Well cannot be excluded from coverage pursuant to paragraph j(5) of the CGL Policy. (Id.) However, CBX's own pleadings in state court do not allege these damages directly as a result of Espada's physical injury to, and loss of use of, the Well. (See Dkt. # 21-8.) Instead, CBX sought to recover these damages as result of that property damage. (See id. at 9–10 ("[t]hese damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the [Well]").) Furthermore, CBX has not presented sufficient evidence in its motion and its responses to Ace's motion—and Ace does not concede—that these alleged damages were "property damage" caused by an "occurrence" as defined in the CGL Policy.

Ace American contends that the UREC Endorsement only (1) modifies and replaces a single exclusion contained in paragraph j(4) of the CGL Policy, and (2) reduces the aggregate limits of liability applicable to claims arising out of certain types of property damage. (Id.)

Endorsements to a policy are issued to add coverages that would otherwise be excluded. Mesa Operating Co. v. Cal. Union Ins. Co., 986 S.W.2d 749, 754 (Tex. App.—Dallas 1999, pet. denied). When an endorsement provides an express grant of coverage, the endorsement supersedes any exclusions in the main body of the policy to the contrary. Id.; Westchester Fire Ins. v. Heddington Ins. Ltd., 883 F. Supp. 158, 165 (S.D. Tex. 1995), aff'd, 84 F.3d 432 (5th Cir. 1996). In particular, a UREC Endorsement providing coverage to the assured will supersede exclusions in the pre-printed policy form to the contrary. Investors Ins. Co. of Am. v. Breck Operating Corp., No. Civ.A 1:02–CV–122–C, 2003 WL 21056849, at *13 (N.D. Tex. May 8, 2003) (underground resources and equipment coverage endorsement superseded the policy's form pollution exclusion).

The UREC Endorsement at issue here expressly changes the CGL Policy in three main ways. First, it reduces the aggregate limits of liability applicable to claims arising out of certain property damage from $2,000,000 to $1,000,000. (Dkt. # 8-1 at 53–54.) Second, the UREC Endorsement expressly replaces part of the language of the exclusion contained within paragraph j(4) in

the CGL Policy. (Id. at 54.) As a result, paragraph j(4), stating that "property damage" to the "[p]ersonal property in the care, custody or control of the insured" will be excluded from coverage, narrows that exclusion and now includes language that "[t]his exclusion does not apply to any 'property damage' included within the 'underground resources hazard' or the 'underground equipment hazard' other than 'property damage' to that particular part of any real property on which operations are being performed by you or on your behalf if the 'property damage' arises out of those operations." (Id.) Last, the UREC Endorsement defines "Underground resources hazard" and "Underground equipment hazard." (Id.) The UREC Endorsement expressly provides that "[a]ll other terms and conditions of the policy remain unchanged." (Id.)

In support of its interpretation of the UREC Endorsement, CBX cites Mid-Continent Cas. Co. v. Bay Rock Operating Co., 614 F.3d 105 (5th Circuit 2010), in which the Fifth Circuit affirmed the district court's conclusion that an Oil & Gas Endorsement superseded the exclusions contained in paragraphs j(5) and j(6) in the insured's CGL Policy—identical in wording to the CGL Policy exclusions in this case. The insured in that case, Bay Rock, was responsible for the supervision of a well that experienced a blow-out caused by a sub-contractor. Id. The district court found that the Oil & Gas Endorsement superseded the CGL policy exclusions in paragraphs j(5) and j(6) in that case, and that Mid-Continent

had a duty to defend Bay Rock in an underlying suit for damages. Mid-Continent Cas. Co. v. Bay Rock Operating Co., 2009 WL 5341825, at *7 (W.D. Tex. Sept. 30, 2009).

The Court here, however, finds Bay Rock distinguishable from the facts in this case. The Oil & Gas Endorsement in Bay Rock did not contain wording specifically identifying any express exclusion(s) in the CGL Policy to which it applied or superseded. Id. at *5. Instead, the district court determined that "a potential conflict with the coverage grant in the Oil & Gas Endorsement existed" because the endorsement "purport[ed] to exclude coverage for damage to that particular part of property that the insured was working on." Id. The Fifth Circuit, in affirming the district court, noted that "[t]he Oil & Gas Endorsement provided Bay Rock with additional coverage for property damage to the" underground resources hazard. Bay Rock, 614 F.3d at 115. Indeed, the Oil & Gas Endorsement considered in that case specifically states that "the 'Underground Resources Hazard' is included within the Limit of Insurance."[5] (Dkt. # 17-3 at 87.) Here, however, there is no similar language in the UREC Endorsement

[5] Although not discussed in Bay Rock, the Oil & Gas Endorsement does not add coverage for property damage to *real property* within the defined "Underground Equipment Hazard," but does, however, appear to apply to *personal property* included in the exclusion in paragraph j(4) of the CGL Policy, as the Court has found so in this case. (See Dkt. # 17-3 at 89 (stating that the insurance "does not apply to . . . 'Property Damage' included within the 'Underground Equipment Hazard," but that "[e]xclusion j(4) . . . does not apply to this hazard.").)

specifically providing coverage for either the underground resources hazard or the underground equipment hazard. Instead, the UREC Endorsement clearly and explicitly adds coverage only to the exclusion in paragraph j(4), while indicating that "[a]ll other terms and conditions of the policy remain unchanged"—no such similar language appears in Bay Rock's Oil & Gas Endorsement. (Dkt. # 8-1 at 54; Dkt. # 17-3 at 87–89.)

Therefore, contrary to CBX's contention, the Court finds the language in the UREC Endorsement unambiguous and that its language does not conflict with the exclusion in paragraph j(5). As discussed, the UREC Endorsement clearly and explicitly states that it is replacing *only* paragraph j(4)'s exclusion, stated above, with language that expands Espada's coverage for damage to property that occurs in the area defined as the "underground resources hazard"[6] and the

[6] CBX contends that the UREC Endorsement provides coverage because the "Underground Resources Hazard" defines the real property damaged in this case. (Dkt. # 21 at 15.) "Underground Resources Hazard" is defined as "property damage" to "[a]ny well, hole, formation, strata, or area in or through which exploration for or production of any substance is carried on." (Dkt. # 8-1 at 54.) The Court disagrees with CBX's contention, finding that the UREC Endorsement narrows the exclusion in paragraph j(4) by providing coverage for damage to certain real property not already included in paragraph (j)(5)'s exclusion—such as underground damage to real property on which Espada's operations are not being performed. Examples of this include damage to neighboring minerals, wells, holes, or formations that result from Espada's operations on the Well that may occur as a result of horizontal drilling or "frackquakes."

"underground equipment hazard."[7] (Dkt. # 8-1 at 54.) Nowhere in the UREC Endorsement does it purport to modify, change, add, or delete the exclusion for damage to *real property* addressed in paragraph j(5). (See id.)

"A consideration of the rules and principles of contract law further supports a conclusion that the UREC Endorsement does not conflict with and supersede the" exclusion in paragraph j(5). Liberty Mut. Ins. Co. v. Linn Energy LLC, 2013 WL 12141366, at *7 (S.D. Tex. Sept. 5, 3013) (citing Progressive Cnty. Mut. Ins. Co. v. Sink, 107 S.W.3d 547, 551 (Tex. 2003) ("It is well settled that the general rules of contract construction apply to the interpretation of insurance contracts."). It is true that exceptions and limitations to insurance policies are strictly construed against the insurer. Columbia Cas. Co. v. Ga. & Fla. RailNet, Inc., 542 F.3d 106, 112 (5th Cir. 2008). However, "each part of the [insurance] contract must also be given effect and meaning." Id. "An interpretation that gives a reasonable meaning to all provisions is preferable to one that leaves a portion of the policy useless, inexplicable, or creates surplusage." Id. at 112–13. Thus, the

[7] Ace American informs the Court of one value to the insured of this interpretation of the UREC Endorsement's additional coverage to personal property: "[a] well operator such as Espada will routinely have in its care, custody, or control, personal property (such as pipes, drill bits, and other well-servicing machinery) that could potentially be damaged in the course of its drilling operations" and that the endorsement "provides coverage for claims against the insured for damage to those types of personal property." (Dkt. # 29 at 9.)

interpretation proposed by Ace American allows the UREC Endorsement and the CGL Policy to be read together, giving both effect and meaning.

Moreover, in consideration of the rule that courts should "give effect to the written expression of the parties' intent . . . [and should] examine [ ] the entire policy to determine the true intent of the parties," Indian Harbor Ins. Co. v. KB Lone Star, Inc., No. H–11–CV–1846, 2012 WL 3866858, at *4 (S.D. Tex. Sept. 5, 2012), the Court observes that the UREC Endorsement does not specifically alter, amend, or add any other coverage in the CGL Policy, aside from the exclusion in paragraph j(4)—which it explicitly and squarely purports to replace. For these reasons, the Court concludes that the UREC Endorsement and the exclusion in paragraph j(5) do not conflict, and thus the UREC Endorsement does not supersede the exclusion in paragraph j(5). Accordingly, despite CBX's argument to the contrary, Ace American had no duty to defend Espada in the underlying case on this basis.

c. Professional Services Exclusion

Ace American further argues that the Professional Services Exclusion, defined above, also precludes coverage for Espada's property damage to the Well. (Dkt. # 17 at 24.) Ace American asserts that the underlying case is based on Espada's failure to use its specialized or technical knowledge in its work on drilling and operating the Well. (Id.) In opposition, CBX disputes that Espada's

work on the Well qualifies as "professional services." (Dkt. # 21 at 18.) Although the Court has already found that the property damage to the Well was excluded from coverage pursuant to the CGL Policy, to be thorough, the Court will consider the Professional Services Exclusion, as well.

Since the CGL Policy does not define professional services, the relevant definition is that provided by Texas law: "the task must arise out of acts particular to the individual's specialized vocation, [and] . . . it must be necessary for the professional to use his specialized knowledge or training." Atl. Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P., 982 S.W.2d 472, 476–77 (Tex. App.—Dallas 1998, pet. denied). While it does not define professional services, the CGL Policy does include a list of activities that fall within the exclusion, including: "supervisory, inspection, architectural or engineering activities." (Dkt. # 8-1 at 39.) None of these terms are further defined.

In accordance with the eight-corners rule, the Court will look to the state court petition in the underlying case to determine whether the conduct alleged falls within the Professional Services Exclusion. See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997). CBX's second amended petition alleges that "Espada was retained for the purpose of implementing [another's] plan, procuring and using the proper materials to include casing, and performing related oil and gas well drilling and completion

services to deliver a producing well for [CBX]." (Dkt. # 21-8 at 7.) CBX further alleges that "Espada owed a duty to perform these activities within recognized industry standards and practices, as well as to deliver a competent well design that would result in a completed and productive well." (Id.) CBX alleges that Espada's breach of this duty resulted in "deviations from accepted industry practices and standards constitute[ing] professional negligence." (Id.) In support of its negligence claim, CBX attached to the petition, an affidavit from a licensed engineer who opined that Espada was professionally negligent in its actions, stating that Espada's "acts, errors, and/or omissions renders the professional services provided insufficient and inadequate." (See Dkt. # 21-5 at 12–16.)

Here, while CBX acknowledges that some of its allegations against Espada are for professional negligence, it asserts that it also alleged ordinary negligence against Espada for the "mundane tasks of drilling and operating." (Dkt. # 27 at 19.) For instance, CBX contends that its live state court petition "leaves open the possibility that the negligent [acts] resulted from ordinary negligence – e.g., a worker fell asleep during [the] operation, dropped a tool that damaged equipment, etc." (Dkt. # 27 at 13.) CBX also argues that, in any case, the UREC Endorsement, discussed above, supersedes the Professional Liability Exclusion. (Id. at 14.)

First, the Court finds CBX's argument that the UREC Endorsement supersedes the Professional Services Exclusion meritless. The Court has already determined, as discussed above, that the UREC Endorsement does not supersede any of the real property damage to the Well at issue. Additionally, to the extent an endorsement can conflict with an added exclusion not contained within the main body of a CGL Policy,[8] the Court finds that the UREC Endorsement and the Professional Services Exclusion do not conflict with each other, and therefore, the UREC Endorsement does not supersede the Professional Services Exclusion.

Second, the Court finds that CBX's argument that its petition alleges claims based on non-professional services also fails. CBX has clearly alleged that its claims are based on Espada's failure "to deliver a producing well for [CBX]," and they are grounded on Espada's "professional negligence," stemming from the "deviations of accepted industry practices and standards." (Dkt. # 21-8 at 7.) CBX further alleges that "Espada owed a duty to perform these services within recognized industry standards." (Id.) CBX's allegations do not otherwise clearly allocate some of the breach of duty to any non-professional duties, and its attached affidavit of an engineer in support of its claims for professional negligence does not do so either.

[8] CBX has failed to cite any authority for this proposition.

The Court also finds that CBX's request for the Court to consider that perhaps "a worker fell asleep during [the] operation, [or] dropped a tool that damaged equipment," asks the Court to look beyond the eight-corners of the petition and CGL Policy. CBX has not alleged these ordinary negligence facts in its state court petition, and the Court cannot now consider them as the basis—either in whole or in part—for its claims against Espada. See Merchants Fast Motor Lines, 939 S.W.2d at 141 ("If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured.").

Additionally, the Court finds the Fifth Circuit's opinion in Admiral Ins. Co. v. Ford instructive. 607 F.3d 420 (5th Cir. 2010). In Admiral, the insured had contracted to provide professional services in drilling an oil well. The Fifth Circuit stated:

> Aside from Exco's bald statement that certain (unspecified) acts were non-professional, the only arguably nonprofessional conduct alleged was failing to look for metal shavings or to use a magnet to detect shavings in mud. The actual performance of these acts is perhaps akin to conduct that we have found to be non-professional. But Exco is not suing Ford because Ford was told to watch for pipe wear and metal shavings and failed to do so. Rather, the complaint is that Ford failed to act upon its specialized knowledge that those tasks needed to be performed (i.e., Ford failed to instruct the mud logger to look for shavings). Indeed, the specific failures are listed as sub-parts of a general failure "to perform adequate and competent drilling operations." In other words, the allegations are not that Ford incorrectly performed some non-professional activity, but that Ford

> failed to properly implement a plan to drill a well over 16,000 feet deep.

Id. at 426. Here, even if the property damage was the result of a worker who fell asleep or dropped a tool—both non-professional activities—CBX's state court petition specifically alleges that Espada failed "to perform[] oil and gas well drilling and completion services to deliver a producing well for [CBX]"—all indisputably professional tasks requiring specialized knowledge. Susman Godfrey, 982 S.W.2d at 476–77; see also Nicklos Drilling Co. v. Ace Am. Ins. Co., 2014 WL 6606575, at * 3 (S.D. Tex. Nov. 5, 2014) (holding no duty to defend where plaintiff alleged conduct based only on failure to use specialized knowledge to prevent well blowout, but alleged no conduct based on non-professional services).[9]

Accordingly, because CBX's allegations in the petition are subject to the policy exclusion for professional services, the Court concludes that Ace American does not have a duty to defend Espada in the underlying case on this basis either.

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[9] The cases CBX cites in support of its contention that Espada's drilling and completion services constituted non-professional services are inapposite and do not completely support CBX's position. See Willbros RPI, Inc. v. Cont'l Cas. Co., 601 F.3d 306, 310 (5th Cir. 2010) (underlying state court petition clearly alleged both professional and non-professional duty based on a failure to "use ordinary care"); Hartford Cas. Ins. Co. v. DP Eng'g, L.L.C., 827 F.3d 423, 427–30 (5th Cir. 2016) (finding professional services exclusion precluded coverage and insurer had no duty to defend). In this case, CBX clearly and explicitly alleged only negligence in professional services, and supported those claims with an affidavit from a licensed engineer who stated the same. (See Dkt. # 21-5; Dkt. # 21-8.)

C. Whether Ace Property Had a Duty to Defend Under the Umbrella Policy

Ace Property moves for summary judgment on the issue of whether it had a duty to defend Espada under the terms of the Umbrella Policy. (Dkt. # 17 at 28.) Ace Property contends that exclusion E(5) in the Umbrella Policy is identical in language to the exclusion in paragraph j(5) of the CGL Policy, and also that the Umbrella Policy's Professional Service Exclusion is substantially the same as the one in the CGL Policy, discussed above. (Id.) Ace Property argues that for the same reasons identified above, the Court should find that the Umbrella Policy and its Professional Services Exclusion preclude coverage for the underlying suit. (Id.) In addition, Ace Property contends that the Umbrella Policy's Oil and Gas Industries Limitation Endorsement precludes coverage for underlying case. (Id.)

For the same reasons discussed herein, as stated above, the Court finds that exclusion e(5) in the Umbrella Policy and its Professional Services Exclusion[10] preclude coverage for the underlying case. As for the Oil and Gas Industries Limitation Endorsement, stating that the Umbrella Policy does not apply to "any injury, damage, expense, cost, 'loss,' liability or legal obligation for any . . . "[l]oss of damage to . . . "[a]ny well, hole, formation, strata or area in or

[10] As Ace Property contends, the wording of the Umbrella Policy's exclusion e(5) and its Professional Services Exclusion are identical, or very similar, to the wording of the same in the CGL Policy. (See Dkt. # 17-1 at 14; Dkt. # 17-2 at 13.) CBX does not dispute this. (See Dkt. # 21 at 27.)

through which exploration for any production of any substance is carried on," the Court arrives at the same conclusion. As discussed, CBX's state court petition clearly alleges such damage to the Well and its casing therein, which is precluded from coverage under the Oil and Gas Industries Limitation Endorsement. (See Dkt. # 21-8.) Accordingly, the Court concludes that the underlying case is not covered by the Umbrella Policy, and Ace Property had no duty to defend Espada.

Based on the foregoing, the Court finds that Ace American and Ace Property had no duty to defend Espada in the underlying case. The Court will **GRANT** Ace's motion for partial summary judgment on this issue (Dkt. # 17), and **DENY** CBX's motion for partial summary judgment (Dkt. # 16).

D. CBX's Objections and Motion to Strike Ace's Summary Judgment Evidence

CBX objects to seven of Defendants' exhibits offered in support of summary judgment. (Dkt. # 22.) First, CBX objects to the declaration of Manuel Mungia, Jr., on the basis that he has attempted to authenticate documents, attached as exhibits to his declaration, without any personal knowledge of them. The Court finds this objection mostly meritless—the bulk of documents attached to Mr. Mungia's declaration are public court filings from the underlying case. Additionally, the Fifth Circuit has recently ruled that, at the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. Lee, 859 F.3d at 355. In any case, in ruling on Ace's motion for summary

judgment, the Court only reviewed CBX's Second Amended Complaint and the Ace Policies at issue in this case; the Court did not consider any of the other attachments to Mr. Mungia's declaration. This objection is **OVERRULED**.

CBX next objects to Ace's exhibits 2 through 9, on the basis that they are not relevant under Rule 402 of the Federal Rules of Evidence. (Dkt. # 22 at 2.) CBX also objects to Ace's exhibits 3 through 9, on the basis that they are inadmissible hearsay and not properly authenticated. However, the Court, in making its ruling on Ace's partial summary judgment motion, did not rely on the evidence that CBX now objects to and moves to strike. In accordance with the eight-corners rule, discussed above, the Court relied mainly on CBX's Second Amended Petition (Dkt. # 21-8), as well as on the two Ace Policies in question (Dkt. # 8-1, Dkt. # 17-1 at 9). Therefore, the Court finds each objection to be without merit and **OVERRULES** the objections and **DENIES** the motion to strike (Dkt. # 22).

CONCLUSION

Because the Court has found that the CGL Policy does not apply to the type of "property damage" alleged by CBX, Ace did not have a duty to defend Espada in the underlying case. Accordingly, based on the foregoing, the Court: (1) **GRANTS** Ace's Motion for Partial Summary Judgment on Ace's Duty to Defend (Dkt. # 17); (2) **DENIES** CBX's Motion for Partial Summary Judgment

(Dkt. # 16), and (3) **OVERRULES** CBX's Objections to and Motion to Strike Evidence in Support of Defendants Motion for Partial Summary Judgment (Dkt. # 22).

IT IS SO ORDERED.

DATED: San Antonio, Texas, October 16, 2017.

David Alan Ezra
Senior United States Distict Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, vs. ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § § § §	NO. 5:17-CV-17-DAE

ORDER: (1) GRANTING ACE'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (2) DENYING CBX'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The matters before the Court are (1) Defendants Ace American Insurance Company ("Ace American") and Ace Property and Casualty Insurance Company's ("Ace Property") (collectively, "Defendants" or "Ace") Motion for Partial Summary Judgment on Fully Adversarial Trial (Dkt. # 46), and (2) Plaintiff CBX Resources, LLC's ("CBX") Motion for Partial Summary Judgment that the Underlying Judgment is Binding and Admissible (Dkt. # 47).

On June 27, 2018, the Court held a hearing on these matters. CBX was represented by Mark Fassold; Defendants were represented by Daniel Lane. After careful consideration of the memoranda in support of and in opposition to the

motions, and in light of the parties' arguments at the hearing, the Court, for the reasons that follow, **GRANTS** Ace's motion for partial summary judgment, and **DENIES** CBX's motion for partial summary judgment.

FACTUAL BACKGROUND

CBX was the lessee of the Hibdon Lease, a mineral tract located in Zavala County, Texas. (Dkt. # 16 at 7.) As lessee, CBX arranged for the drilling and operation of the Picosa Creek 1V Well ("the Well") to be performed by Espada Operating, LLC ("Espada"). (Id.) In 2011, Espada drilled the well bore, placing almost 900 feet of surface casing and more than 5,700 feet of production casing into the Well, and it installed a fracking system into the production casing. (Id.) On October 25, 2011, Espada attempted to pressurize the fracking system; a few months later, on January 25, 2012, Espada attempted to pull the production casing out of the well bore. (Id.) In pulling out the production casing, Espada discovered a fracture of about 3,400 feet in the Well. (Id.) Espada determined that the production casing below the fracture could not be recovered from the well bore. (Id.) Because the casing was irremovable, the well bore could not be restored, and the Well was plugged and abandoned as a result. (Id.)

Espada was a named insured on a Commercial General Liability ("CGL Policy") issued by Ace American, with a coverage period from April 2, 2011, through April 2, 2012. (Dkt. # 16 at 7.) The CGL Policy was accompanied

by an "Underground Resources and Equipment Coverage Endorsement," which replaced and/or added exclusions in the CGL Policy, while also adding certain definitions to the CGL Policy. (Id.) Espada was also a named insured on an Umbrella Policy issued by Ace Property, which covered the same policy period of April 2, 2011, through April 2, 2012. (Id.)

PROCEDURAL BACKGROUND – STATE COURT CASE

On February 21, 2013, CBX brought suit for damages arising from its total loss of the use of the Well against several defendants—but not Espada—in the 293rd Judicial District Court of Zavala County, Texas ("underlying case"). (Dkt. # 16 at Ex. C.) In October 2013, CBX amended its state court petition, adding Espada as a defendant, and appending a Certificate of Merit of a licensed engineer who described Espada's role in the failure of the Well. (Id. at Ex. D.) According to CBX, Espada filed its original answer on November 19, 2013, represented by counsel retained by Ace American after Espada tendered the defense of the lawsuit to Ace.[1] (Id. at Exs. E, L.) The state court set a trial in this case for February 9, 2016. (Id. at Ex. F.)

On August 7, 2015, CBX filed its second amended petition, itemizing alleged damages to its tangible property including: drilling operations, surface casing, unrecovered production casing, the Well and the well bore, the oil and gas

[1] According to Ace, however, Espada had ceased doing any business operations sometime in 2012, due to a lack of funding. (See Dkt. # 17 at 5–6.)

itself, and the lease. (Dkt. # 16 at Ex. G.) On August 13, 2015, Espada filed a third party petition, suing three separate parties. (Id. at Ex. H.) Espada's third party petition stated that it "alleges that a catastrophic failure of the casing occurred down hole in the Well," and that the "Well allegedly could not be repaired and was plugged and abandoned." (Id.)

On September 22, 2015, CBX served a Stowers demand upon Espada through its counsel, seeking to fully and unconditionally release its claims for an amount within the limits of the policies issued to Espada by Ace American and Ace Property. (Dkt. # 16 at Ex. I.) By its terms, the Stowers demand was set to expire on October 23, 2015, at 5:00pm. (Id.)

However, on October 15, 2015, the Claims Director for Ace American, Matthew Spector, sent a withdrawal letter to Espada. (Id. at Ex. K.) The letter indicated that Ace American intended "to cease the retention of defense counsel effective fourteen days from that date of [the] letter," or, on October 29, 2015. (Id.) Mr. Spector's letter characterized CBX's claims as non-professional liability negligence claims. (Id.) On November 30, 2015, approximately 71 days before the February 9, 2016 trial setting, the state court granted Espada's defense counsel's motion to withdraw as counsel. (Id. at Exs. L, M.)

A pre-trial hearing was held in the state court case on February 1, 2016; Espada failed to appear at the hearing. (Dkt. # 16 at Ex. N.) Because of

Espada's failure to appear at the hearing, CBX requested the state court enter judgment in CBX's favor against Espada.[2] (Id.) The Court ordered that judgment be entered in CBX's favor and set the matter for February 10, 2016, to hear evidence in support of damages. (Id.) On February 10, 2016, the state court heard evidence from CBX's witnesses and exhibits in support of its claim. (Id. at Ex. O.) The state court entered judgment, finding that Espada was negligent and awarded damages and post-judgment interest payable to CBX by Espada. (Id. at Ex. N.) According to CBX, the judgment became final and is no longer appealable. (Dkt. # 16 at 10.)

On November 1, 2016, the state court entered an Order for Turnover Relief ("turnover order"), transferring ownership of Espada's causes of action against Ace American and Ace Property to CBX.[3] (Dkt. # 16 at Ex. P.) The turnover order also compelled Espada to execute an assignment of those claims to CBX; according to CBX, Espada has complied with that portion of the turnover order. (See id. at 11; Ex. P.)

[2] CBX had apparently settled with the other defendants in the case. (See Dkt. # 17 at 8–9.)

[3] Espada's causes of action against Ace American and Ace Property arise from their refusal to defend and indemnify Espada. (See Dkt. 16 at 11, Ex. P.)

PROCEDURAL BACKGROUND – FEDERAL COURT CASE

On January 10, 2017, CBX filed suit in this Court against Ace American and Ace Property. (Dkt. # 1.) Its first amended complaint alleges claims against Defendants for (1) breach of the Stowers duty to reasonably settle claims within the scope of coverage and for an amount within the limits of the applicable policy; (2) bad faith; (3) breach of contract; (4) deceptive insurance practices; and (5) declaratory judgment regarding Defendants' duties to defend and indemnify Espada in the underlying case. (Dkt. # 33.)

Pursuant to the Court's scheduling order entered in this case on April 13, 2017, the parties were allowed to file partial motions for summary judgment regarding Ace's duty to defend the underlying case based on the terms and conditions of the CGL Policy and the Umbrella Policy. (Dkt. # 14.) In accordance with that Order, CBX and Ace filed cross motions for partial summary judgment on Ace's duty to defend in the underlying case. On October 16, 2017, the Court granted Ace's motion and denied CBX's motion, finding that the insurance policy at issue does not apply to the type of property damage alleged by CBX. (Dkt. # 47.) Accordingly, the Court held that Ace did not have a duty to defend Espada in the underlying case. (Id.)

In accordance with the Court's scheduling order, the parties were allowed to file a second motion for partial summary judgment. On October 20,

2017, Ace filed its motion, seeking a declaration that the underlying judgment that CBX obtained against Espada in the underlying case is not binding on Ace nor admissible as evidence of damages in the instant suit.[4] (Dkt. # 46.) CBX filed its motion on the same day, asking the Court to declare that the underlying judgment is binding and admissible and fixes the actual amount of damages of its Stowers claim in an amount in excess of the judgment rendered. (Dkt. # 47.) The motions have been fully briefed and are now ready for disposition.

APPLICABLE LAW

A movant is entitled to summary judgment upon showing that "there is no genuine dispute as to any material fact," and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for

[4] While the Court has already determined that Ace had no duty to defend Espada in the underlying suit, CBX has also asserted claims against Ace based on estoppel and alleged violations of the Texas Insurance Code. (Dkt. # 33.)

trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

ANALYSIS

Ace moves for partial summary judgment on Count 21 of its First Amended Counterclaim for Declaratory Relief, seeking a judicial declaration that

the underlying judgment that CBX obtained against Espada is neither binding on Ace nor admissible as evidence of damages in this lawsuit because it was not the result of a fully adversarial trial. (Dkt. # 46.) Conversely, CBX argues in its motion that the underlying judgment was in fact the result of a fully adversarial proceeding and therefore it is binding and admissible as evidence in this case. (Dkt. # 47.) Because both CBX and Ace's motions for partial summary judgment concern the same issue, the Court will consider them together. (See Dkts. ## 46, 47.)

A. Fully Adversarial Trial

The Texas Supreme Court held in State Farm Fire & Casualty Co. v. Gandy that "[i]n no event . . . is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer . . . ." 925 S.W.2d 696, 714 (Tex. 1996).

Recently, the Texas Supreme Court issued an opinion in Great American Insurance Co. v. Hamel, 525 S.W.3d 655 (Tex. 2017), addressing certain questions that have arisen since Gandy. For instance, in Hamel, the court interpreted the phrase "fully adversarial" as used in Gandy. Id. at 661–67. The court noted that, under prior authority, a determination of "fully adversarial" required courts to "retroactively evaluate and thus second-guess trial strategies and

tactics, which . . . often produces an inaccurate and unreliable result." Id. at 666. The court concluded that "[t]his misplaced focus on trial details likely results from a misinterpretation of the phrase 'fully adversarial.'" Id. The court held:

> Today we clarify that the controlling factor is whether, at the time of the underlying trial or settlement, **the insured bore an actual risk of liability for the damages** awarded or agreed upon, or **had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages** and thus the [insured defendant's] covered liability loss. . . .
>
> We believe adversity turns on the insured defendant's incentive to defend (or lack thereof), and an after-the-fact evaluation of the parties' trial strategies therefore has no place in the analysis.

Id. at 665–67 (emphasis added).

In Hamel, the insured entered into an agreement with the claimant prior to trial that "eliminated any meaningful incentive" for the insured to contest a judgment against the claimant. Id. at 666. The court held that, "[w]hen the parties reach an agreement before trial or settlement that deprives one of the parties of its incentive to oppose the other, the proceeding is no longer adversarial." Id. "Stated another way, proceedings lose their adversarial nature when, by agreement, one party has no stake in the outcome and thus no meaningful incentive to defend itself." Id.

B. Was the Underlying Judgment the Product of a Fully Adversarial Trial?

Based on Hamel, the dispositive issue for the Court to decide here is (1) whether Espada bore any actual risk of liability for the damages at the time of the underlying judgment, or (2) whether Espada had some other meaningful incentive to ensure the underlying judgment accurately represented CBX's damages in the state court case. See Hamel, 525 S.W.3d 665–67.

Ace contends that CBX faced no actual opposition in the underlying suit because Espada defaulted, thereby failing to even show up for the trial. (Dkt. # 46 at 2.) Ace further contends that there is no dispute that Espada had ceased any business operations by February 2013, several months before CBX added Espada to the underlying suit, and therefore had no assets or income. (Id.) Ace also asserts that Espada had millions of dollars in liability, and was prohibited from acting as an oil and gas operator by order of the Texas Railroad Commission. (Id.) Therefore, according to Ace, Espada was defunct and insolvent and had no real stake in the outcome of the underlying suit, nor did it have any incentive to defend itself. (Id.)

Ace further highlights its argument by asserting that the very manner in which the $105 million judgment occurred underscores the complete absence of an adversarial proceeding. (Dkt. # 46 at 2.) Ace argues that the exorbitant amount of the judgment is comprised of speculative damages that are not recoverable

under Texas law and are in fact barred by Espada's contract with CBX. (Id.) Instead, Ace argues the damages portion of the underlying judgment was a sham proceeding that the Texas Supreme Court sought to eradicate when it imposed the fully adversarial requirement. (Id. at 3.)

CBX, on the other hand and in support of its position that the underlying judgment was the result of a fully adversarial trial, asserts that there was no pretrial agreement that eliminated Espada's financial risk of liability for the damages awarded during the underlying trial. (Dkt. # 47 at 12.) CBX also contends that Espada had a meaningful stake in the outcome of the underlying litigation and Espada attempted to hire counsel to sue Ace to force Ace to resume Espada's defense in the underlying suit. (Id. at 18.)

In Hamel, the insured-defendant and the plaintiff entered into a pretrial agreement in the underlying suit, which removed the insured-defendant's stake in the outcome and the corresponding incentive to defend itself. Hamel, 525 S.W.3d at 668. The court determined that "[a]fter the agreement was executed, [the suit for damages against insured-defendant] no longer involved opposing parties, and the trial that followed was not fully adversarial." Id. The Texas Supreme Court determined then that "the presence of such an agreement creates a strong presumption that the judgment did not result from an adversarial proceeding, while the absence of such an agreement creates a strong presumption

that it did." Id. The court went on to say that "the insurer may overcome the presumption by demonstrating that, even though the plaintiff and insured defendant did not enter into any formal, written agreement, the evidence nonetheless establishes that the defendant had no meaningful stake in the outcome of the underlying litigation." Id. The court, however, cautioned that "the presumption of adversity may [not] by overcome solely by evidence that a defendant has minimal assets" and that "[s]omething more is required to demonstrate a lack of incentive to defend in the absence of an agreement affirmatively removing such an incentive." Id. at 668 n.9.

In considering Hamel to the facts in this case, the Court notes that, unlike here, the insured-defendant in Hamel executed a pretrial agreement with the plaintiff. Thus, under the Texas Supreme Court's instruction in Hamel, the Court should normally apply the presumption that the lack of any pretrial agreement in this case suggests that the underlying judgment was the result of a fully adversarial proceeding. However, the facts in Hamel are distinguishable from the facts here. In Hamel, the insured-defendant—represented by counsel—still attended the damages hearing. See Hamel, 525 S.W.3d at 665–66. Therefore, while Hamel contemplated a situation where, as here, the parties did not enter into a pretrial agreement, Hamel did not address the situation before this Court where the insured-defendant failed to show up at all at the time of trial after it lost its defense

from the insurer. Ace argues therefore that the presumption in Hamel should not apply in this case because of Espada's failure to show up at all to the trial and damages hearing.

Assuming without deciding that the presumption applies in this case, the Court finds that, in any case, Ace has presented sufficient evidence that Espada had no meaningful stake in the underlying judgment. Once Ace withdrew its defense of Espada in the underlying case, there is no real dispute that Espada lacked the financial resources to retain an attorney to maintain its defense. (See Dkt. # 47 at 7; Dkt. # 46-1 Ex. 4 at 72:13–19, Ex. 3 at 26:22–25.) It is also undisputed that the Texas Railroad Commission prohibited Espada from acting as a well operator, thereby prohibiting a major part of its operations. (See id.) While this is some evidence that Espada lacked a meaningful stake, the Court cannot consider a lack of financial resources by itself in making such a determination. See Hamel, 525 S.W.3d at 668 n.9. Thus, as further evidence, Ace points to the fact that Espada completely failed to show up at all at the trial and subsequent damages hearing. (Dkt. # 46 at 20.)

Extending Hamel and Gandy to the most straight-forward interpretation, the fact that Espada failed to appear at docket call in the underlying trial and damages hearing, leads the Court to believe that the trial and underlying judgment was not fully adversarial and therefore cannot be used as evidence in this

case. However, to combat this conclusion, CBX asserts that although Espada did not show up at the trial or damages hearing, it had very valid reasons for not attending, none of which were related to its lack of material or financial interest in the outcome. For instance, CBX contends that Espada's president did not attend "solely because of his physical limitations as a quadriplegic and not because of any other reason." (Dkt. # 49 at 13.) CBX also argues that Espada's business manager did not attend because he "had been told in other cases that individuals could not represent corporate entities" and because the proceedings were being held in Zavala County and not for any other reason. (Id.; Ex. U at 37:14–38:19.)

CBX also argues that at the time of trial, Espada still had a meaningful stake in the outcome of the underlying litigation because (1) it held the right to receive a fee in exchange for making several different wells produce and it did not want to have a judgment against it if it wanted to continue its business; (2) it attempted to hire counsel to sue Ace to force Ace to continue its defense in the underlying litigation, but the law firm declined to take the case; (3) to this day, Espada remains a going concern in that the business has never been dissolved and it still presently files tax returns; and (4) as an operating company, Espada did not need any assets to generate revenue because "its assets were the people that were running it as managers," and that it was designed to be insolvent as a result of

"incurring liabilities like for these plugging of wells." (Dkt. # 47 at 19–20; Ex. U at 52:20–53:9.)

In considering all of the evidence together, the Court finds that the $105 million underlying judgment entered against Espada was not the result of a fully adversarial proceeding. While CBX has produced some evidence that Espada did in fact attempt to hire counsel to sue Ace into continuing to defend Espada in the underlying suit (see Dkt. # 47 at 19; Ex. U at 34:20–36:15; 36:16–37:5), CBX has failed to show that Espada attempted to hire counsel to defend *itself*. (See, e.g., Dkt. # 49-25 at 32.) Ace's summary judgment evidence includes deposition testimony from Espada's manager, who stated that Espada never attempted to find an attorney to defend Espada in the underlying suit because it would amount to "throwing good money after bad." (Dkt. # 46, Ex. 4 at 72:3–10.) And while CBX's reasons for Espada's failure to *physically* show up at the proceedings seem valid on their face, and despite making other arguments that Espada was still a viable company at the time of the underlying judgment, CBX has not explained why Espada was unable to submit a written letter or some other evidence concerning Espada's defense or position on CBX's damages. Thus, even if Espada was in a dire financial situation, there are some steps it could have likely taken to more readily defend itself from the extraordinary $105 million in damages obtained against it.

In fact, the only evidence produced at the damages proceeding in the underlying suit was from CBX. (See Dkt. # 1-18.) At that proceeding, CBX produced six witnesses and 47 exhibits, without any witnesses or testimony from any other party. (Id.) Such a proceeding is antithetical to an "adversarial proceeding." See Gandy, 925 S.W.2d at 714; Hamel, 525 S.W.3d at 666 (defining "adversarial" as "when the parties oppose each other"). At the proceeding, it was clear there was no opposition to the amount of damages claimed by CBX.

Accordingly, while it is true that there are differences in the facts of this case in comparison to Hamel—i.e., no pretrial agreement and no clear evidence of collusion by the parties to take advantage of the insurer, the fact that (1) Espada failed to show up at all, physically or otherwise, to defend itself at the underlying proceedings once Ace withdrew its defense, and (2) the damages hearing was clearly non-adversarial as CBX was the only party in attendance, taken in combination with (3) Ace's evidence that Espada was financially unstable, all lead the Court to conclude that the underlying judgment was not the result of a fully adversarial proceeding.[5] Furthermore, one of Espada's managers agreed in

[5] The Court further distinguishes Hamel on the basis that there was no dispute in Hamel that the insurance company wrongfully refused to defend the insured; here, the Court has already determined that Ace had no duty to defend Espada in the underlying case. (Dkt. # 45.) Hamel instructs however that "an insurer's wrongful failure to defend is no longer dispositive." Hamel, 525 S.W.3d at 665. In any case, the Court finds no merit to CBX's argument that "default judgments are

deposition testimony that it was his belief that by the time the underlying case went to trial, "Espada had no meaningful stake in the outcome because it was not a going concern."[6] (Dkt. # 46, Ex. 4 at 72:13–19.)

Based on the foregoing, the Court finds that Ace has produced sufficient evidence that Espada did not have a meaningful incentive to ensure that CBX's default judgment accurately reflected its damages. See Hamel, 525 S.W.3d at 668. Accordingly, the Court finds that the underlying judgment was not the result of a fully adversarial proceeding, and thus it is not binding on Ace in this suit. See id. ("The defendant's insurer is often the plaintiff's only real source of recovery, but without the insurer's involvement in the lawsuit the likelihood of a fully adversarial trial diminishes substantially."). The Court will therefore grant Ace's motion for partial summary judgment on this issue, and deny CBX's motion on the same.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Ace's Motion for Partial Summary Judgment on Fully Adversarial Trial (Dkt. # 46), and **DENIES** CBX's Motion for Partial Summary Judgment that the Underlying Judgment is Binding

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binding on insurers that wrongfully defend their insureds" because of the Court's prior determination that Ace had no duty to defend Espada. (See Dkt. # 47 at 15.)

[6] The Court **OVERRULES** CBX's objections to this testimony, but notes CBX's evidence that other managers of Espada testified differently when asked similar questions. (See Dkt. # 49 at 11 n.8; Dkt. # 49-25 at 32.)

and Admissible (Dkt. # 47). Given the Court's rulings on the instant partial summary judgment motions, as well as its prior rulings on the parties' first partial summary judgment motions, the Court will require the parties to provide a joint status report, or separate reports if the parties do not agree, on the remaining issues in this case. To the extent the Court's rulings, in effect, dismiss some of the claims in the case, the parties should so instruct the Court and move to dismiss such claims. The parties will have **twenty-one days from the date of this Order** to file the report(s).[7]

IT IS SO ORDERED.

DATED: San Antonio, Texas, June 28, 2018.

David Alan Ezra
Senior United States Distict Judge

[7] At the hearing, the parties indicated there would also likely be a request for an interlocutory appeal of the Court's Orders on the partial summary judgment motions entered in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 5:17-cv-00017-DAE
	§	
ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

Plaintiff, CBX Resources, LLC, appeared through its attorney. Defendants, ACE American Insurance Company and ACE Property and Casualty Insurance Company, appeared through their attorney. The Court determined that it had jurisdiction over the subject matter and the parties in the case.

The Court entered orders granting partial summary judgment in favor of the Defendants on October 16, 2017 (Dkt. # 45) and on June 28, 2018 (Dkt. # 76). Pursuant to the Joint Status Report to the Court (Dkt # 78) and the stipulations therein, Plaintiff voluntarily dismissed without prejudice its claims for violation of Texas Insurance Code §§ 541.060(a)(3)-(4) (Dkt # 80).

Final Judgment is entered that Plaintiff take nothing by its suit and that the action be dismissed on the merits.

All costs and fees are taxed against the party incurring same.

The Court denies all relief not granted in this Final Judgment.

SIGNED on August 20, 2018

U.S. DISTRICT JUDGE

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3470)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 116-158.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTOIO DIVISION

CBX RESOURCES, LLC, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant.	§ § § § § § § § § § § §	CIVIL ACTION NO. 5:17-cv-17 JURY REQUESTED

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff CBX Resources, LLC ("CBX") complains herein of Defendant ACE American Insurance Company ("ACE American") and Defendant ACE Property and Casualty Insurance Company ("ACE Property") (collectively, "ACE" or "Defendants").

I. INTRODUCTION

1. ACE American and ACE Property issued a CGL Policy and Umbrella Policy, respectively, to Espada for the policy period April 2, 2011 to April 2, 2012.[1]

2. In the Underlying Lawsuit, CBX sued for damages to tangible property proximately caused by Espada's negligence as an oil and gas operator. Those damages occurred between August 6, 2011 and January 25, 2012.

3. In the Underlying Lawsuit, ACE American controlled Espada's defense and hired a law firm, Royston Rayzor, to defend Espada. ACE American did not formally attempt to reserve its rights or otherwise dispute the existence of coverage

[1] Please see the "Definitions" sub-section of the "Facts" section below for definitions of the defined terms found in this introduction.

under the applicable insurance policy. Pursuant to ACE American's retention, Royston Rayzor represented Espada for two years in the Underlying Lawsuit.

4. Approximately three-months before trial, CBX served a *Stowers* Demand on ACE American and ACE Property. Roughly one month after the service of that demand, ACE American and ACE Property withdrew their defense of Espada.

5. The Underlying Lawsuit proceeded to trial on February 10, 2016. Following the trial, the state district court entered judgment for CBX and against Espada in the Underlying Lawsuit in the amount of $105,674,240, representing CBX's proven actual damages proximately caused by Espada's proven negligence. The trial court's judgment also awarded *inter alia* post-judgment interest.

6. On November 1, 2016, the state district court entered an order transferring to CBX, Espada's claims against ACE American and ACE Property.

7. CBX files the above styled lawsuit as a judgment creditor of Espada and a third-party beneficiary of the CGL Policy and Umbrella Policy. It is also the owner, by virtue of the state district court's transfer order, of Espada's contractual and extra-contractual claims against ACE American and ACE Property.

II. PARTIES

8. Plaintiff CBX Resources, LLC is a Texas corporation, a citizen of Texas, organized under the laws of Texas, and has its principal place of business in Boerne, Texas.

9. Defendant, ACE AMERICAN INSURANCE COMPANY, is a foreign insurance carrier organized and existing under the laws of Pennsylvania and authorized to conduct business in Texas. It may be served with process by serving its

designated agent for service of process, C T Corporation System, in Dallas County at 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

10. Defendant, ACE PROPERTY AND CASUALTY INSURANCE COMPANY, is a foreign insurance carrier organized and existing under the laws of Pennsylvania and authorized to conduct business in Texas. It may be served with process by serving its designated agent for service of process, C T Corporation System, in Dallas County at 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

III. JURISDICTION

11. Because this action, which has an amount in controversy in excess of $75,000, is between citizens of different U.S. states, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a).

12. This Court has general personal jurisdiction over ACE American Insurance Company and ACE Property and Casualty Insurance Company because each does business in Texas and each has sufficient contacts with the State of Texas, both generally and with regard to this specific action, so that the exercise of personal jurisdiction over it is proper.

13. Further, this Court has specific personal jurisdiction over ACE American Insurance Company and ACE Property and Casualty Insurance Company because the facts giving rise to the claims made in this lawsuit all occurred in the State of Texas.

IV. VENUE

14. Venue is proper in this district under 28 U.S.C. §1391(b)(2) because a substantial part of the events or omissions giving rise to this claim, as detailed below, occurred in this district.

V. FACTS

A. DEFINITIONS

15. "ACE American" means ACE American Insurance Company.

16. "ACE Property" means ACE Property and Casualty Insurance Company.

17. "ACE" means ACE American and ACE Property collectively.

18. "CBX" means CBX Resources, LLC.

19. "CGL Policy" means Commercial General Liability Policy No. G24994090 002 issued by ACE American Insurance Company to Espada Operating, LLC.

20. "Espada" means Espada Operating, LLC.

21. "Live Petition" means Plaintiff's Second Amended Petition filed in the Underlying Lawsuit and attached hereto as Exhibit I.

22. "Occurrence" means the accident described in the Live Petition.

23. "Royston Rayzor" means Royston, Rayzor, Vickery & Williams, LLP.

24. "Umbrella Policy" means Umbrella Policy No. G24924592 issued by ACE Property and Casualty Insurance Company to Espada Operating, LLC.

25. "Underlying Lawsuit" means Cause No. 13-02-12940-ZCV; *CBX Resources, LLC v. Daewoo International Corp., et al*; in the 293rd Judicial District, Zavala County, Texas.

26. "Underlying Judgment" means the February 10, 2016 judgment entered in the Underlying Lawsuit and attached hereto as Exhibit Q.

27. "UREC Endorsement" means the "Underground Resources and Equipment Coverage Endorsement" that is a part of the "CGL Policy." (Ex. A, CBX 429650-000052:53.)

B. EXHIBITS

28. **Exhibit A** to this Complaint, at bates number CBX 429650-000001 to CBX 429650-000071, is a copy of the Commercial General Liability Policy No. G24994090 002 issued by ACE American to Espada.

29. The document attached as Exhibit A is a genuine copy of that document.

30. **Exhibit B** to this Complaint, at bates number CBX 429650-000072, is a copy of the Declarations Page of Umbrella Policy No. G24924592 issued by ACE Property to Espada.

31. The document attached as Exhibit B is a genuine copy of that document.

32. **Exhibit C** to this Complaint, at bates number CBX 429650-000073 to CBX 429650-000080, is a copy of Plaintiff's Original Petition and Requests for Disclosure filed in the Underlying Lawsuit.

33. The document attached as Exhibit C is a genuine copy of that document.

34. **Exhibit D** to this Complaint, at bates number CBX 429650-000081 to CBX 429650-000102, is a copy of Plaintiff's First Amended Petition and Requests for Disclosure filed in the Underlying Lawsuit.

35. The document attached as Exhibit D is a genuine copy of that document.

36. **Exhibit E** to this Complaint, at bates number CBX 429650-000103 to CBX 429650-000105, is a copy of Defendant Espada Operating, LLC's Original Answer filed in the Underlying Lawsuit.

37. The document attached as Exhibit E is a genuine copy of that document.

38. **Exhibit F** to this Complaint, at bates number CBX 429650-000106 to CBX 429650-000109, is a copy of Defendant Espada Operating LLC's Responses to CBX

Resources, LLC's Request for Disclosure served during the pendency of the Underlying Lawsuit.

39. The document attached as Exhibit F is a genuine copy of that document.

40. **Exhibit G** to this Complaint, at bates number CBX 429650-000110 to CBX 429650-000113, is a copy of Defendant Espada Operating, LLC's First Amended Original Answer filed in the Underlying Lawsuit.

41. The document attached as Exhibit G is a genuine copy of that document.

42. **Exhibit H** to this Complaint, at bates number CBX 429650-000114 to CBX 429650-000119, is a copy of the Third Amended Docket Control Order entered in the Underlying Lawsuit.

43. The document attached as Exhibit H is a genuine copy of that document.

44. **Exhibit I** to this Complaint, at bates number CBX 429650-000120 to CBX 429650-000132, is a copy of Plaintiff's Second Amended Petition filed in the Underlying Lawsuit.

45. The document attached as Exhibit I is a genuine copy of that document.

46. **Exhibit J** to this Complaint, at bates number CBX 429650-000133 to CBX 429650-000159, is a copy of Espada Operating, LLC's First Amended Third Party Petition filed in the Underlying Lawsuit.

47. The document attached as Exhibit J is a genuine copy of that document.

48. **Exhibit K** to this Complaint, at bates number CBX 429650-000160 to CBX 429650-000165, is a copy of the September 22, 2015 Offer to Settle Sent from Edward Allred to Ewing Sikes served during the pendency of the Underlying Lawsuit.

49. The document attached as Exhibit K is a genuine copy of that document.

50. **Exhibit L** to this Complaint, at bates number CBX 429650-000166, is a copy of a September 30, 2015 E-mail from Eddie Sikes to Edward Allred.

51. The document attached as Exhibit L is a genuine copy of that document.

52. **Exhibit M** to this Complaint, at bates number CBX 429650-000167 to CBX 429650-000169, is a copy of the October 1, 2015 E-mail from Eddies Sikes to David Ortega.

53. The document attached as Exhibit M is a genuine copy of that document.

54. **Exhibit N** to this Complaint, at bates number CBX 429650-000170 to CBX 429650-000173, is a copy of a October 15, 2015 letter from Matthew Spector to Lee Roy Billington served during the pendency of the Underlying Lawsuit.

55. The document attached as Exhibit N is a genuine copy of that document.

56. **Exhibit O** to this Complaint, at bates number CBX 429650-000174 to CBX 429650-000188, is a copy of the Royston Rayzor's Motion to Withdraw as Counsel for Espada Operating, LLC filed in the Underlying Lawsuit.

57. The document attached as Exhibit O is a genuine copy of that document.

58. **Exhibit P** to this Complaint, at bates number CBX 429650-000189, is a copy of the Order of Withdrawal entered by the court in the Underlying Lawsuit.

59. The document attached as Exhibit P is a genuine copy of that document.

60. **Exhibit Q** to this Complaint, at bates number CBX 429650-000190 to CBX 429650-000192, is a copy of the Final Judgment entered by the court in the Underlying Lawsuit.

61. The document attached as Exhibit Q is a genuine copy of that document.

62. **Exhibit R** to this Complaint, at bates number CBX 429650-000193 to CBX 429650-000274, is a copy of the Transcript of the Trial of the Underlying Lawsuit Held On February 10, 2016.

63. The document attached as Exhibit R is a genuine copy of that document.

64. **Exhibit S** to this Complaint, at bates number CBX 429650-000275 to CBX 429650-000287, is a copy of a Redline Comparing the First and Second Amended Petitions filed in the Underlying Lawsuit.

65. The document attached as Exhibit S is a genuine copy of that document.

66. **Exhibit T** to this Complaint, at bates number CBX 429650-000288 to CBX 429650-000292, is a copy of Trial Exhibit 38 Entered During the Underlying Trial.

67. The document attached as Exhibit T is a genuine copy of that document.

68. **Exhibit U** to this Complaint, at bates number CBX 429650-000293 to CBX 429650-000294, is a copy of the Abstract of Judgment Filed in Bexar County.

69. The document attached as Exhibit U is a genuine copy of that document.

70. **Exhibit V** to this Complaint, at bates number CBX 429650-000295 to CBX 429650-000296, is a copy of the Abstract of Judgment Filed in Zavala County.

71. The document attached as Exhibit V is a genuine copy of that document.

72. **Exhibit W** to this Complaint, at bates number CBX 429650-000297 to CBX 429650-000300 is a copy of the November 1, 2016 Order for Turnover Relief.

73. The document attached as Exhibit W is a genuine copy of that document.

74. **Exhibit X** to this Complaint, at bates number CBX 429650-000301, is a copy of a November 8, 2016 Assignment of Cause of Action.

75. The document attached as Exhibit X is a genuine copy of that document.

C. THE INSURERS

76. ACE American and ACE Property are interconnected companies.

77. ACE American and ACE Property are both part of the ACE group of companies.

78. ACE American and ACE Property share common ownership.

79. ACE American and ACE Property have common affiliates.

80. ACE North American Claims is an affiliate of ACE American and ACE Property.

81. ACE American and ACE Property are affiliates of one another.

82. ACE American and ACE Property share common management.

83. ACE American and ACE Property issued the CGL Policy and Umbrella Policy as connected insurance policies.

84. ACE American and ACE Property were represented by common employees.

85. Matthew Spector had the authority to bind ACE American and ACE Property.

86. Xavier Blum supervised the administration of the CGL Policy and Umbrella Policy.

D. THE CGL POLICY

1. **Basic Insuring Agreement – Property Damage Covered**

87. ACE American issued the CGL Policy to Espada for the policy period April 2, 2011 to April 2, 2012. (Ex. A; Ex. N, CBX 429650-000170.)

88. Espada is a named insured in the CGL Policy. (Ex. A, CBX 429650-000001.)

POLICY NUMBER: G24994090 002 COMMERCIAL GENERAL LIABILITY
CG DS 01 10 01

COMMERCIAL GENERAL LIABILITY DECLARATIONS

ACE American Insurance Company	GENERAL AGENCY SERVICES INC
P.O. Box 1000 436 Walnut Street Philadelphia, PA 19106	3700 E RIVER ROAD MT PLEASANT MI 48858

NAMED INSURED: Espada Operating, LLC
MAILING ADDRESS: 8918 Tesoro Dr., Ste 500
San Antonio, TX 78217

89. The CGL Policy's declarations page described Espada's "Business Description" as "Oil and Gas Operations." (Ex. A, CBX 429650-000001.)

90. The CGL Policy declarations identifying Espada Operating as the named insured and identifying its business as "Oil and Gas Operations" are unambiguous.

91. In the Underlying Lawsuit, CBX alleged property damage. (Ex. I, CB 429650-000122, 123, 127, 128, 129.)

92. Section I.A.1.a. of the CGL Policy states the "Insuring Agreement" and "Duty to Defend" with regard to "Property Damage Liability." (Ex. A, CBX 429650-000003.)

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured

93. Section 1.A.1.a of the CGL Policy is unambiguous.

94. Section I.A.1.a. of the CGL Policy obligated ACE American to defend Espada.

95. The CGL Policy gave ACE American the right to control Espada's defense in the Underlying Lawsuit.

96. ACE American in fact controlled Espada's defense in the Underlying Lawsuit.

97. ACE American in fact controlled Espada's defense in the Underlying Lawsuit for over two years.

98. The CGL Policy defines "Property damage" to mean "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." (Ex. A, CBX 429650-000017.)

> **17.** "Property damage" means:
>
> **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

> **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

99. These definitions in Section V.17 are unambiguous.

100. Section I.A.1.b. of the CGL Policy limits the scope of the insurance by "coverage territory" and "policy period." (Ex. A, CBX 429650-000003.)

> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> **(2)** The "bodily injury" or "property damage" occurs during the policy period; and

101. Section I.A.1.b of the CGL policy is unambiguous.

102. The CGL Policy defines "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. A, CBX 429650-000016.)

> **13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

103. The definition of "occurrence" in Section V.13 of the CGL Policy is unambiguous.

104. The CGL Policy defines "Coverage Territory" to include "The United States of America." (Ex. A, CBX 429650-000015.)

> **4.** "Coverage territory" means:
>
> **a.** The United States of America (including its territories and possessions), Puerto Rico and Canada;

105. The Occurrence described in the Live Petition took place in the "coverage territory."

106. The Occurrence described in the Live Petition took place in Zavala County, Texas.

107. There is a claim of an "occurrence" in the Live Petition according to the terms of the CGL Policy.

108. The property damage described in the Live Petition was unexpected.

109. The property damage described in the Live Petition was caused by an accident.

110. The property damage described in the Live Petition occurred between April 2, 2011 and April 2, 2012.

111. The property damage described in the Live Petition occurred between August 6, 2011 and January 25, 2012.

2. Underground Resources and Equipment Coverage Endorsement

112. An "Underground Resources and Equipment Coverage Endorsement" ("UREC Endorsement") "change[d]" and "modifie[d]" the CGL Policy. (Ex. A, CBX 429650-000052.)

UNDERGROUND RESOURCES AND EQUIPMENT COVERAGE ENDORSEMENT

Named Insured			Endorsement Number
Espada Operating, LLC			
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
PMG	**G24994090 002**	**04/02/2011 - 04/02/2012**	**04/02/2011**
Issued By (Name of Insurance Company)			
ACE American Insurance Company			

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
This Endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM

113. In sum, the UREC Endorsement (1) adds limits of insurance, (2) replaces an exclusion, and (3) adds definitions to the CGL Policy.

114. First, the UREC Endorsement adds limits of insurance. (Ex. A, CBX 429650-000052:53.)

I. With respect to "property damage" included within the "underground resources hazard" or the "underground equipment hazard" the following is added to Section III – Limits Of Insurance:

A. Subject to the Each Occurrence Limit and the General Aggregate Limit shown in the Declarations:

1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well,

2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

B. The property damage aggregate limits shown in the Schedule above are subject to the General Aggregate Limit of Insurance stated in the Declarations. Any payment for "property damage" under this endorsement will be applied to and will erode the General Aggregate Limit of Insurance stated in the Declarations.

115. Second, the UREC endorsement *replaces* an exclusion. (Ex. A, CBX 429650-000053.)

II. Exclusion **j.(4)**, under Paragraph **2.** Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

a. Damage To Property

"Property damage" to:

(4) Personal property in the care, custody or control of the insured;

This exclusion does not apply to any "property damage" included within the "underground resources hazard" or the "underground equipment hazard" other than "property damage" to that particular part of any real property on which operations are being performed by you or on your behalf if the "property damage" arises out of those operations.

116. Finally, the UREC Endorsement adds definitions. (Ex. A, CBX 429650-000053.)

III. The following definitions are added to the Definitions Section:

"Underground resources hazard" includes "property damage" to any of the following:

a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

"Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

117. The UREC Endorsement expands the scope of coverage of the CGL Policy.

118. The UREC Endorsement is unambiguous.

119. Espada paid an additional premium for the UREC Endorsement.

120. Espada paid an additional premium for the expanded scope of coverage provided by the UREC Endorsement.

121. The UREC Endorsement is a coverage adding endorsement.

122. The UREC Endorsement broadened the definition of "property damage" found in the CGL Policy.

123. The UREC Endorsement broadened the definition of "property damage" found in the CGL Policy to the extent that the property damage alleged in the Live Complaint was covered.

124. The inherent nature of a coverage adding endorsement is to overcome exclusions of coverage.

125. Coverage adding endorsements supersede conflicting exclusions in the main policy.

E. UMBRELLA POLICY

126. ACE Property issued the Umbrella Policy to Espada for the policy period April 2, 2011 to April 2, 2012. (Ex. B, CBX 429650-000072.)

F. UNDERLYING LAWSUIT

1. February 21, 2013: CBX's Original Petition

127. On February 21, 2013, CBX filed Plaintiff's Original Petition and Requests for Disclosure. (Ex. C.)

128. CBX did not name Espada as a defendant in Plaintiff's Original Petition. (Ex. C.)

129. CBX stated in Plaintiff's Original Petition the following: "In 2011, Plaintiff hired Espada Operating, LLC ("Espada") to drill and operate an oil and gas lease. . . . " (Ex. C, CBX 429650-000076.)

130. CBX stated in Plaintiff's Original Petition the following: "As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of it drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things." (Ex. C, CBX 429650-000079.)

DAMAGES

25. As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well.

26. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things.

2. October 29, 2013: CBX's First Amended Petition

131. On October 29, 2013, CBX filed Plaintiff's First Amended Petition and Requests for Disclosure. (Ex. D.)

132. CBX named Espada as a defendant in Plaintiff's First Amended Petition and Requests for Disclosure. (Ex. D.)

133. Espada did not challenge the sufficiency of the allegations in Plaintiff's First Amended Petition.

134. Espada did not specially except (a right provided for by Texas Rule of Civil Procedure 91) to Plaintiff's First Amended Petition.

135. In Plaintiff's First Amended Petition, CBX alleged that Espada was professionally negligent. (Ex. D, CBX 429650-000087.)

136. In Plaintiff's First Amended Petition, CBX alleged that Espada was negligent (i.e., non-professionally negligent). (Ex. D, CBX 429650-000087.)

20. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and to perform related oil and gas well drilling and completion services to deliver a producing well for the Plaintiff. Espada owed a duty to perform these duties within recognized industry standards and practices, as well as to deliver a competent well design that would allow for a completed and productive well.

21. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation.

137. The failures of Espada were "more fully explained and detailed in [an] Affidavit and Certificate of Merit of David E. Prichard, P.E. (Licensed Engineer)." (Ex. D, CBX 429650-000087.)

138. In the Affidavit and Certificate of Merit of David E. Prichard, P.E., Mr. Pritchard detailed Espada's role as follows: "Espada, the operating company on the Well, was engaged in, and was retained on the Well, to procure and use the proper materials, and to perform oil and gas well drilling and completion operations to achieve a finished and productive oil and gas well for CBX Resources, the mineral owners for the Well." (Ex. D, CBX 429650-000093.)

4. Based on my research, experience in the industry, and review of documents relating to the Well, Baker was engaged in, and was retained on the Well, to perform oil well design, material specification, engineering, and similar services relating to the process and procedures to be utilized in drilling and completing the Well. Espada, the operating company on the Well, was engaged in, and was retained on the Well, to procure and use the proper materials, and to perform oil and gas well drilling and completion operations to achieve a finished and productive oil and gas well for CBX Resources, the mineral owners for the Well.

139. Further, Mr. Pritchard detailed the acts, errors, or omissions of Espada. (Ex. D, CBX 429650-000095.)

8. Based on my knowledge, skill, experience, education, training, practice, and a review of the documents listed above, it is my professional opinion that both Baker and Espada are responsible for at least the following act(s), error(s), or omission(s) that occurred and/or existed on the Well and that caused or contributed to the Well's failure:

a. Failure to correctly and/or accurately conduct a casing movement calculation;
b. Applying tension after the packers were set for stretch testing;
c. Accepting, and using casing that was not originally specified for this well.
d. Failing to require, perform, and review external pressure testing and/or torque-validated running in the well hole; and,
e. Excessive cuttings, including frac sand on clean-up in the open well hole.

9. These acts, errors and/or omissions show that both Baker and Espada failed to meet the applicable work product standards of oil and gas design, engineering, drilling, and operating professionals. Further, based upon the documents I have reviewed, the general factual occurrences as I understand them to be at this point, and further based upon my knowledge, skill, experience, education, training and practice in engineering and well design, drilling, completion, and oil and gas production practices, it is my professional opinion that these acts, errors, and/or omissions contributed to the failure of the Well, that absent these acts, errors, and/or omissions the Well would not have failed, that the commission of these acts, errors, and/or omissions renders the professional services provided insufficient and inadequate, and that the provision of services including these acts, errors, and/or omissions falls below the standard of professional standards that are usual, customary, and expected in the design, drilling, and completion of an oil well such and the Well and casing that failed in this case.

140. In Plaintiff's First Amended Petition, CBX made the same damage allegations as were made in Plaintiff's Original Petition. (Ex. D, CBX 429650-000088.)

DAMAGES

24. As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well.

25. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things.

141. In Plaintiff's First Amended Petition, CBX made additional damage allegations as follows: "The Baker and Espada Defendant's actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation. . . . The breaches . . . [were] a proximate cause of the casing failure and Plaintiff's damage." (Ex. D, CBX 429650-000087:88.)

negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation.

23. The breaches by of the Baker and Espada Defendants was a proximate cause of the casing failure and Plaintiff's damage.

3. November 19, 2013: Espada's Original Answer

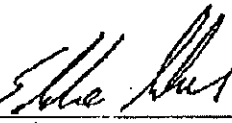
142. On November 19, 2013, Espada served Defendant Espada Operating, LLC's Original Answer. (Ex. E.)

143. Espada served Defendant Espada Operating, LLC's Original Answer through its law firm Royston Rayzor.

WHEREFORE, PREMISES CONSIDERED, Defendant, ESPADA OPERATING, LLC prays that Plaintiff takes nothing by this suit against Defendant and Defendant be discharged without delay, and for such other and further relief, both general and special, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, LLP

By: 

Ewing E. Sikes, III
State Bar No. 00794631
Robert L. Guerra, Jr.
State Bar No. 24036694
55 Cove Circle
Brownsville, Texas 78521
Tel: (956) 542-4377
Fax: (956) 542-4370

144. In November of 2013, ACE American appointed Royston Rayzor as defense counsel for Espada. (Ex. O, 429650-000174.)

Good cause exists for granting this motion. Royston Rayzor was appointed as defense counsel for Espada in the above styled cause of action in November 2013 by Espada's insurer, ACE American Insurance Company ("ACE"). On October 15, 2015, ACE advised that it had

145. Espada did not assert any affirmative defenses in its original answer.

4. January 27, 2014: Espada's Responses to Requests for Disclosure

146. On January 27, 2014, Espada served Defendant Espada Operating LLC's Responses to CBX Resources, LLC's Request for Disclosure. (Ex. F.)

147. In Defendant Espada Operating LLC's Responses to CBX Resources, LLC's Request for Disclosure, Espada indicated that Espada had "been correctly identified." (Ex. F, CBX 429650-000108.)

5. April 7, 2014: Espada's First Amended Original Answer

148. On April, 7, 2014, Espada served Defendant Espada Operating, LLC's First Amended Original Answer. (Ex. G.)

149. Espada asserted affirmative defenses for the first time.

6. December 30, 2014: Court's Third Amended Docket Control Order

150. On December 30, 2014, the court signed the Third Amended Docket Control Order. (Ex. H.)

151. That Third Amended Docket Control Order set "Jury Selection and Trial" for February 9, 2016. (Ex. H, CBX 429650-000115.)

15. Jury Selection and Trial are set for February 9, 2016, at 9:30 a.m. This date is subject to the change by the Court. (Subject to change) CLM

152. Royston Rayzor agreed to that February 9, 2016 trial. (Ex. H, CBX 429650-000116, 118.)

APPROVED AS TO FORM AND ENTRY:

Ewing Sykes, III
by ERR with permission
EWING E. SYKES, III
SBN: 00794631
ROBERT L. GUERRA, JR.
SBN: 24036694
ROYSTON, RAYZOR, VICKERY & WILLIAMS, LLP
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Brownsville, Texas 78521
Telephone: (956) 542-4377
Facsimile: (956) 542-4370
ATTORNEYS FOR DEFENDANT ESPADA OPERATING, LLC

7. August 7, 2015: CBX's Second Amended Petition

153. On August 7, 2015, CBX filed Plaintiff's Second Amended Petition. (Ex. I.)

154. Espada did not challenge the sufficiency of the allegations in Plaintiff's Second Amended Petition.

155. Espada did not specially except (a right provided for by Texas Rule of Civil Procedure 91) to Plaintiff's Second Amended Petition.

a) The Live Petition at Time of Trial

156. CBX did not amend Plaintiff's Second Amended Petition.

157. CBX did not supplement Plaintiff's Second Amended Petition.

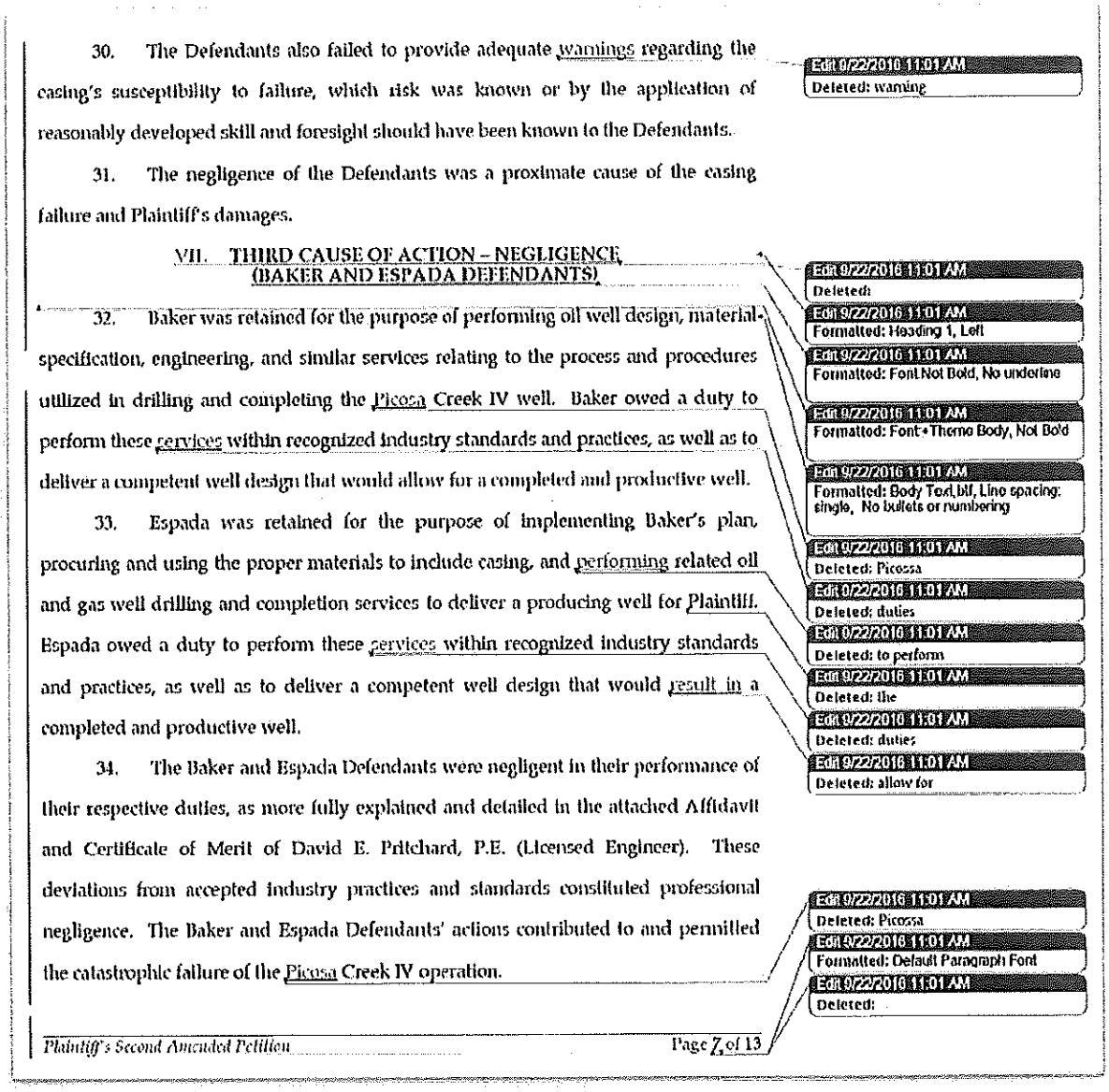
158. Plaintiff's Second Amended Petition was the live petition at the time of trial.

159. In Plaintiff's Second Amended Petition, CBX stated Espada's role: "On or about June 27, 2011, Plaintiff hired Espada Operating, LLC ("Espada") to drill and operate an oil and gas lease. . . . " (Ex. I, CBX 429650-000122.)

b) The Same Simple Negligence Claim Remained

160. Exhibit S is a "redline" comparing Plaintiff's First Amended Petition and Plaintiff's Second Amended Petition. (Ex. S.)

161. CBX made no substantive change to the negligence claim made against Espada as between Plaintiff's First Amended Petition and Plaintiff's Second Amended Petition. (Ex. D, I, S.)



30. The Defendants also failed to provide adequate warnings regarding the casing's susceptibility to failure, which risk was known or by the application of reasonably developed skill and foresight should have been known to the Defendants.

31. The negligence of the Defendants was a proximate cause of the casing failure and Plaintiff's damages.

VII. THIRD CAUSE OF ACTION – NEGLIGENCE (BAKER AND ESPADA DEFENDANTS)

32. Baker was retained for the purpose of performing oil well design, material specification, engineering, and similar services relating to the process and procedures utilized in drilling and completing the Picosa Creek IV well. Baker owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would allow for a completed and productive well.

33. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and performing related oil and gas well drilling and completion services to deliver a producing well for Plaintiff. Espada owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would result in a completed and productive well.

34. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

Plaintiff's Second Amended Petition Page 7 of 13

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35. The failures and deviations by the Baker and Espada Defendants breached their duties to perform their respective services within industry-accepted standards, practices, and requirements for well design, drilling, and completion.

36. The breaches by the Baker and Espada Defendants were proximate causes of the casing failure and Plaintiff's damages.

VIII. FOURTH CAUSE OF ACTION – BREACH OF CONTRACT (ESPADA DEFENDANT)

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162. In Plaintiff's Second Amended Petition, CBX alleged that Espada was professionally negligent. (Ex. I, CBX 429650-000126.)

163. In Plaintiff's Second Amended Petition, CBX alleged that Espada was negligent (i.e., non-professionally negligent). (Ex. D, CBX 429650-000126.)

33. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and performing related oil and gas well drilling and completion services to deliver a producing well for Plaintiff. Espada owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would result in a completed and productive well.

34. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

164. In Plaintiff's Second Amended Petition, CBX alleged that "Espada was retained for the purpose of implementing Baker's Plan." (*Id.*)

165. In fact, Espada's role was to execute Baker's plan.

166. Plaintiff's Second Amended Petition did not contain a claim for contractual indemnification.

c) The Detail of the Property Damage Grew

167. In Plaintiff's Second Amended Petition, CBX made the damage allegations as were made in Plaintiff's Original Petition and Plaintiff's First Amended Petition. (Ex. I, CBX 429650-000128:129.)

> **XI. DAMAGES**
>
> **47. As a result of the action and conduct of the Defendants, Plaintiff suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picosa Creek IV well.**
>
> **48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.**

168. In Plaintiff's Second Amended Petition, CBX made the "additional damage allegations" first announced in Plaintiff's First Amended Petition. (Ex. I, CBX 429650-000126:27.)

negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

36. The breaches by the Baker and Espada Defendants were proximate causes of the casing failure and Plaintiff's damages.

169. In Plaintiff's Second Amended Petition, CBX described property damage not described in CBX's prior petitions, to wit: "[O]n or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property"). . . . On or about January 24, 2012, Espada . . . discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use. . . . Accordingly, the Picosa Creek IV well was plugged and abandoned. . . . The 5 ½" Production Casing . . . damaged, among other property, the August 6, 2011 Property." (Ex. I, CBX 429650-000122:23.)

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

(1) Drilling Operations Property

170. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "drilling operations" that was located beneath the surface of the earth in a well or hole (hereinafter "**Drilling Operations Property**"). (Ex. I, CBX 429650-000123.)

actual and consequential damages. These damages flow from the loss of its drilling

Plaintiff's Second Amended Petition Page 9 of 13

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek

171. In Plaintiff's Second Amended Petition, CBX described the Drilling Operations Property as including "casing, pipe, . . . tool and other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well [Picosa Creek IV well] or hole. . . ." (Ex. I, CBX 429650-000122.)

172. As defined, Drilling Operations Property is tangible property.

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing -- i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

CBX 429650

15. **Production Casing and Completion Liner:** On or about August 6, 2011, Espada and/or its subcontractors placed 5,708 feet of production casing and a Baker Hughes FracPoint Completion System into the production casing.

16. **Frac Job:** On or about October 25, 2011 (80 days after the production casing had been placed in the wellbore), Espada and/or its subcontractors attempted to pressurize the Baker Hughes FracPoint Completion System to fracture and stimulate five production zones.

173. In Plaintiff's Second Amended Petition, CBX alleged that the Drilling Operations Property was damaged. (Ex. I, CBX 429650-000123.)

actual and consequential damages. These damages flow from the loss of its drilling

Plaintiff's Second Amended Petition Page 9 of 13

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek

174. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the Drilling Operations Property arose out of operations in connection with the Picosa Creek IV well. (CBX 429650-000128:29.)

actual and consequential damages. These damages flow from the loss of its drilling

Plaintiff's Second Amended Petition Page 9 of 13

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek IV well.

175. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing, pipe, . . . tool and other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

"Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

176. In Plaintiff's Second Amended Petition, CBX alleged damage to the Drilling Operations Property that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in

the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

177. At the time that the Drilling Operations Property was injured, the Drilling Operations Property was not personal property.

178. At the time that the Drilling Operations Property was injured, the Drilling Operations Property was not in the care, custody or control of Espada.

179. Espada did not manufacture, sell, distribute or dispose of the Drilling Operations Property.

180. Espada did not handle the Drilling Operations Property.

181. The Drilling Operations Property could not be restored to use.

182. The Drilling Operations Property was not restored to use.

183. The Drilling Operations Property was physically injured.

184. The Drilling Operations Property was injured suddenly and accidentally.

(2) Surface Casing Property

185. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "surface casing" that was located beneath the surface of the earth in a well or hole (hereinafter "**Surface Casing Property**"). (Ex. I, CBX 429650-000122.)

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

186. Surface Casing Property is tangible property.

187. In Plaintiff's Second Amended Petition, CBX alleged that the **Surface Casing Property** was damaged. (Ex. I, CBX 429650-000123.)

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

188. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Surface Casing Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

189. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing . . . located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

> "Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

190. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Surface Casing Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

191. At the time that the Surface Casing Property was injured, the Surface Casing Property was not personal property.

192. At the time that the Surface Casing Property was injured, the Surface Casing Property was not in the care, custody or control of Espada.

193. Espada did not manufacture, sell, distribute or dispose of the Surface Casing Property.

194. Espada did not handle the Surface Casing Property.

195. The Surface Casing Property could not be restored to use.

196. The Surface Casing Property was not restored to use.

197. The Surface Casing Property was physically injured.

198. The Surface Casing Property was injured suddenly and accidentally.

(3) Unrecovered Production Casing Property

199. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "unrecovered production casing" that was located beneath the surface of the earth in a well or hole (hereinafter "**Unrecovered Production Casing Property**"). (Ex. I, CBX 429650-000123.)

> 15. **Production Casing and Completion Liner:** On or about August 6, 2011, Espada and/or its subcontractors placed 5,708 feet of production casing and a Baker Hughes FracPoint Completion System into the production casing.
>
> 16. **Frac Job:** On or about October 25, 2011 (80 days after the production casing had been placed in the wellbore), Espada and/or its subcontractors attempted to pressurize the Baker Hughes FracPoint Completion System to fracture and stimulate five production zones.
>
> 17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

200. Unrecovered Production Casing Property is tangible property.

201. In Plaintiff's Second Amended Petition, CBX alleged that the **Unrecovered Production Casing Property** was damaged. (*Id.*)

202. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Unrecovered Production Casing Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

203. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing. . . located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

> "Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

204. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Unrecovered Production Casing Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

205. At the time that the Unrecovered Production Casing Property was injured, the Unrecovered Production Casing Property was not personal property.

206. At the time that the Unrecovered Production Casing Property was injured, the Unrecovered Production Casing Property was not in the care, custody or control of Espada.

207. Espada did not manufacture, sell, distribute or dispose of the Unrecovered Production Casing Property.

208. Espada did not handle the Unrecovered Production Casing Property.

209. The Unrecovered Production Casing Property could not be restored to use.

210. The Unrecovered Production Casing Property was not restored to use.

211. The Unrecovered Production Casing Property was physically injured.

212. The Unrecovered Production Casing Property was injured suddenly and accidentally.

(4) Well Property

213. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "well" in or through which exploration for or production of any substance was carried on (hereinafter "**Well Property**"). (Ex. I, CBX 429650-000122:123, 129.)

14. **Wellbore and Surface Casing**: On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing**: On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

214. Well Property is tangible property.

215. In Plaintiff's Second Amended Petition, CBX alleged that the **Well Property** was damaged. (*Id.*)

216. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Well Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

217. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny well . . . in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

218. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Well Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

219. At the time that the Well Property was injured, the Well Property was not personal property.

220. At the time that the Well Property was injured, the Well Property was not in the care, custody or control of Espada.

221. Espada did not manufacture, sell, distribute or dispose of the Well Property.

222. Espada did not handle the Well Property.

223. The Well Property could not be restored to use.

224. The Well Property was not restored to use.

225. The Well Property was physically injured.

226. The Well Property was injured suddenly and accidentally.

(5) Oil and Gas Property

227. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "oil and gas" and "past production" and "future production" which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water (hereinafter "**Oil and Gas Property**"). (Ex. I, CBX 429650-000122:123, 129.)

> 14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above **damaged,** among other property, the August 6, 2011 Property.

48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

228. Oil and Gas Property is tangible property.

229. In Plaintiff's Second Amended Petition, CBX alleged that the **Oil and Gas Property** was damaged. (*Id.*)

230. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Oil and Gas Property** arose out of operations in connection with the Picosa Creek IV well. (CBX 429650-000128:29.)

231. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [o]il, gas . . . which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water." (Ex. A, CBX 429650-000053.)

"Underground resources hazard" includes "property damage" to any of the following:

a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

232. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Oil and Gas Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground

resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

233. At the time that the Oil and Gas Property was injured, the Oil and Gas Property was not personal property.

234. At the time that the Oil and Gas Property was injured, the Oil and Gas Property was not in the care, custody or control of Espada.

235. Espada did not manufacture, sell, distribute or dispose of the Oil and Gas Property.

236. Espada did not handle the Oil and Gas Property.

237. The Oil and Gas Property could not be restored to use.

238. The Oil and Gas Property was not restored to use.

239. The Oil and Gas Property was physically injured.

240. The Oil and Gas Property was injured suddenly and accidentally.

(6) Wellbore Property

241. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "wellbore" in or through which exploration for or production of any substance was carried on (hereinafter "**Wellbore Property**"). (Ex. I, CBX 429650-000122:123.)

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

242. Wellbore Property is tangible property.

243. In Plaintiff's Second Amended Petition, CBX alleged that the **Wellbore Property** was damaged. (*Id.*)

244. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Wellbore Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

245. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

246. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Wellbore Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

247. At the time that the Wellbore Property was injured, the Wellbore Property was not personal property.

248. At the time that the Wellbore Property was injured, the Wellbore Property was not in the care, custody or control of Espada.

249. Espada did not manufacture, sell, distribute or dispose of the Wellbore Property.

250. Espada did not handle the Wellbore Property.

251. The Wellbore Property could not be restored to use.

252. The Wellbore Property was not restored to use.

253. The Wellbore Property was physically injured.

254. The Wellbore Property was injured suddenly and accidentally.

(7) Lease Property

255. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "lease" (i.e., an "area") in or through which exploration for or production of any substance was carried on (hereinafter **"Lease Property"**). (Ex. I, CBX 429650-000122:123.)

> 48. **Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.**

256. Lease Property is tangible property. *See Mitchell Energy Corp. v. Samson Res Co.*, 80 F.3d 976, 982 (5th Cir. 1996); *Energy Res., LLC v. Petroleum Sols. Int'l, LLC*, No. H-08-656, 2011 WL 3648083, *13 (S.D. Tex. Aug. 17, 2011)("In Texas, an oil and gas lease is considered an interest in tangible property.")

257. In Plaintiff's Second Amended Petition, CBX alleged that the **Lease Property** was damaged. (Ex. I, CBX 429650-000122:123.)

258. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Lease Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

259. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny . . . area in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

260. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Lease Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

261. At the time that the Lease Property was injured, the Lease Property was not personal property.

262. At the time that the Lease Property was injured, the Lease Property was not in the care, custody or control of Espada.

263. Espada did not manufacture, sell, distribute or dispose of the Lease Property.

264. Espada did not handle the Lease Property.

265. The Lease Property could not be restored to use.

266. The Lease Property was not restored to use.

267. The Lease Property was physically injured.

268. The Lease Property was injured suddenly and accidentally.

d) Occurrence: Fracturing of the Production Casing

269. The CGL Policy defines "Occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. A, CBX 429650-000016.)

> **13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

270. In Plaintiff's Second Amended Petition, CBX alleged: "On or about January 24, 2012, Espada . . . attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. . . . The 5 ½" Production Casing . . . damaged, among other property, the August 6, 2011 Property." (Ex. I, CBX 429650-000123.)

271. Said fracturing of the production casing was accidental.

272. Said fracturing of the production casing was sudden.

273. Said fracturing of the production casing was physical.

274. ACE American's Claims Director for Complex Claims, Matthew Specter, affirmatively described the occurrence as a sudden, accidental and physical fracturing of the production casing, explaining: "the casing was installed and below ground and was severed during Espada's pressurizing and fracturing operations." (Ex. N, CBX 429650-000127.)

275. Said fracturing of the production casing constitutes an "occurrence" as defined in the CGL Policy.

8. August 13, 2015: Espada's First Amended Third-Party Petition

276. On August 13, 2015, Espada served Espada Operating, LLC's First Amended Third Party Petition. (Ex. J.)

277. In the Underlying Lawsuit, Espada sued three separate parties. (Ex. J, CBX 429650-000134.)

278. In Espada Operating, LLC's First Amended Third Party Petition, Espada stated: "In 2011, CBX hired Espada to perform services related to drilling and operating a the [sic] Picosa Creek 1V well located on an oil and gas lease in Zavala County, Texas (the "Well"). Espada was the operator at the Well Site." (Ex. J, CBX 429650-000135.)

9. **In 2011, CBX hired Espada to perform services related to drilling and operating a the Picosa Creek 1V well located on an oil and gas lease in Zavala County, Texas (the "Well"). Espada was the operator at the Well Site.** In October 2011, hydraulic fracturing operations

279. In Espada Operating, LLC's First Amended Third Party Petition, Espada articulated Espada's understanding of an occurrence alleged by CBX as: "CBX alleges that a catastrophic failure of the casing occurred down hole in the Well. The Well allegedly could not be repaired and was plugged and abandoned." (Ex. J, CBX 429650-000135.)

> about January 23, 2012, CBX alleges that a catastrophic failure of the casing occurred down hole in the Well. The Well allegedly could not be repaired and was plugged and abandoned.

280. In Espada Operating, LLC's First Amended Third Party Petition, Espada indicated that Espada understood that it was being sued for "simple" negligence (i.e., negligence not related to professional services). (Ex. J, CBX 429650-000135:136.)

> 12. On October 29, 2013, CBX filed suit against Third-Party Plaintiff Espada, among others, in Zavala County, Texas. CBX alleges it sustained damages due to a failure of the casing used in the Well. CBX further alleges that Espada was negligent in the performance of its duties of "procuring and using the proper materials to include casing, and to perform related oil and gas related well drilling and completion services to deliver a producing well for" CBX. CBX has also made claims against the casing suppliers / manufacturers, and another oil and gas service provider.
>
> 13. CBX's current Petition is critical of the work and materials provided for the Well.

G. *STOWERS* DEMAND

281. On September 22, 2015, CBX served a "*Stowers* Demand" on ACE American and ACE Property through Royston Rayzor. (Ex. K, CBX 429650-000160.)

September 22, 2015

Mr. Ewing E. Sikes, III *via Fax: (956) 542-4370*
Mr. Robert L. Guerra, Jr.
ROYSTON, RAYZOR, VICKERY & WILLIAMS, LLP
55 Cove Circle
Brownsville, Texas 78521

RE: Cause No. 13-02-12940-ZCV; *CBX Resources, LLC v. Daewoo International Corp, et al*
In the 293rd Judicial District, Zavala County, Texas
WG File: CBX Resources 429650

"RULE 408 CONFIDENTIAL SETTLEMENT COMMUNICATION"

Dear Counsel:

As you are well aware, we have conducted a significant amount of discovery to date in this case. While additional discovery remains outstanding, we believe both sides are in a position to evaluate the case for settlement purposes in lieu of a formal mediation and further litigation expenses. Please consider this correspondence as a formal *Stowers* demand to fully settle all claims against Espada Operating, LLC., in the above referenced matter. Please forward this request to your client and the applicable insurance representatives for their consideration. As set forth below, Plaintiff's

282. The *Stowers* Demand discussed, among other things, Espada's negligence.

(CBX 429650-000160, 162.)

insurance representatives for their consideration. As set forth below, Plaintiff's settlement demand is reasonable based on (1) the clear and convincing evidence of your client's negligence and gross negligence; (2) the undisputable damages in this case; and (3) our firm's verdict history.

> **Espada Was Grossly Negligent In Failing to Stop Work at the Time It Suspected the Fractured Casing:** Espada's corporate representative admitted that Espada suspected that the casing failed during fracking operations -- the "dropping of the fourth ball." (Billington Dep. 114:9-18.) Rather than stopping work and investigating as a reasonably prudent Operator would under the same or similar circumstances, Espada allowed work to continue that exacerbated the problem ultimately causing the casing to part in its entirety and preventing the full recovery of the production casing. That is, had Espada stopped work once pressure was lost during the fourth ball drop, Espada could have prevented the full diameter casing fracture that would have allowed the recovery of the entire casing subsequently enabling the running of a new casing and full exploitation of the minerals from the well.

283. In the *Stowers* Demand, CBX made a settlement demand within policy limits. (Ex. K, CBX 429650-000163.)

> Nonetheless, Plaintiff demands the lesser of the following amounts in full and final settlement of CBX Resources's claims against Espada Operating, LLC:
>
> (1) **$121,827,692**; or
> (2) the policy limits for all applicable insurance policies covering or responding to the occurrence made the basis of this lawsuit, specifically including
>
> a. Ace American Insurance Company, Policy No. G24994090 002, policy limits: $1,000,000;
>
> b. Ace Group – umbrella, Policy No. XOO G24924592; policy limits: $2,000,000.

284. In the *Stowers* Demand, CBX stated that "[P]ayment of this demand will result in a full, complete, and unconditional release of Plaintiff's claims against Espada Operating, LLC, pursuant to *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489,491 (Tex. 1998)." (CBX 429650-000163.)

> fees). Payment of this demand will result in a full, complete, and unconditional release of Plaintiff's claims against Espada Operating, LLC, pursuant to *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998).

285. As such, the *Stowers* Demand offered a release that was full, complete and unconditional.

286. In the *Stowers* Demand, CBX stated: "This demand shall expire automatically and without further notice at 5:00 p.m. CST on October 23, 2015." (CBX 429650-000164.)

> **This demand shall expire automatically and without further notice at 5:00 p.m. CST on October 23, 2015. After such time and date, Plaintiff's demand will**

287. On September 30, 2015, Royston Rayzor requested a seven-day extension to respond to the *Stowers* Demand. (Ex. L.)

288. Royston Rayzor provided two reasons for the extension: "First, I think it helps to have a more successful mediation. As you know, it takes time for insurance carriers to get their ducks in a row and to make sure we have the maximum authority from all parties. Second, I don't see how the extension hurts your client." (Ex. M.)

289. CBX did not extend the October 23, 2015 deadline.

290. The *Stowers* Demand expired automatically at 5:00 p.m. CST on October 23, 2015.

291. The *Stowers* Demand expired at a time that ACE American was providing a defense to Espada.

292. ACE had a duty to accept reasonable settlement offers within policy limits.

293. CBX offered to settle the claims asserted in the Underlying Lawsuit within the applicable policy limits.

294. CBX's claims asserted in the Underlying Lawsuit were within the scope of coverage provided by the CGL Policy.

295. The *Stowers* Demand was reasonable considering the likelihood and degree of Espada's potential exposure to an excess judgment.

296. Without a defense, Espada was likely to be exposed to a judgment imposing damages in an amount that exceeded the available amounts of coverage under the CGL Policy.

H. ACE'S NOTICE OF WITHDRAWAL OF DEFENSE

297. Prior to October 15, 2015, ACE American did not send a reservation of rights letter to Espada.

298. Prior to October 15, 2015, ACE American did not reserve any rights regarding the Underlying Lawsuit.

299. On October 15, 2015, Matthew Spector wrote a letter to Lee Roy Billington (hereinafter "Withdrawal Letter"). (Ex. N.)

300. In the Withdrawal Letter, Mr. Spector told Mr. Billington: "ACE American notifies Espada of its intent to cease the retention of defense counsel effective 14 days from the date of this letter." (Ex. N.)

> **Notice of Withdrawal of Defense.** As you know, ACE American previously retained the law firm of Royston, Rayzor, Vickery & Williams ("Royston Rayzor") as Espada's defense counsel. Due to the denial under the CGL policy, ACE American notifies Espada of its intent to cease the retention of defense counsel effective 14 days from the date of this letter. We are providing the 14 days to provide a reasonable opportunity for Espada to arrange for Royston Rayzor's continued retention thereafter or to retain new counsel, at its option.

301. In the Withdrawal Letter, Mr. Spector acknowledged that CBX's allegations included at least one claim against Espada that sounded in non-professional liability negligence to wit: "The causes of action against Espada are negligence. . . ." (Ex. N, CBX 429650-000170.)

out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal ... [and] the Picosa Creek IV well was plugged and abandoned." The causes of action against Espada are negligence (inclusive of professional negligence and Res Ipsa Loquitur theories), gross negligence and breach of contract. The alleged damages

302. In the Withdrawal Letter, Mr. Spector said, "CBX's allegations do not fall within the insuring agreement as there is no claim of physical injury to tangible property or loss of use of tangible property." (Ex. N, CBX 429650-000171.)

CBX's allegations do not fall within the insuring agreement as there is no claim of physical injury to tangible property or loss of use of tangible property. Rather, the claim is of initial faulty construction of the well (more particularly, the well's production casing) that precluded the well's completion and placement into service. There is no contention that the well existed in an un-faulty state and was then made faulty by physical injury; nor could the use of the well be lost given that there was never an actual use of the well in the first place.

303. Mr. Spector failed to support that statement with supporting language from the CGL Policy.

304. In the Withdrawal Letter, Mr. Spector took the erroneous position that because there was "no contention [in the petition] that the well existed in an un-faulty state and was then made faulty by physical injury," no insurance was provided by the CGL Policy. (*Id.*)

305. ACE American cannot support Mr. Spector's position with language from the CGL Policy.

306. In the Withdrawal Letter, Mr. Spector took the erroneous position that because there was "never an actual use of the well," no insurance was provided by the CGL Policy. (*Id.*)

307. ACE American cannot support Mr. Spector's above stated positions with language from the CGL Policy.

308. In the Withdrawal Letter, Mr. Spector erroneously claimed that several exclusions justified denial of coverage:

a. "exclusions j.(4)-(6), as amended by endorsement,"

b. "b. for Contractual Liability,"

c. "k. for Damage to Your Product,"

d. "l. for Damage to Your Work,"

e. "m. for Damage to Impaired Property or Property Not Physically Injured," and

f. "the endorsement entitled Exclusion – Engineers, Architects or Surveyors Professional Liability."

(CBX 429650-000171:172.)

309. Mr. Spector did not consider *Mid–Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105, 115–16 (5th Cir.2010) in the analysis of the coverage issues presented in the Withdrawal Letter.

310. Mr. Spector did not consider *Mid-Continent Cas. Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App.--Houston [1st Dist.] 2013, pet. denied) in the analysis of the coverage issues presented in the Withdrawal Letter.

311. Mr. Spector did not hire counsel independent from Royston Rayzor to analyze the coverage issues presented in the Withdrawal Letter.

312. Mr. Spector used Royston Rayzor, in part, as the source of the information it articulated in the Withdrawal Letter.

313. ACE American did not file a declaratory judgment action regarding the coverage issues presented in the Withdrawal Letter.

I. ROYSTON RAYZOR'S WITHDRAWAL

314. ACE American appointed Royston Rayzor as defense counsel for Espada in the Underlying Lawsuit in November 2013. (Ex. O, CBX 429650-000174.)

315. On November 19, 2013, Royston Rayzor filed an answer in the Underlying Lawsuit on behalf of Espada. (Ex. E.)

316. On October 15, 2015, ACE advised that it had denied coverage for the lawsuit, and would cease retaining Royston Rayzor to defend Espada, effective October 30, 2015. (*Id.*)

317. Espada told Royston Rayzor that Espada lacked the financial ability to retain Royston Rayzor to defend it. (Ex. O, CBX 429650-000175.)

318. On November 4, 2015, nevertheless, Royston Rayzor filed a Motion to Withdraw as Counsel for Espada Operating, LLC. (Ex. M.)

> **Good cause exists for granting this motion. Royston Rayzor was appointed as defense counsel for Espada in the above styled cause of action in November 2013 by Espada's insurer, ACE American Insurance Company ("ACE"). On October 15, 2015, ACE advised that it had denied coverage for the lawsuit, and would cease retaining Royston to defend Espada, effective October 30, 2015.**

> **Espada indicated that it lacks financial ability to retain Royston to defend it in this case, and could not pay legal fees incurred beyond October 30, 2015.**

319. The Motion to Withdraw as Counsel for Espada Operating, LLC, noted that trial was set on February 9, 2016. (Ex. O, CBX 429650-000175.)

PENDING SETTINGS AND DEADLINES

Pursuant to this Court's Third Amended Docket Control Order, issued on December 30, 2014, and the Amended Trial Setting, issued October 13, 2015, the following deadlines remain:

- Mediation deadline with Judge Elma Teresa Salinas Ender- **November 30, 2015**
- Dispositive Motion Deadline- **December 11, 2015**
- Pretrial Conference- **January 11, 2016 at 10:00 AM**
- Docket Call- **February 1, 2016 at 10:00 AM**
- Trial February- **9, 2016 1:30 PM**

320. On November 30, 2015, the state trial court granted Royston Rayzor's Motion to Withdraw as Counsel for Espada Operating, LLC. (Ex. P.)

321. ACE American selected Royston Rayzor as Espada's defense counsel.

322. ACE American provided Royston Rayzor as the defense counsel to Espada without serving a reservation of rights letter.

323. Royston Rayzor represented Espada for over two-years in the Underlying Lawsuit.

324. Royston Rayzor withdrew as counsel for Espada approximately seventy-one (71) days before trial.

J. TRIAL OF THE UNDERLYING LAWSUIT

325. On February 1, 2015 (approximately sixty-three days after Royston Rayzor withdrew), the court held a docket call of the Underlying Lawsuit as per the scheduling order agreed to by Royston Rayzor. (Ex. H, O.)

326. On February 1, 2015, counsel for Plaintiff noted on the record that Espada failed to appear and requested entry of judgment in favor of Plaintiff.

327. In turn, the court ordered that judgment would be entered in favor of CBX and set the matter to be heard on February 10, 2015 so that evidence could be heard in support of the judgment.

328. During the February 10, 2016 trial, the court admitted the testimony of six witnesses. (Ex. R.)

329. During the February 10, 2016, the court admitted into evidence forty-seven exhibits. (Ex. R, CBX 429650-000222:223, 30:25-31:7.)

330. During the February 10, 2016 trial, CBX offered expert testimony that Espada was negligent:

> Q. Is it fair to say that you know what an operator should do in serving as an operator with regard to any given prospect or well.
>
> A. Yes, sir, it is.
>
> Q. When -- now, you have been asked to provide an opinion about whether or not Espada was negligent in building the well?
>
> A. I have.
>
> Q. And you understood when you came to that opinion that the term "negligence" means: "Failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances"?
>
> A. That's correct.
>
> Q. And you understood that "ordinary care" means: "That degree of care that would be used by a person of ordinary prudence under the same or similar circumstances"?

A. Correct.

Q. And you understood that "proximate cause" means: "A cause that was a substantial factor in bringing about the occurrence or injury and without which cause such occurrence or injury would not have occurred"?

A. That's correct.

Q. You also understood with regard to proximate cause that, "In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the occurrence or injury or similar occurrence or injury might reasonably result therefrom"?

A. Yes.

Q. And you also understood that there may be more than one proximate cause of an occurrence or injury?

A. I do.

Q. Did the negligence of Espada Operating, LLC, proximately cause the fractured casing in question and result in loss of market value described by Mr. Tomblin"?

A. Yes.

(Ex. R, CBX 429650-000266:68, 74:21-76:12.)

331. During the February 10, 2016 trial, CBX offered expert testimony of Charles Tomblin who established a total damage amount of $105,674,240. (Ex. R, CBX 429650-000265, 73:8-10.)

K. JUDGMENT ENTERED

332. On February 10, 2016, the court entered judgment in favor of CBX Resources, LLC and against Espada Operating, LLC in the amount of $105,674,240 together with interest at the rate of five percent (5%) per annum, compounded annually, from the date of judgment until paid in full. (Ex. Q.)

333. On February 10, 2016, the court "ordered, adjudged and decreed that Plaintiff CBX Resources, LLC prevail[ed] on its negligence claim against Defendant Espada Operating, LLC." (Ex. Q, CBX 429650-000191.)

> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff CBX Resources, LLC prevail on its negligence claim against Defendant Espada Operating, LLC, and be, and is, hereby awarded judgment against Defendant Espada Operating, LLC.

334. By the judgment, Espada became legally obligated to pay damages to CBX.

335. The judgment has harmed Espada because the judgment has affected Espada's credit and has subjected Espada's nonexempt property to sudden execution and forced sale.

336. The judgment is final and non-appealable.

L. TRANSFER ORDER

337. On November 1, 2016, the court in the Underlying Lawsuit signed and entered Order for Turnover Relief and ordered that: "ownership of the Cause of Action Property [as defined in that order] is, by entry of this order, transferred to CBX Resources, LLC."

338. Said order defined "Cause of Action Property" to include "causes of action against Espada's insurers, including but not limited to ACE American Insurance Company and ACE Property and Casualty Insurance Company and their affiliates, parents and subsidiaries. . . . "

339. Said order also ordered Espada to execute an assignment of the causes of action to CBX.

340. Pursuant to said order, on November 8, 2016, Defendant Espada Operating, LLC assigned any and all of its causes of action against ACE AMERICAN INSURANCE COMPANY and ACE PROPERTY AND CASUALTY INSURANCE COMPANY to Plaintiff CBX Resources, LLC.

M. STANDING

341. CBX has standing to bring this lawsuit as a judgment creditor of Espada.

342. CBX has standing to bring this lawsuit as a third-party beneficiary of the CGL Policy.

343. CBX has standing to bring this lawsuit as a third-party beneficiary of the Umbrella Policy.

344. CBX has standing to bring this lawsuit as the owner (by transfer order) of Espada's contractual and extra-contractual claims against ACE American and ACE Property.

VI. CAUSES OF ACTION

A. COUNT 1 – BREACH OF *STOWERS* DUTY TO REASONABLY SETTLE CLAIMS WITHIN THE SCOPE OF COVERAGE AND FOR AN AMOUNT WITHIN THE LIMITS OF THE APPLICABLE POLICY

345. Plaintiff incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

346. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

347. Espada was insured under contracts issued by ACE American and ACE Property.

348. CBX asserted a liability claim against Espada. The allegations of fact concerning that claim against Espada were sufficient to bring those claims within the scope of coverage afforded by the express terms of the CGL Policy and Umbrella Policy.

349. CBX offered to settle the covered claim against Espada within the limits of the CGL Policy and Umbrella Policy with Espada and its insurers.

350. An ordinary, prudent insurer would have accepted that offer considering the likelihood and degree of the insured's potential exposure to an excess judgment.

351. ACE American and ACE Property owed Espada a duty to accept reasonable settlement offers within the policy limits.

352. ACE American and ACE Property breached that duty of care to Espada by not accepting CBX's reasonable settlement offer.

353. The breach of the duty owed ACE American and ACE Property to accept reasonable settlement offers concerning covered claims for amounts within the stated limits of the applicable policies proximately caused injury to Espada when a judgment was rendered against Espada in excess of the policy limits.

354. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages in the amount of at least $105,674,240, together with interest at the rate of five percent (5%) per annum, compounded annually from the date of judgment until paid in full, which is the amount of the judgment rendered against Espada in the underlying suit. This amount is within the jurisdictional limits of this Court.

B. COUNT 2 – BAD FAITH

355. CBX incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

356. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

357. In the alternative to other counts, ACE American and ACE Property breached ACE American and ACE Property's duty of good faith and fair dealing.

358. Espada was an insured under insurance contracts issued by ACE American and ACE Property, which gave rise to a duty of good faith and fair dealing.

359. ACE American and ACE Property breached their duties by denying a defense to Espada and by denying payment of a covered claim when ACE American and ACE Property knew or should have known that their liability under the policy was reasonably clear.

360. ACE American and ACE Property's breach of duty proximately caused injury to Espada, which resulted in loss of policy benefits.

361. ACE American's bad faith denial of its duty to defend approximately sixty-one (61) days before trial, after controlling Espada's defense for over two years, prejudiced Espada and proximately caused injury to Espada, which resulted an excess judgment being entered against Espada. *See Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136 (Tex. 2010) ("But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions."); *Sentry Ins. v. Just Right Prod., Inc.*, No. 4:14-CV-30-O, 2015 WL 10819157, at *7 (N.D. Tex. Jan. 7, 2015) ("However, 'if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.' *Ulico Cas. Co.*, 262 S.W.3d at 787; *see also Gilbert Tex. Constr., LP v. Underwriters at Lloyd's London*, 327

S.W.3d 118, 136–38 (Tex.2010). 'Although courts cannot judicially rewrite the parties' agreement to create new coverage terms, estoppel does not create a new contract: it only compensates for reliance damages that the insured suffers when the insurer takes over the insured's defense.' *Canal Indem. Co.*, 750 F.Supp.2d at 750. Thus, Just Right may succeed on an estoppel theory if it can establish that Sentry assumed control of the underlying suit and it was prejudiced as a result of Sentry's actions.").

362. CBX asserts this bad faith claim inclusive of the estoppel theory discussed by several Texas courts. *See Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136 (Tex. 2010) ("But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions."); *Sentry Ins. v. Just Right Prod., Inc.*, No. 4:14-CV-30-O, 2015 WL 10819157, at *7 (N.D. Tex. Jan. 7, 2015) ("However, 'if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.' *Ulico Cas. Co.*, 262 S.W.3d at 787; *see also Gilbert Tex. Constr., LP v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136–38 (Tex.2010). 'Although courts cannot judicially rewrite the parties' agreement to create new coverage terms, estoppel does not create a new contract: it only compensates for reliance damages that the insured suffers when the insurer takes over the insured's defense.' *Canal Indem. Co.*, 750 F.Supp.2d at 750. Thus, Just Right may succeed on an estoppel theory if it can establish that Sentry assumed control of the underlying suit and it was prejudiced as a result of Sentry's actions.").

363. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages in the amount of at least $105,674,240, together with interest at the rate

of five percent (5%) per annum, compounded annually from the date of judgment until paid in full, which is the amount of the judgment rendered against Espada in the underlying suit. This amount is within the jurisdictional limits of this Court.

C. COUNT 3 – BREACH OF CONTRACT

364. Plaintiff incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

365. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

366. In addition to other counts, CBX sues ACE American and ACE Property for breach of contract.

1. ACE American

367. ACE American and Espada entered into a valid and enforceable contract attached hereto as Exhibit A and incorporated herein by reference.

368. The contract provided that ACE American would defend and indemnify Espada from covered claims and that Espada would pay a premium in exchange.

369. Espada fully performed its contractual obligations.

370. ACE American breached the contract by failing to defend Espada in the Underlying Lawsuit.

371. ACE American's breach caused injury to Espada, which resulted in the damages described below.

372. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages resulting from that breach in the amount of $105,674,240.

373. As a matter of Texas law, the recovery of attorney's fees is permitted to a party prevailing upon a claim for breach of an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).

2. ACE Property

374. ACE Property and Espada entered into a valid and enforceable contract represented in part by Exhibit B.

375. The contract provided that ACE Property would defend and indemnify Espada from covered claims and that Espada would pay a premium in exchange.

376. Espada fully performed its contractual obligations.

377. ACE Property breached the contract by failing to indemnify Espada with regard to the Underlying Lawsuit.

378. ACE Property breached the contract by failing to defend Espada in the Underlying Lawsuit.

379. ACE Property breached the contract by failing to indemnify Espada with regard to the Underlying Lawsuit.

380. ACE Property's breach caused injury to Espada, which resulted in the damages described below.

381. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages resulting from that breach in the amount of $105,674,240.

382. As a matter of Texas law, the recovery of attorney's fees is permitted to a party prevailing upon a claim for breach of an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).

VII. DECLARATORY JUDGMENT

383. Plaintiff incorporates here, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

384. Plaintiff seeks a declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§2201 and 2202.

385. CBX seeks the following declarations:

a. Espada was covered by the CGL Policy.

b. Espada was covered by the Umbrella Policy.

c. The Occurrence was covered by the CGL Policy.

d. The Occurrence was covered by the Umbrella Policy.

e. ACE American had a duty to defend Espada in the Underlying Lawsuit.

f. ACE American has a duty to indemnify Espada with regard to the Underlying Judgment.

g. ACE Property had a duty to defend Espada in the Underlying Lawsuit.

h. ACE Property has a duty to indemnify Espada with regard to the Underlying Judgment.

386. As a matter of Texas law, the recovery of attorney's fees is permitted to a party seeking declaratory relief. *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

VIII. CONDITIONS PRECEDENT

387. All conditions precedent have been performed or have occurred.

IX. JURY DEMAND

388. Plaintiff requests a trial by jury.

X. EXEMPLARY DAMAGES

389. Plaintiff incorporates here, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

390. Plaintiff's injury resulted from Defendant's gross negligence, malice, or actual fraud, which entitles Plaintiff to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a).

XI. DAMAGES

391. As a direct and proximate result of defendants' conduct, plaintiff suffered the following injuries and damages.

a. Actual damages in the amount of the February 10, 2016 judgment,

b. Actual damages in the amount of the unpaid policy limits,

c. Exemplary damages,

d. Prejudgment and postjudgment interest,

e. Court costs, and

f. Attorneys' fees.

XII. PRAYER

392. Plaintiff CBX Resources, LLC prays that Defendants ACE American Insurance Company and ACE Property and Casualty Insurance Company be cited to appear and answer herein, that this case be set for trial, and that Plaintiff recover a judgment of and from Defendants for damages in such amount as the evidence may show and the jury may determine to be proper, in addition to pre-judgment interest, post-judgment interest, costs, and all other and further relief to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

By: /s/ Mark A. Fassold

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § §	Civil Action No. 5:17-cv-00017-DAE

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff CBX Resources, LLC ("CBX") complains herein of Defendant ACE American Insurance Company ("ACE American") and Defendant ACE Property and Casualty Insurance Company ("ACE Property") (collectively, "ACE" or "Defendants").

I. INTRODUCTION

1. ACE American and ACE Property issued a CGL Policy and Umbrella Policy, respectively, to Espada for the policy period April 2, 2011 to April 2, 2012.[1]

2. In the Underlying Lawsuit, CBX sued for damages to tangible property proximately caused by Espada's negligence as an oil and gas operator. Those damages occurred between August 6, 2011 and January 25, 2012.

3. In the Underlying Lawsuit, ACE American controlled Espada's defense and hired a law firm, Royston Rayzor, to defend Espada. ACE American did not formally attempt to reserve its rights or otherwise dispute the existence of coverage

[1] Please see the "Definitions" sub-section of the "Facts" section below for definitions of the defined terms found in this introduction.

under the applicable insurance policy. Pursuant to ACE American's retention, Royston Rayzor represented Espada for two years in the Underlying Lawsuit.

4. Approximately three-months before trial, CBX served a *Stowers* Demand on ACE American and ACE Property. Roughly one month after the service of that demand, ACE American and ACE Property withdrew their defense of Espada.

5. The Underlying Lawsuit proceeded to trial on February 10, 2016. Following the trial, the state district court entered judgment for CBX and against Espada in the Underlying Lawsuit in the amount of $105,674,240, representing CBX's proven actual damages proximately caused by Espada's proven negligence. The trial court's judgment also awarded *inter alia* post-judgment interest.

6. On November 1, 2016, the state district court entered an order transferring to CBX, Espada's claims against ACE American and ACE Property.

7. CBX files the above styled lawsuit as a judgment creditor of Espada and a third-party beneficiary of the CGL Policy and Umbrella Policy. It is also the owner, by virtue of the state district court's transfer order, of Espada's contractual and extra-contractual claims against ACE American and ACE Property.

II. PARTIES

8. Plaintiff CBX Resources, LLC is a Texas corporation, a citizen of Texas, organized under the laws of Texas, and has its principal place of business in Boerne, Texas.

9. Defendant, ACE AMERICAN INSURANCE COMPANY, is a foreign insurance carrier organized and existing under the laws of Pennsylvania and authorized to conduct business in Texas. It may be served with process by serving its

designated agent for service of process, C T Corporation System, in Dallas County at 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

10. Defendant, ACE PROPERTY AND CASUALTY INSURANCE COMPANY, is a foreign insurance carrier organized and existing under the laws of Pennsylvania and authorized to conduct business in Texas. It may be served with process by serving its designated agent for service of process, C T Corporation System, in Dallas County at 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

III. JURISDICTION

11. Because this action, which has an amount in controversy in excess of $75,000, is between citizens of different U.S. states, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a).

12. This Court has general personal jurisdiction over ACE American Insurance Company and ACE Property and Casualty Insurance Company because each does business in Texas and each has sufficient contacts with the State of Texas, both generally and with regard to this specific action, so that the exercise of personal jurisdiction over it is proper.

13. Further, this Court has specific personal jurisdiction over ACE American Insurance Company and ACE Property and Casualty Insurance Company because the facts giving rise to the claims made in this lawsuit all occurred in the State of Texas.

IV. VENUE

14. Venue is proper in this district under 28 U.S.C. §1391(b)(2) because a substantial part of the events or omissions giving rise to this claim, as detailed below, occurred in this district.

V. FACTS

A. DEFINITIONS

15. "ACE American" means ACE American Insurance Company.

16. "ACE Property" means ACE Property and Casualty Insurance Company.

17. "ACE" means ACE American and ACE Property collectively.

18. "CBX" means CBX Resources, LLC.

19. "CGL Policy" means Commercial General Liability Policy No. G24994090 002 issued by ACE American Insurance Company to Espada Operating, LLC.

20. "Espada" means Espada Operating, LLC.

21. "Live Petition" means Plaintiff's Second Amended Petition filed in the Underlying Lawsuit and attached hereto as Exhibit I.

22. "Occurrence" means the accident described in the Live Petition.

23. "Royston Rayzor" means Royston, Rayzor, Vickery & Williams, LLP.

24. "Umbrella Policy" means Umbrella Policy No. G24924592 issued by ACE Property and Casualty Insurance Company to Espada Operating, LLC.

25. "Underlying Lawsuit" means Cause No. 13-02-12940-ZCV; *CBX Resources, LLC v. Daewoo International Corp., et al*; in the 293rd Judicial District, Zavala County, Texas.

26. "Underlying Judgment" means the February 10, 2016 judgment entered in the Underlying Lawsuit and attached hereto as Exhibit Q.

27. "UREC Endorsement" means the "Underground Resources and Equipment Coverage Endorsement" that is a part of the "CGL Policy." (Ex. A, CBX 429650-000052:53.)

B. EXHIBITS

28. **Exhibit A** to this Complaint, at bates number CBX 429650-000001 to CBX 429650-000071, is a copy of the Commercial General Liability Policy No. G24994090 002 issued by ACE American to Espada.

29. The document attached as Exhibit A is a genuine copy of that document.

30. **Exhibit B** to this Complaint, at bates number CBX 429650-000072, is a copy of the Declarations Page of Umbrella Policy No. G24924592 issued by ACE Property to Espada.

31. The document attached as Exhibit B is a genuine copy of that document.

32. **Exhibit C** to this Complaint, at bates number CBX 429650-000073 to CBX 429650-000080, is a copy of Plaintiff's Original Petition and Requests for Disclosure filed in the Underlying Lawsuit.

33. The document attached as Exhibit C is a genuine copy of that document.

34. **Exhibit D** to this Complaint, at bates number CBX 429650-000081 to CBX 429650-000102, is a copy of Plaintiff's First Amended Petition and Requests for Disclosure filed in the Underlying Lawsuit.

35. The document attached as Exhibit D is a genuine copy of that document.

36. **Exhibit E** to this Complaint, at bates number CBX 429650-000103 to CBX 429650-000105, is a copy of Defendant Espada Operating, LLC's Original Answer filed in the Underlying Lawsuit.

37. The document attached as Exhibit E is a genuine copy of that document.

38. **Exhibit F** to this Complaint, at bates number CBX 429650-000106 to CBX 429650-000109, is a copy of Defendant Espada Operating LLC's Responses to CBX

Resources, LLC's Request for Disclosure served during the pendency of the Underlying Lawsuit.

39. The document attached as Exhibit F is a genuine copy of that document.

40. **Exhibit G** to this Complaint, at bates number CBX 429650-000110 to CBX 429650-000113, is a copy of Defendant Espada Operating, LLC's First Amended Original Answer filed in the Underlying Lawsuit.

41. The document attached as Exhibit G is a genuine copy of that document.

42. **Exhibit H** to this Complaint, at bates number CBX 429650-000114 to CBX 429650-000119, is a copy of the Third Amended Docket Control Order entered in the Underlying Lawsuit.

43. The document attached as Exhibit H is a genuine copy of that document.

44. **Exhibit I** to this Complaint, at bates number CBX 429650-000120 to CBX 429650-000132, is a copy of Plaintiff's Second Amended Petition filed in the Underlying Lawsuit.

45. The document attached as Exhibit I is a genuine copy of that document.

46. **Exhibit J** to this Complaint, at bates number CBX 429650-000133 to CBX 429650-000159, is a copy of Espada Operating, LLC's First Amended Third Party Petition filed in the Underlying Lawsuit.

47. The document attached as Exhibit J is a genuine copy of that document.

48. **Exhibit K** to this Complaint, at bates number CBX 429650-000160 to CBX 429650-000165, is a copy of the September 22, 2015 Offer to Settle Sent from Edward Allred to Ewing Sikes served during the pendency of the Underlying Lawsuit.

49. The document attached as Exhibit K is a genuine copy of that document.

50. **Exhibit L** to this Complaint, at bates number CBX 429650-000166, is a copy of a September 30, 2015 E-mail from Eddie Sikes to Edward Allred.

51. The document attached as Exhibit L is a genuine copy of that document.

52. **Exhibit M** to this Complaint, at bates number CBX 429650-000167 to CBX 429650-000169, is a copy of the October 1, 2015 E-mail from Eddies Sikes to David Ortega.

53. The document attached as Exhibit M is a genuine copy of that document.

54. **Exhibit N** to this Complaint, at bates number CBX 429650-000170 to CBX 429650-000173, is a copy of a October 15, 2015 letter from Matthew Spector to Lee Roy Billington served during the pendency of the Underlying Lawsuit.

55. The document attached as Exhibit N is a genuine copy of that document.

56. **Exhibit O** to this Complaint, at bates number CBX 429650-000174 to CBX 429650-000188, is a copy of the Royston Rayzor's Motion to Withdraw as Counsel for Espada Operating, LLC filed in the Underlying Lawsuit.

57. The document attached as Exhibit O is a genuine copy of that document.

58. **Exhibit P** to this Complaint, at bates number CBX 429650-000189, is a copy of the Order of Withdrawal entered by the court in the Underlying Lawsuit.

59. The document attached as Exhibit P is a genuine copy of that document.

60. **Exhibit Q** to this Complaint, at bates number CBX 429650-000190 to CBX 429650-000192, is a copy of the Final Judgment entered by the court in the Underlying Lawsuit.

61. The document attached as Exhibit Q is a genuine copy of that document.

62. **Exhibit R** to this Complaint, at bates number CBX 429650-000193 to CBX 429650-000274, is a copy of the Transcript of the Trial of the Underlying Lawsuit Held On February 10, 2016.

63. The document attached as Exhibit R is a genuine copy of that document.

64. **Exhibit S** to this Complaint, at bates number CBX 429650-000275 to CBX 429650-000287, is a copy of a Redline Comparing the First and Second Amended Petitions filed in the Underlying Lawsuit.

65. The document attached as Exhibit S is a genuine copy of that document.

66. **Exhibit T** to this Complaint, at bates number CBX 429650-000288 to CBX 429650-000292, is a copy of Trial Exhibit 38 Entered During the Underlying Trial.

67. The document attached as Exhibit T is a genuine copy of that document.

68. **Exhibit U** to this Complaint, at bates number CBX 429650-000293 to CBX 429650-000294, is a copy of the Abstract of Judgment Filed in Bexar County.

69. The document attached as Exhibit U is a genuine copy of that document.

70. **Exhibit V** to this Complaint, at bates number CBX 429650-000295 to CBX 429650-000296, is a copy of the Abstract of Judgment Filed in Zavala County.

71. The document attached as Exhibit V is a genuine copy of that document.

72. **Exhibit W** to this Complaint, at bates number CBX 429650-000297 to CBX 429650-000300 is a copy of the November 1, 2016 Order for Turnover Relief.

73. The document attached as Exhibit W is a genuine copy of that document.

74. **Exhibit X** to this Complaint, at bates number CBX 429650-000301, is a copy of a November 8, 2016 Assignment of Cause of Action.

75. The document attached as Exhibit X is a genuine copy of that document.

C. THE INSURERS

76. ACE American and ACE Property are interconnected companies.

77. ACE American and ACE Property are both part of the ACE group of companies.

78. ACE American and ACE Property share common ownership.

79. ACE American and ACE Property have common affiliates.

80. ACE North American Claims is an affiliate of ACE American and ACE Property.

81. ACE American and ACE Property are affiliates of one another.

82. ACE American and ACE Property share common management.

83. ACE American and ACE Property issued the CGL Policy and Umbrella Policy as connected insurance policies.

84. ACE American and ACE Property were represented by common employees.

85. Matthew Spector had the authority to bind ACE American and ACE Property.

86. Xavier Blum supervised the administration of the CGL Policy and Umbrella Policy.

D. THE CGL POLICY

1. **Basic Insuring Agreement – Property Damage Covered**

87. ACE American issued the CGL Policy to Espada for the policy period April 2, 2011 to April 2, 2012. (Ex. A; Ex. N, CBX 429650-000170.)

88. Espada is a named insured in the CGL Policy. (Ex. A, CBX 429650-000001.)

POLICY NUMBER: G24994090 002

COMMERCIAL GENERAL LIABILITY
CG DS 01 10 01

COMMERCIAL GENERAL LIABILITY DECLARATIONS

ACE American Insurance Company P.O. Box 1000 436 Walnut Street Philadelphia, PA 19106	GENERAL AGENCY SERVICES INC 3700 E RIVER ROAD MT PLEASANT MI 48858

NAMED INSURED: Espada Operating, LLC

MAILING ADDRESS: 8918 Tesoro Dr ., Ste 500
San Antonio, TX 78217

89. The CGL Policy's declarations page described Espada's "Business Description" as "Oil and Gas Operations." (Ex. A, CBX 429650-000001.)

90. The CGL Policy declarations identifying Espada Operating as the named insured and identifying its business as "Oil and Gas Operations" are unambiguous.

91. In the Underlying Lawsuit, CBX alleged property damage. (Ex. I, CB 429650-000122, 123, 127, 128, 129.)

92. Section I.A.1.a. of the CGL Policy states the "Insuring Agreement" and "Duty to Defend" with regard to "Property Damage Liability." (Ex. A, CBX 429650-000003.)

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured

93. Section 1.A.1.a of the CGL Policy is unambiguous.

94. Section I.A.1.a. of the CGL Policy obligated ACE American to defend Espada.

95. The CGL Policy gave ACE American the right to control Espada's defense in the Underlying Lawsuit.

96. ACE American in fact controlled Espada's defense in the Underlying Lawsuit.

97. ACE American in fact controlled Espada's defense in the Underlying Lawsuit for over two years.

98. The CGL Policy defines "Property damage" to mean "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." (Ex. A, CBX 429650-000017.)

> **17.** "Property damage" means:
>
> **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

> **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

99. These definitions in Section V.17 are unambiguous.

100. Section I.A.1.b. of the CGL Policy limits the scope of the insurance by "coverage territory" and "policy period." (Ex. A, CBX 429650-000003.)

> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> **(2)** The "bodily injury" or "property damage" occurs during the policy period; and

101. Section I.A.1.b of the CGL policy is unambiguous.

102. The CGL Policy defines "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. A, CBX 429650-000016.)

> **13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

103. The definition of "occurrence" in Section V.13 of the CGL Policy is unambiguous.

104. The CGL Policy defines "Coverage Territory" to include "The United States of America." (Ex. A, CBX 429650-000015.)

> **4.** "Coverage territory" means:
>
> a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

105. The Occurrence described in the Live Petition took place in the "coverage territory."

106. The Occurrence described in the Live Petition took place in Zavala County, Texas.

107. There is a claim of an "occurrence" in the Live Petition according to the terms of the CGL Policy.

108. The property damage described in the Live Petition was unexpected.

109. The property damage described in the Live Petition was caused by an accident.

110. The property damage described in the Live Petition occurred between April 2, 2011 and April 2, 2012.

111. The property damage described in the Live Petition occurred between August 6, 2011 and January 25, 2012.

2. Underground Resources and Equipment Coverage Endorsement

112. An "Underground Resources and Equipment Coverage Endorsement" ("UREC Endorsement") "change[d]" and "modifie[d]" the CGL Policy. (Ex. A, CBX 429650-000052.)

UNDERGROUND RESOURCES AND EQUIPMENT COVERAGE ENDORSEMENT

Named Insured			Endorsement Number
Espada Operating, LLC			
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
PMG	G24994090 002	04/02/2011 - 04/02/2012	04/02/2011
Issued By (Name of Insurance Company)			
ACE American Insurance Company			

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This Endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

113. In sum, the UREC Endorsement (1) adds limits of insurance, (2) replaces an exclusion, and (3) adds definitions to the CGL Policy.

114. First, the UREC Endorsement adds limits of insurance. (Ex. A, CBX 429650-000052:53.)

I. With respect to "property damage" included within the "underground resources hazard" or the "underground equipment hazard" the following is added to Section III – Limits Of Insurance:

A. Subject to the Each Occurrence Limit and the General Aggregate Limit shown in the Declarations:

1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

B. The property damage aggregate limits shown in the Schedule above are subject to the General Aggregate Limit of Insurance stated in the Declarations. Any payment for "property damage" under this endorsement will be applied to and will erode the General Aggregate Limit of Insurance stated in the Declarations.

115. Second, the UREC endorsement *replaces* an exclusion. (Ex. A, CBX 429650-000053.)

II. Exclusion j.(4), under Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

a. Damage To Property

"Property damage" to:

(4) Personal property in the care, custody or control of the insured;

This exclusion does not apply to any "property damage" included within the "underground resources hazard" or the "underground equipment hazard" other than "property damage" to that particular part of any real property on which operations are being performed by you or on your behalf if the "property damage" arises out of those operations.

116. Finally, the UREC Endorsement adds definitions. (Ex. A, CBX 429650-000053.)

III. The following definitions are added to the Definitions Section:

"Underground resources hazard" includes "property damage" to any of the following:

a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

"Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

117. The UREC Endorsement expands the scope of coverage of the CGL Policy.

118. The UREC Endorsement is unambiguous.

119. Espada paid an additional premium for the UREC Endorsement.

120. Espada paid an additional premium for the expanded scope of coverage provided by the UREC Endorsement.

121. The UREC Endorsement is a coverage adding endorsement.

122. The UREC Endorsement broadened the definition of "property damage" found in the CGL Policy.

123. The UREC Endorsement broadened the definition of "property damage" found in the CGL Policy to the extent that the property damage alleged in the Live Complaint was covered.

124. The inherent nature of a coverage adding endorsement is to overcome exclusions of coverage.

125. Coverage adding endorsements supersede conflicting exclusions in the main policy.

E. UMBRELLA POLICY

126. ACE Property issued the Umbrella Policy to Espada for the policy period April 2, 2011 to April 2, 2012. (Ex. B, CBX 429650-000072.)

F. UNDERLYING LAWSUIT

1. February 21, 2013: CBX's Original Petition

127. On February 21, 2013, CBX filed Plaintiff's Original Petition and Requests for Disclosure. (Ex. C.)

128. CBX did not name Espada as a defendant in Plaintiff's Original Petition. (Ex. C.)

129. CBX stated in Plaintiff's Original Petition the following: "In 2011, Plaintiff hired Espada Operating, LLC ("Espada") to drill and operate an oil and gas lease. . . . " (Ex. C, CBX 429650-000076.)

130. CBX stated in Plaintiff's Original Petition the following: "As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of it drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things." (Ex. C, CBX 429650-000079.)

DAMAGES

25. As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well.

26. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things.

2. October 29, 2013: CBX's First Amended Petition

131. On October 29, 2013, CBX filed Plaintiff's First Amended Petition and Requests for Disclosure. (Ex. D.)

132. CBX named Espada as a defendant in Plaintiff's First Amended Petition and Requests for Disclosure. (Ex. D.)

133. Espada did not challenge the sufficiency of the allegations in Plaintiff's First Amended Petition.

134. Espada did not specially except (a right provided for by Texas Rule of Civil Procedure 91) to Plaintiff's First Amended Petition.

135. In Plaintiff's First Amended Petition, CBX alleged that Espada was professionally negligent. (Ex. D, CBX 429650-000087.)

136. In Plaintiff's First Amended Petition, CBX alleged that Espada was negligent (i.e., non-professionally negligent). (Ex. D, CBX 429650-000087.)

20. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and to perform related oil and gas well drilling and completion services to deliver a producing well for the Plaintiff. Espada owed a duty to perform these duties within recognized industry standards and practices, as well as to deliver a competent well design that would allow for a completed and productive well.

21. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation.

137. The failures of Espada were "more fully explained and detailed in [an] Affidavit and Certificate of Merit of David E. Prichard, P.E. (Licensed Engineer)." (Ex. D, CBX 429650-000087.)

138. In the Affidavit and Certificate of Merit of David E. Prichard, P.E., Mr. Pritchard detailed Espada's role as follows: "Espada, the operating company on the Well, was engaged in, and was retained on the Well, to procure and use the proper materials, and to perform oil and gas well drilling and completion operations to achieve a finished and productive oil and gas well for CBX Resources, the mineral owners for the Well." (Ex. D, CBX 429650-000093.)

> 4. Based on my research, experience in the industry, and review of documents relating to the Well, Baker was engaged in, and was retained on the Well, to perform oil well design, material specification, engineering, and similar services relating to the process and procedures to be utilized in drilling and completing the Well. Espada, the operating company on the Well, was engaged in, and was retained on the Well, to procure and use the proper materials, and to perform oil and gas well drilling and completion operations to achieve a finished and productive oil and gas well for CBX Resources, the mineral owners for the Well.

139. Further, Mr. Pritchard detailed the acts, errors, or omissions of Espada. (Ex. D, CBX 429650-000095.)

8. Based on my knowledge, skill, experience, education, training, practice, and a review of the documents listed above, it is my professional opinion that both Baker and Espada are responsible for at least the following act(s), error(s), or omission(s) that occurred and/or existed on the Well and that caused or contributed to the Well's failure:

a. Failure to correctly and/or accurately conduct a casing movement calculation;
b. Applying tension after the packers were set for stretch testing;
c. Accepting, and using casing that was not originally specified for this well.
d. Failing to require, perform, and review external pressure testing and/or torque-validated running in the well hole; and,
e. Excessive cuttings, including frac sand on clean-up in the open well hole.

9. These acts, errors and/or omissions show that both Baker and Espada failed to meet the applicable work product standards of oil and gas design, engineering, drilling, and operating professionals. Further, based upon the documents I have reviewed, the general factual occurrences as I understand them to be at this point, and further based upon my knowledge, skill, experience, education, training and practice in engineering and well design, drilling, completion, and oil and gas production practices, it is my professional opinion that these acts, errors, and/or omissions contributed to the failure of the Well, that absent these acts, errors, and/or omissions the Well would not have failed, that the commission of these acts, errors, and/or omissions renders the professional services provided insufficient and inadequate, and that the provision of services including these acts, errors, and/or omissions falls below the standard of professional standards that are usual, customary, and expected in the design, drilling, and completion of an oil well such and the Well and casing that failed in this case.

140. In Plaintiff's First Amended Petition, CBX made the same damage allegations as were made in Plaintiff's Original Petition. (Ex. D, CBX 429650-000088.)

DAMAGES

24. As a result of the action and conduct of the Defendants, Plaintiff has suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picossa Creek IV well.

25. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other things.

141. In Plaintiff's First Amended Petition, CBX made additional damage allegations as follows: "The Baker and Espada Defendant's actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation. . . . The breaches . . . [were] a proximate cause of the casing failure and Plaintiff's damage." (Ex. D, CBX 429650-000087:88.)

negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picossa Creek IV operation.

23. The breaches by of the Baker and Espada Defendants was a proximate cause of the casing failure and Plaintiff's damage.

3. November 19, 2013: Espada's Original Answer

142. On November 19, 2013, Espada served Defendant Espada Operating, LLC's Original Answer. (Ex. E.)

143. Espada served Defendant Espada Operating, LLC's Original Answer through its law firm Royston Rayzor.

WHEREFORE, PREMISES CONSIDERED, Defendant, ESPADA OPERATING, LLC prays that Plaintiff takes nothing by this suit against Defendant and Defendant be discharged without delay, and for such other and further relief, both general and special, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, LLP

By: _____

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Robert L. Guerra, Jr.
State Bar No. 24036694
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144. In November of 2013, ACE American appointed Royston Rayzor as defense counsel for Espada. (Ex. O, 429650-000174.)

Good cause exists for granting this motion. Royston Rayzor was appointed as defense counsel for Espada in the above styled cause of action in November 2013 by Espada's insurer, ACE American Insurance Company ("ACE"). On October 15, 2015, ACE advised that it had

145. Espada did not assert any affirmative defenses in its original answer.

4. January 27, 2014: Espada's Responses to Requests for Disclosure

146. On January 27, 2014, Espada served Defendant Espada Operating LLC's Responses to CBX Resources, LLC's Request for Disclosure. (Ex. F.)

147. In Defendant Espada Operating LLC's Responses to CBX Resources, LLC's Request for Disclosure, Espada indicated that Espada had "been correctly identified." (Ex. F, CBX 429650-000108.)

5. April 7, 2014: Espada's First Amended Original Answer

148. On April, 7, 2014, Espada served Defendant Espada Operating, LLC's First Amended Original Answer. (Ex. G.)

149. Espada asserted affirmative defenses for the first time.

6. December 30, 2014: Court's Third Amended Docket Control Order

150. On December 30, 2014, the court signed the Third Amended Docket Control Order. (Ex. H.)

151. That Third Amended Docket Control Order set "Jury Selection and Trial" for February 9, 2016. (Ex. H, CBX 429650-000115.)

> 5. Jury Selection and Trial are set for ~~February~~ February 9, 2016, at 9:30 a.m. This date is subject to the change by the Court. (Subject to change) clm

152. Royston Rayzor agreed to that February 9, 2016 trial. (Ex. H, CBX 429650-000116, 118.)

APPROVED AS TO FORM AND ENTRY:

Ewing Sikes, III
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ATTORNEYS FOR DEFENDANT ESPADA OPERATING, LLC

by RLA with permission

7. August 7, 2015: CBX's Second Amended Petition

153. On August 7, 2015, CBX filed Plaintiff's Second Amended Petition. (Ex. I.)

154. Espada did not challenge the sufficiency of the allegations in Plaintiff's Second Amended Petition.

155. Espada did not specially except (a right provided for by Texas Rule of Civil Procedure 91) to Plaintiff's Second Amended Petition.

a) The Live Petition at Time of Trial

156. CBX did not amend Plaintiff's Second Amended Petition.

157. CBX did not supplement Plaintiff's Second Amended Petition.

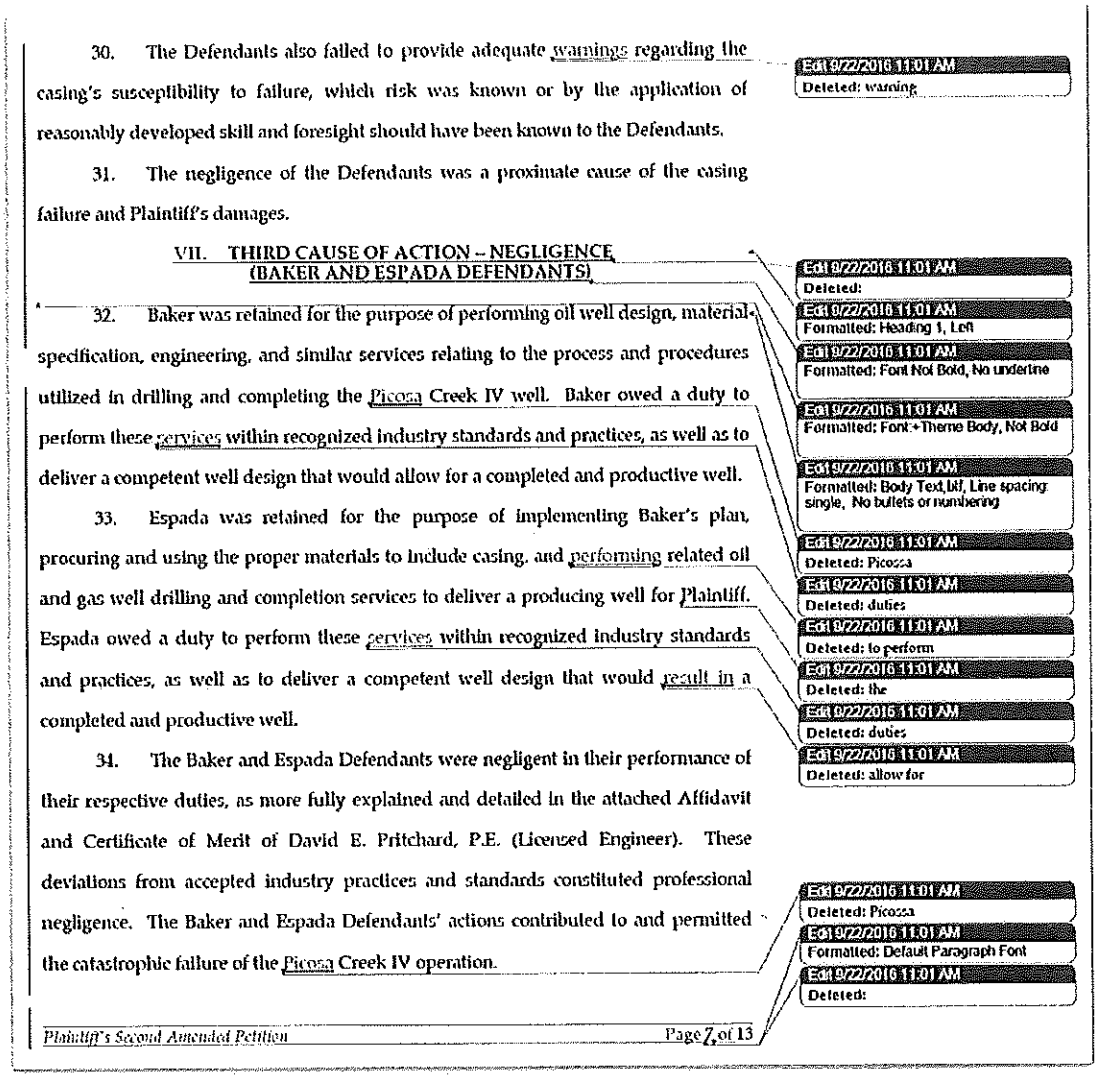
158. Plaintiff's Second Amended Petition was the live petition at the time of trial.

159. In Plaintiff's Second Amended Petition, CBX stated Espada's role: "On or about June 27, 2011, Plaintiff hired Espada Operating, LLC ("Espada") to drill and operate an oil and gas lease. . . ." (Ex. I, CBX 429650-000122.)

b) The Same Simple Negligence Claim Remained

160. Exhibit S is a "redline" comparing Plaintiff's First Amended Petition and Plaintiff's Second Amended Petition. (Ex. S.)

161. CBX made no substantive change to the negligence claim made against Espada as between Plaintiff's First Amended Petition and Plaintiff's Second Amended Petition. (Ex. D, I, S.)



30. The Defendants also failed to provide adequate warnings regarding the casing's susceptibility to failure, which risk was known or by the application of reasonably developed skill and foresight should have been known to the Defendants.

31. The negligence of the Defendants was a proximate cause of the casing failure and Plaintiff's damages.

VII. THIRD CAUSE OF ACTION – NEGLIGENCE (BAKER AND ESPADA DEFENDANTS)

32. Baker was retained for the purpose of performing oil well design, material specification, engineering, and similar services relating to the process and procedures utilized in drilling and completing the Picosa Creek IV well. Baker owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would allow for a completed and productive well.

33. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and performing related oil and gas well drilling and completion services to deliver a producing well for Plaintiff. Espada owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would result in a completed and productive well.

34. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

Plaintiff's Second Amended Petition Page 7 of 13

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35. The failures and deviations by the Baker and Espada Defendants breached their duties to perform their respective services within industry-accepted standards, practices, and requirements for well design, drilling, and completion.

36. The breaches by the Baker and Espada Defendants were proximate causes of the casing failure and Plaintiff's damages.

VIII. FOURTH CAUSE OF ACTION – BREACH OF CONTRACT (ESPADA DEFENDANT)

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162. In Plaintiff's Second Amended Petition, CBX alleged that Espada was professionally negligent. (Ex. I, CBX 429650-000126.)

163. In Plaintiff's Second Amended Petition, CBX alleged that Espada was negligent (i.e., non-professionally negligent). (Ex. D, CBX 429650-000126.)

33. Espada was retained for the purpose of implementing Baker's plan, procuring and using the proper materials to include casing, and performing related oil and gas well drilling and completion services to deliver a producing well for Plaintiff. Espada owed a duty to perform these services within recognized industry standards and practices, as well as to deliver a competent well design that would result in a completed and productive well.

34. The Baker and Espada Defendants were negligent in their performance of their respective duties, as more fully explained and detailed in the attached Affidavit and Certificate of Merit of David E. Pritchard, P.E. (Licensed Engineer). These deviations from accepted industry practices and standards constituted professional negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

164. In Plaintiff's Second Amended Petition, CBX alleged that "Espada was retained for the purpose of implementing Baker's Plan." (*Id.*)

165. In fact, Espada's role was to execute Baker's plan.

166. Plaintiff's Second Amended Petition did not contain a claim for contractual indemnification.

c) The Detail of the Property Damage Grew

167. In Plaintiff's Second Amended Petition, CBX made the damage allegations as were made in Plaintiff's Original Petition and Plaintiff's First Amended Petition. (Ex. I, CBX 429650-000128:129.)

> **XI. DAMAGES**
>
> 47. As a result of the action and conduct of the Defendants, Plaintiff suffered actual and consequential damages. These damages flow from the loss of its drilling operations due to the subsequent forced plugging and abandoning of the Picosa Creek IV well.
>
> 48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

168. In Plaintiff's Second Amended Petition, CBX made the "additional damage allegations" first announced in Plaintiff's First Amended Petition. (Ex. I, CBX 429650-000126:27.)

negligence. The Baker and Espada Defendants' actions contributed to and permitted the catastrophic failure of the Picosa Creek IV operation.

36. The breaches by the Baker and Espada Defendants were proximate causes of the casing failure and Plaintiff's damages.

169. In Plaintiff's Second Amended Petition, CBX described property damage not described in CBX's prior petitions, to wit: "[O]n or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property"). . . . On or about January 24, 2012, Espada . . . discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use. . . . Accordingly, the Picosa Creek IV well was plugged and abandoned. . . . The 5 ½" Production Casing . . . damaged, among other property, the August 6, 2011 Property." (Ex. I, CBX 429650-000122:23.)

14. **Wellbore and Surface Casing**: On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

(1) Drilling Operations Property

170. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "drilling operations" that was located beneath the surface of the earth in a well or hole (hereinafter "**Drilling Operations Property**"). (Ex. I, CBX 429650-000123.)

actual and consequential damages. These damages flow from the loss of its drilling

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek

171. In Plaintiff's Second Amended Petition, CBX described the Drilling Operations Property as including "casing, pipe, . . . tool and other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well [Picosa Creek IV well] or hole. . . ." (Ex. I, CBX 429650-000122.)

172. As defined, Drilling Operations Property is tangible property.

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing -- i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

CBX 429650

15. **Production Casing and Completion Liner:** On or about August 6, 2011, Espada and/or its subcontractors placed 5,708 feet of production casing and a Baker Hughes FracPoint Completion System into the production casing.

16. **Frac Job:** On or about October 25, 2011 (80 days after the production casing had been placed in the wellbore), Espada and/or its subcontractors attempted to pressurize the Baker Hughes FracPoint Completion System to fracture and stimulate five production zones.

173. In Plaintiff's Second Amended Petition, CBX alleged that the Drilling Operations Property was damaged. (Ex. I, CBX 429650-000123.)

actual and consequential damages. These damages flow from the loss of its drilling

Plaintiff's Second Amended Petition Page 9 of 13

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek

174. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the Drilling Operations Property arose out of operations in connection with the Picosa Creek IV well. (CBX 429650-000128:29.)

actual and consequential damages. These damages flow from the loss of its drilling

Plaintiff's Second Amended Petition Page 9 of 13

CBX 429650

operations due to the subsequent forced plugging and abandoning of the Picosa Creek IV well.

175. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing, pipe, . . . tool and other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

"Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

176. In Plaintiff's Second Amended Petition, CBX alleged damage to the Drilling Operations Property that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in

the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

177. At the time that the Drilling Operations Property was injured, the Drilling Operations Property was not personal property.

178. At the time that the Drilling Operations Property was injured, the Drilling Operations Property was not in the care, custody or control of Espada.

179. Espada did not manufacture, sell, distribute or dispose of the Drilling Operations Property.

180. Espada did not handle the Drilling Operations Property.

181. The Drilling Operations Property could not be restored to use.

182. The Drilling Operations Property was not restored to use.

183. The Drilling Operations Property was physically injured.

184. The Drilling Operations Property was injured suddenly and accidentally.

(2) Surface Casing Property

185. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "surface casing" that was located beneath the surface of the earth in a well or hole (hereinafter "**Surface Casing Property**"). (Ex. I, CBX 429650-000122.)

14. **Wellbore and Surface Casing**: On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

186. Surface Casing Property is tangible property.

187. In Plaintiff's Second Amended Petition, CBX alleged that the **Surface Casing Property** was damaged. (Ex. I, CBX 429650-000123.)

17. **Fractured Production Casing**: On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

188. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Surface Casing Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

189. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing . . . located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

> "Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

190. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Surface Casing Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

191. At the time that the Surface Casing Property was injured, the Surface Casing Property was not personal property.

192. At the time that the Surface Casing Property was injured, the Surface Casing Property was not in the care, custody or control of Espada.

193. Espada did not manufacture, sell, distribute or dispose of the Surface Casing Property.

194. Espada did not handle the Surface Casing Property.

195. The Surface Casing Property could not be restored to use.

196. The Surface Casing Property was not restored to use.

197. The Surface Casing Property was physically injured.

198. The Surface Casing Property was injured suddenly and accidentally.

(3) Unrecovered Production Casing Property

199. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "unrecovered production casing" that was located beneath the surface of the earth in a well or hole (hereinafter **"Unrecovered Production Casing Property"**). (Ex. I, CBX 429650-000123.)

15. **Production Casing and Completion Liner:** On or about August 6, 2011, Espada and/or its subcontractors placed 5,708 feet of production casing and a Baker Hughes FracPoint Completion System into the production casing.

16. **Frac Job:** On or about October 25, 2011 (80 days after the production casing had been placed in the wellbore), Espada and/or its subcontractors attempted to pressurize the Baker Hughes FracPoint Completion System to fracture and stimulate five production zones.

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

200. Unrecovered Production Casing Property is tangible property.

201. In Plaintiff's Second Amended Petition, CBX alleged that the **Unrecovered Production Casing Property** was damaged. (*Id.*)

202. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Unrecovered Production Casing Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

203. "Underground equipment hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to casing. . . located beneath the surface of the earth in any such well or hole. . . ." (Ex. A, CBX 429650-000053.)

> "Underground equipment hazard" includes "property damage" to any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole or beneath the surface of any body of water.

204. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Unrecovered Production Casing Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground equipment hazard" (as "underground equipment hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 2. The Underground Equipment Hazard Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground equipment hazard" and arising out of operations in connection with any one well.

205. At the time that the Unrecovered Production Casing Property was injured, the Unrecovered Production Casing Property was not personal property.

206. At the time that the Unrecovered Production Casing Property was injured, the Unrecovered Production Casing Property was not in the care, custody or control of Espada.

207. Espada did not manufacture, sell, distribute or dispose of the Unrecovered Production Casing Property.

208. Espada did not handle the Unrecovered Production Casing Property.

209. The Unrecovered Production Casing Property could not be restored to use.

210. The Unrecovered Production Casing Property was not restored to use.

211. The Unrecovered Production Casing Property was physically injured.

212. The Unrecovered Production Casing Property was injured suddenly and accidentally.

(4) Well Property

213. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "well" in or through which exploration for or production of any substance was carried on (hereinafter "**Well Property**"). (Ex. I, CBX 429650-000122:123, 129.)

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

214. Well Property is tangible property.

215. In Plaintiff's Second Amended Petition, CBX alleged that the **Well Property** was damaged. (*Id.*)

216. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Well Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

217. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny well . . . in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

218. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Well Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

219. At the time that the Well Property was injured, the Well Property was not personal property.

220. At the time that the Well Property was injured, the Well Property was not in the care, custody or control of Espada.

221. Espada did not manufacture, sell, distribute or dispose of the Well Property.

222. Espada did not handle the Well Property.

223. The Well Property could not be restored to use.

224. The Well Property was not restored to use.

225. The Well Property was physically injured.

226. The Well Property was injured suddenly and accidentally.

(5) Oil and Gas Property

227. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as "oil and gas" and "past production" and "future production" which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water (hereinafter "**Oil and Gas Property**"). (Ex. I, CBX 429650-000122:123, 129.)

> 14. **Wellbore and Surface Casing**: On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

228. Oil and Gas Property is tangible property.

229. In Plaintiff's Second Amended Petition, CBX alleged that the **Oil and Gas Property** was damaged. (*Id.*)

230. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Oil and Gas Property** arose out of operations in connection with the Picosa Creek IV well. (CBX 429650-000128:29.)

231. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [o]il, gas . . . which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water." (Ex. A, CBX 429650-000053.)

"Underground resources hazard" includes "property damage" to any of the following:

a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

232. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Oil and Gas Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground

resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

233. At the time that the Oil and Gas Property was injured, the Oil and Gas Property was not personal property.

234. At the time that the Oil and Gas Property was injured, the Oil and Gas Property was not in the care, custody or control of Espada.

235. Espada did not manufacture, sell, distribute or dispose of the Oil and Gas Property.

236. Espada did not handle the Oil and Gas Property.

237. The Oil and Gas Property could not be restored to use.

238. The Oil and Gas Property was not restored to use.

239. The Oil and Gas Property was physically injured.

240. The Oil and Gas Property was injured suddenly and accidentally.

(6) Wellbore Property

241. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "wellbore" in or through which exploration for or production of any substance was carried on (hereinafter "**Wellbore Property**"). (Ex. I, CBX 429650-000122:123.)

14. **Wellbore and Surface Casing:** On or before August 6, 2011, Espada and/or its subcontractors fully drilled the Picosa Creek IV well bore and placed 850 feet of 9 5/8" surface casing. On or before August 6, 2011, Plaintiff paid money or incurred liabilities to construct the wellbore and surface casing – i.e., Plaintiff owned the wellbore and surface casing. Therefore, on or before August 6, 2011, Plaintiff owned the wellbore, surface casing and future oil and gas revenues made possible by the wellbore and surface casing (the "August 6, 2011 Property").

17. **Fractured Production Casing:** On or about January 24, 2012, Espada and/or its subcontractors attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal. Accordingly, the Picosa Creek IV well was plugged and abandoned.

18. TAS Drilling, LLC assigned its rights related to this subject matter to CBX Resources, LLC.

19. The 5 ½" Production Casing ("The Product") manufactured and sold by the Defendants listed in paragraphs three through six above damaged, among other property, the August 6, 2011 Property.

242. Wellbore Property is tangible property.

243. In Plaintiff's Second Amended Petition, CBX alleged that the **Wellbore Property** was damaged. (*Id.*)

244. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Wellbore Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

245. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

246. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Wellbore Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

247. At the time that the Wellbore Property was injured, the Wellbore Property was not personal property.

248. At the time that the Wellbore Property was injured, the Wellbore Property was not in the care, custody or control of Espada.

249. Espada did not manufacture, sell, distribute or dispose of the Wellbore Property.

250. Espada did not handle the Wellbore Property.

251. The Wellbore Property could not be restored to use.

252. The Wellbore Property was not restored to use.

253. The Wellbore Property was physically injured.

254. The Wellbore Property was injured suddenly and accidentally.

(7) Lease Property

255. In Plaintiff's Second Amended Petition, CBX alleged that CBX owned property described as a "lease" (i.e., an "area") in or through which exploration for or production of any substance was carried on (hereinafter "**Lease Property**"). (Ex. I, CBX 429650-000122:123.)

48. Because of the casing failure, Plaintiff lost its (1) initial lease cost, (2) lease extension, (3) casing cost, (4) initial well cost, (5) past production and (6) future production, among other damages.

256. Lease Property is tangible property. *See Mitchell Energy Corp. v. Samson Res Co.*, 80 F.3d 976, 982 (5th Cir. 1996); *Energy Res., LLC v. Petroleum Sols. Int'l, LLC*, No. H-08-656, 2011 WL 3648083, *13 (S.D. Tex. Aug. 17, 2011)("In Texas, an oil and gas lease is considered an interest in tangible property.")

257. In Plaintiff's Second Amended Petition, CBX alleged that the **Lease Property** was damaged. (Ex. I, CBX 429650-000122:123.)

258. In Plaintiff's Second Amended Petition, CBX alleged that the damage to the **Lease Property** arose out of operations in connection with the Picosa Creek IV well. (*Id.*)

259. "Underground resources hazard" (as that term is defined by the CGL Policy) "includes 'property damage' to [a]ny . . . area in or through which exploration for or production of any substance is carried on." (Ex. A, CBX 429650-000053.)

> "Underground resources hazard" includes "property damage" to any of the following:
>
> a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;
>
> b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on.

260. In Plaintiff's Second Amended Petition, CBX alleged damage to the **Lease Property** that constitutes "property damage" (as "property damage" is defined in the CGL Policy, Ex. A, CBX 429650-000017) included within the "underground resources hazard" (as "underground resources hazard" is defined in the UREC Endorsement, Ex. A, CBX 429650-000053) that arose out of operations in connection with any one well. (Ex. A, CBX 429650-000053.)

> 1. The Underground Resources Property Damage Aggregate Limit shown in the Schedule above is the most we will pay under Coverage A for the sum of damages because of all "property damage" included within the "underground resources hazard" and arising out of operations in connection with any one well;

261. At the time that the Lease Property was injured, the Lease Property was not personal property.

262. At the time that the Lease Property was injured, the Lease Property was not in the care, custody or control of Espada.

263. Espada did not manufacture, sell, distribute or dispose of the Lease Property.

264. Espada did not handle the Lease Property.

265. The Lease Property could not be restored to use.

266. The Lease Property was not restored to use.

267. The Lease Property was physically injured.

268. The Lease Property was injured suddenly and accidentally.

d) Occurrence: Fracturing of the Production Casing

269. The CGL Policy defines "Occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. A, CBX 429650-000016.)

> **13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

270. In Plaintiff's Second Amended Petition, CBX alleged: "On or about January 24, 2012, Espada . . . attempted to pull the production casing out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. . . . The 5 ½" Production Casing . . . damaged, among other property, the August 6, 2011 Property." (Ex. I, CBX 429650-000123.)

271. Said fracturing of the production casing was accidental.

272. Said fracturing of the production casing was sudden.

273. Said fracturing of the production casing was physical.

274. ACE American's Claims Director for Complex Claims, Matthew Specter, affirmatively described the occurrence as a sudden, accidental and physical fracturing of the production casing, explaining: "the casing was installed and below ground and was severed during Espada's pressurizing and fracturing operations." (Ex. N, CBX 429650-000127.)

275. Said fracturing of the production casing constitutes an "occurrence" as defined in the CGL Policy.

8. August 13, 2015: Espada's First Amended Third-Party Petition

276. On August 13, 2015, Espada served Espada Operating, LLC's First Amended Third Party Petition. (Ex. J.)

277. In the Underlying Lawsuit, Espada sued three separate parties. (Ex. J, CBX 429650-000134.)

278. In Espada Operating, LLC's First Amended Third Party Petition, Espada stated: "In 2011, CBX hired Espada to perform services related to drilling and operating a the [sic] Picosa Creek 1V well located on an oil and gas lease in Zavala County, Texas (the "Well"). Espada was the operator at the Well Site." (Ex. J, CBX 429650-000135.)

9. In 2011, CBX hired Espada to perform services related to drilling and operating a the Picosa Creek 1V well located on an oil and gas lease in Zavala County, Texas (the "Well"). Espada was the operator at the Well Site. In October 2011, hydraulic fracturing operations

279. In Espada Operating, LLC's First Amended Third Party Petition, Espada articulated Espada's understanding of an occurrence alleged by CBX as: "CBX alleges that a catastrophic failure of the casing occurred down hole in the Well. The Well allegedly could not be repaired and was plugged and abandoned." (Ex. J, CBX 429650-000135.)

> about January 23, 2012, CBX alleges that a catastrophic failure of the casing occurred down hole in the Well. The Well allegedly could not be repaired and was plugged and abandoned.

280. In Espada Operating, LLC's First Amended Third Party Petition, Espada indicated that Espada understood that it was being sued for "simple" negligence (i.e., negligence not related to professional services). (Ex. J, CBX 429650-000135:136.)

> 12. On October 29, 2013, CBX filed suit against Third-Party Plaintiff Espada, among others, in Zavala County, Texas. CBX alleges it sustained damages due to a failure of the casing used in the Well. CBX further alleges that Espada was negligent in the performance of its duties of "procuring and using the proper materials to include casing, and to perform related oil and gas related well drilling and completion services to deliver a producing well for" CBX. CBX has also made claims against the casing suppliers / manufacturers, and another oil and gas service provider.
>
> 13. CBX's current Petition is critical of the work and materials provided for the Well.

G. *STOWERS* DEMAND

281. On September 22, 2015, CBX served a "*Stowers* Demand" on ACE American and ACE Property through Royston Rayzor. (Ex. K, CBX 429650-000160.)

September 22, 2015

Mr. Ewing E. Sikes, III
Mr. Robert L. Guerra, Jr.
ROYSTON, RAYZOR, VICKERY & WILLIAMS, LLP
55 Cove Circle
Brownsville, Texas 78521

via Fax: (956) 542-4370

RE: Cause No. 13-02-12940-ZCV; *CBX Resources, LLC v. Daewoo International Corp, et al*
In the 293rd Judicial District, Zavala County, Texas
WG File: CBX Resources 429650

"RULE 408 CONFIDENTIAL SETTLEMENT COMMUNICATION"

Dear Counsel:

As you are well aware, we have conducted a significant amount of discovery to date in this case. While additional discovery remains outstanding, we believe both sides are in a position to evaluate the case for settlement purposes in lieu of a formal mediation and further litigation expenses. Please consider this correspondence as a formal *Stowers* demand to fully settle all claims against Espada Operating, LLC., in the above referenced matter. Please forward this request to your client and the applicable insurance representatives for their consideration. As set forth below, Plaintiff's settlement demand is reasonable based on (1) the clear and convincing evidence of your client's negligence and gross negligence; (2) the undisputable damages in this case; and (3) our firm's verdict history.

282. The *Stowers* Demand discussed, among other things, Espada's negligence.

(CBX 429650-000160, 162.)

Espada Was Grossly Negligent In Failing to Stop Work at the Time It Suspected the Fractured Casing: Espada's corporate representative admitted that Espada suspected that the casing failed during fracking operations -- the "dropping of the fourth ball." (Billington Dep. 114:9-18.) Rather than stopping work and investigating as a reasonably prudent Operator would under the same or similar circumstances, Espada allowed work to continue that exacerbated the problem ultimately causing the casing to part in its entirety and preventing the full recovery of the production casing. That is, had Espada stopped work once pressure was lost during the fourth ball drop, Espada could have prevented the full diameter casing fracture that would have allowed the recovery of the entire casing subsequently enabling the running of a new casing and full exploitation of the minerals from the well.

283. In the *Stowers* Demand, CBX made a settlement demand within policy limits. (Ex. K, CBX 429650-000163.)

Nonetheless, Plaintiff demands the lesser of the following amounts in full and final settlement of CBX Resources's claims against Espada Operating, LLC:

(1) **$121,827,692**; or
(2) the policy limits for all applicable insurance policies covering or responding to the occurrence made the basis of this lawsuit, specifically including

a. Ace American Insurance Company, Policy No. G24994090 002, policy limits: $1,000,000;

b. Ace Group – umbrella, Policy No. XOO G24924592; policy limits: $2,000,000.

284. In the *Stowers* Demand, CBX stated that "[P]ayment of this demand will result in a full, complete, and unconditional release of Plaintiff's claims against Espada Operating, LLC, pursuant to *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489,491 (Tex. 1998)." (CBX 429650-000163.)

fees). Payment of this demand will result in a full, complete, and unconditional release of Plaintiff's claims against Espada Operating, LLC, pursuant to *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998).

285. As such, the *Stowers* Demand offered a release that was full, complete and unconditional.

286. In the *Stowers* Demand, CBX stated: "This demand shall expire automatically and without further notice at 5:00 p.m. CST on October 23, 2015." (CBX 429650-000164.)

> **This demand shall expire automatically and without further notice at 5:00 p.m. CST on October 23, 2015. After such time and date, Plaintiff's demand will**

287. On September 30, 2015, Royston Rayzor requested a seven-day extension to respond to the *Stowers* Demand. (Ex. L.)

288. Royston Rayzor provided two reasons for the extension: "First, I think it helps to have a more successful mediation. As you know, it takes time for insurance carriers to get their ducks in a row and to make sure we have the maximum authority from all parties. Second, I don't see how the extension hurts your client." (Ex. M.)

289. CBX did not extend the October 23, 2015 deadline.

290. The *Stowers* Demand expired automatically at 5:00 p.m. CST on October 23, 2015.

291. The *Stowers* Demand expired at a time that ACE American was providing a defense to Espada.

292. ACE had a duty to accept reasonable settlement offers within policy limits.

293. CBX offered to settle the claims asserted in the Underlying Lawsuit within the applicable policy limits.

294. CBX's claims asserted in the Underlying Lawsuit were within the scope of coverage provided by the CGL Policy.

295. The *Stowers* Demand was reasonable considering the likelihood and degree of Espada's potential exposure to an excess judgment.

296. Without a defense, Espada was likely to be exposed to a judgment imposing damages in an amount that exceeded the available amounts of coverage under the CGL Policy.

H. ACE'S NOTICE OF WITHDRAWAL OF DEFENSE

297. Prior to October 15, 2015, ACE American did not send a reservation of rights letter to Espada.

298. Prior to October 15, 2015, ACE American did not reserve any rights regarding the Underlying Lawsuit.

299. On October 15, 2015, Matthew Spector wrote a letter to Lee Roy Billington (hereinafter "Withdrawal Letter"). (Ex. N.)

300. In the Withdrawal Letter, Mr. Spector told Mr. Billington: "ACE American notifies Espada of its intent to cease the retention of defense counsel effective 14 days from the date of this letter." (Ex. N.)

> **Notice of Withdrawal of Defense.** As you know, ACE American previously retained the law firm of Royston, Rayzor, Vickery & Williams ("Royston Rayzor") as Espada's defense counsel. Due to the denial under the CGL policy, ACE American notifies Espada of its intent to cease the retention of defense counsel effective 14 days from the date of this letter. We are providing the 14 days to provide a reasonable opportunity for Espada to arrange for Royston Rayzor's continued retention thereafter or to retain new counsel, at its option.

301. In the Withdrawal Letter, Mr. Spector acknowledged that CBX's allegations included at least one claim against Espada that sounded in non-professional liability negligence to wit: "The causes of action against Espada are negligence. . . ." (Ex. N, CBX 429650-000170.)

out of the wellbore and discovered that the production casing was fractured at about 3,402 feet. The bottom portion of the casing (below 3,402 feet) could not be recovered, and the wellbore could not be restored to use by repair, replacement, adjustment, or removal ... [and] the Picosa Creek IV well was plugged and abandoned." The causes of action against Espada are negligence (inclusive of professional negligence and Res Ipsa Loquitur theories), gross negligence and breach of contract. The alleged damages

302. In the Withdrawal Letter, Mr. Spector said, "CBX's allegations do not fall within the insuring agreement as there is no claim of physical injury to tangible property or loss of use of tangible property." (Ex. N, CBX 429650-000171.)

CBX's allegations do not fall within the insuring agreement as there is no claim of physical injury to tangible property or loss of use of tangible property. Rather, the claim is of initial faulty construction of the well (more particularly, the well's production casing) that precluded the well's completion and placement into service. There is no contention that the well existed in an un-faulty state and was then made faulty by physical injury; nor could the use of the well be lost given that there was never an actual use of the well in the first place.

303. Mr. Spector failed to support that statement with supporting language from the CGL Policy.

304. In the Withdrawal Letter, Mr. Spector took the erroneous position that because there was "no contention [in the petition] that the well existed in an un-faulty state and was then made faulty by physical injury," no insurance was provided by the CGL Policy. (*Id.*)

305. ACE American cannot support Mr. Spector's position with language from the CGL Policy.

306. In the Withdrawal Letter, Mr. Spector took the erroneous position that because there was "never an actual use of the well," no insurance was provided by the CGL Policy. (*Id.*)

307. ACE American cannot support Mr. Spector's above stated positions with language from the CGL Policy.

308. In the Withdrawal Letter, Mr. Spector erroneously claimed that several exclusions justified denial of coverage:

a. "exclusions j.(4)-(6), as amended by endorsement,"

b. "b. for Contractual Liability,"

c. "k. for Damage to Your Product,"

d. "l. for Damage to Your Work,"

e. "m. for Damage to Impaired Property or Property Not Physically Injured," and

f. "the endorsement entitled Exclusion – Engineers, Architects or Surveyors Professional Liability."

(CBX 429650-000171:172.)

309. Mr. Spector did not consider *Mid–Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105, 115–16 (5th Cir.2010) in the analysis of the coverage issues presented in the Withdrawal Letter.

310. Mr. Spector did not consider *Mid-Continent Cas. Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App.--Houston [1st Dist.] 2013, pet. denied) in the analysis of the coverage issues presented in the Withdrawal Letter.

311. Mr. Spector did not hire counsel independent from Royston Rayzor to analyze the coverage issues presented in the Withdrawal Letter.

312. Mr. Spector used Royston Rayzor, in part, as the source of the information it articulated in the Withdrawal Letter.

313. ACE American did not file a declaratory judgment action regarding the coverage issues presented in the Withdrawal Letter.

I. ROYSTON RAYZOR'S WITHDRAWAL

314. ACE American appointed Royston Rayzor as defense counsel for Espada in the Underlying Lawsuit in November 2013. (Ex. O, CBX 429650-000174.)

315. On November 19, 2013, Royston Rayzor filed an answer in the Underlying Lawsuit on behalf of Espada. (Ex. E.)

316. On October 15, 2015, ACE advised that it had denied coverage for the lawsuit, and would cease retaining Royston Rayzor to defend Espada, effective October 30, 2015. (*Id.*)

317. Espada told Royston Rayzor that Espada lacked the financial ability to retain Royston Rayzor to defend it. (Ex. O, CBX 429650-000175.)

318. On November 4, 2015, nevertheless, Royston Rayzor filed a Motion to Withdraw as Counsel for Espada Operating, LLC. (Ex. M.)

> Good cause exists for granting this motion. Royston Rayzor was appointed as defense counsel for Espada in the above styled cause of action in November 2013 by Espada's insurer, ACE American Insurance Company ("ACE"). On October 15, 2015, ACE advised that it had denied coverage for the lawsuit, and would cease retaining Royston to defend Espada, effective October 30, 2015.

> Espada indicated that it lacks financial ability to retain Royston to defend it in this case, and could not pay legal fees incurred beyond October 30, 2015.

319. The Motion to Withdraw as Counsel for Espada Operating, LLC, noted that trial was set on February 9, 2016. (Ex. O, CBX 429650-000175.)

PENDING SETTINGS AND DEADLINES

Pursuant to this Court's Third Amended Docket Control Order, issued on December 30, 2014, and the Amended Trial Setting, issued October 13, 2015, the following deadlines remain:

- Mediation deadline with Judge Elma Teresa Salinas Ender- **November 30, 2015**
- Dispositive Motion Deadline- **December 11, 2015**
- Pretrial Conference- **January 11, 2016 at 10:00 AM**
- Docket Call- **February 1, 2016 at 10:00 AM**
- **Trial February- 9, 2016 1:30 PM**

320. On November 30, 2015, the state trial court granted Royston Rayzor's Motion to Withdraw as Counsel for Espada Operating, LLC. (Ex. P.)

321. ACE American selected Royston Rayzor as Espada's defense counsel.

322. ACE American provided Royston Rayzor as the defense counsel to Espada without serving a reservation of rights letter.

323. Royston Rayzor represented Espada for over two-years in the Underlying Lawsuit.

324. Royston Rayzor withdrew as counsel for Espada approximately seventy-one (71) days before trial.

J. TRIAL OF THE UNDERLYING LAWSUIT

325. On February 1, 2015 (approximately sixty-three days after Royston Rayzor withdrew), the court held a docket call of the Underlying Lawsuit as per the scheduling order agreed to by Royston Rayzor. (Ex. H, O.)

326. On February 1, 2015, counsel for Plaintiff noted on the record that Espada failed to appear and requested entry of judgment in favor of Plaintiff.

327. In turn, the court ordered that judgment would be entered in favor of CBX and set the matter to be heard on February 10, 2015 so that evidence could be heard in support of the judgment.

328. During the February 10, 2016 trial, the court admitted the testimony of six witnesses. (Ex. R.)

329. During the February 10, 2016, the court admitted into evidence forty-seven exhibits. (Ex. R, CBX 429650-000222:223, 30:25-31:7.)

330. During the February 10, 2016 trial, CBX offered expert testimony that Espada was negligent:

> Q. Is it fair to say that you know what an operator should do in serving as an operator with regard to any given prospect or well.
>
> A. Yes, sir, it is.
>
> Q. When -- now, you have been asked to provide an opinion about whether or not Espada was negligent in building the well?
>
> A. I have.
>
> Q. And you understood when you came to that opinion that the term "negligence" means: "Failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances"?
>
> A. That's correct.
>
> Q. And you understood that "ordinary care" means: "That degree of care that would be used by a person of ordinary prudence under the same or similar circumstances"?

A. Correct.

Q. And you understood that "proximate cause" means: "A cause that was a substantial factor in bringing about the occurrence or injury and without which cause such occurrence or injury would not have occurred"?

A. That's correct.

Q. You also understood with regard to proximate cause that, "In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the occurrence or injury or similar occurrence or injury might reasonably result therefrom"?

A. Yes.

Q. And you also understood that there may be more than one proximate cause of an occurrence or injury?

A. I do.

Q. Did the negligence of Espada Operating, LLC, proximately cause the fractured casing in question and result in loss of market value described by Mr. Tomblin"?

A. Yes.

(Ex. R, CBX 429650-000266:68, 74:21-76:12.)

331. During the February 10, 2016 trial, CBX offered expert testimony of Charles Tomblin who established a total damage amount of $105,674,240. (Ex. R, CBX 429650-000265, 73:8-10.)

K. JUDGMENT ENTERED

332. On February 10, 2016, the court entered judgment in favor of CBX Resources, LLC and against Espada Operating, LLC in the amount of $105,674,240 together with interest at the rate of five percent (5%) per annum, compounded annually, from the date of judgment until paid in full. (Ex. Q.)

333. On February 10, 2016, the court "ordered, adjudged and decreed that Plaintiff CBX Resources, LLC prevail[ed] on its negligence claim against Defendant Espada Operating, LLC." (Ex. Q, CBX 429650-000191.)

> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff CBX Resources, LLC prevail on its negligence claim against Defendant Espada Operating, LLC, and be, and is, hereby awarded judgment against Defendant Espada Operating, LLC.

334. By the judgment, Espada became legally obligated to pay damages to CBX.

335. The judgment has harmed Espada because the judgment has affected Espada's credit and has subjected Espada's nonexempt property to sudden execution and forced sale.

336. The judgment is final and non-appealable.

L. TRANSFER ORDER

337. On November 1, 2016, the court in the Underlying Lawsuit signed and entered Order for Turnover Relief and ordered that: "ownership of the Cause of Action Property [as defined in that order] is, by entry of this order, transferred to CBX Resources, LLC."

338. Said order defined "Cause of Action Property" to include "causes of action against Espada's insurers, including but not limited to ACE American Insurance Company and ACE Property and Casualty Insurance Company and their affiliates, parents and subsidiaries. . . . "

339. Said order also ordered Espada to execute an assignment of the causes of action to CBX.

340. Pursuant to said order, on November 8, 2016, Defendant Espada Operating, LLC assigned any and all of its causes of action against ACE AMERICAN INSURANCE COMPANY and ACE PROPERTY AND CASUALTY INSURANCE COMPANY to Plaintiff CBX Resources, LLC.

M. STANDING

341. CBX has standing to bring this lawsuit as a judgment creditor of Espada.

342. CBX has standing to bring this lawsuit as a third-party beneficiary of the CGL Policy.

343. CBX has standing to bring this lawsuit as a third-party beneficiary of the Umbrella Policy.

344. CBX has standing to bring this lawsuit as the owner (by transfer order) of Espada's contractual and extra-contractual claims against ACE American and ACE Property.

VI. CAUSES OF ACTION

A. COUNT 1 – BREACH OF *STOWERS* DUTY TO REASONABLY SETTLE CLAIMS WITHIN THE SCOPE OF COVERAGE AND FOR AN AMOUNT WITHIN THE LIMITS OF THE APPLICABLE POLICY

345. Plaintiff incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

346. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

347. Espada was insured under contracts issued by ACE American and ACE Property.

348. CBX asserted a liability claim against Espada. The allegations of fact concerning that claim against Espada were sufficient to bring those claims within the scope of coverage afforded by the express terms of the CGL Policy and Umbrella Policy.

349. CBX offered to settle the covered claim against Espada within the limits of the CGL Policy and Umbrella Policy with Espada and its insurers.

350. An ordinary, prudent insurer would have accepted that offer considering the likelihood and degree of the insured's potential exposure to an excess judgment.

351. ACE American and ACE Property owed Espada a duty to accept reasonable settlement offers within the policy limits.

352. ACE American and ACE Property breached that duty of care to Espada by not accepting CBX's reasonable settlement offer.

353. The breach of the duty owed ACE American and ACE Property to accept reasonable settlement offers concerning covered claims for amounts within the stated limits of the applicable policies proximately caused injury to Espada when a judgment was rendered against Espada in excess of the policy limits.

354. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages in the amount of at least $105,674,240, together with interest at the rate of five percent (5%) per annum, compounded annually from the date of judgment until paid in full, which is the amount of the judgment rendered against Espada in the underlying suit. This amount is within the jurisdictional limits of this Court.

B. COUNT 2 – BAD FAITH

355. CBX incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

356. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

357. In the alternative to other counts, ACE American and ACE Property breached ACE American and ACE Property's duty of good faith and fair dealing.

358. Espada was an insured under insurance contracts issued by ACE American and ACE Property, which gave rise to a duty of good faith and fair dealing.

359. ACE American and ACE Property breached their duties by denying a defense to Espada and by denying payment of a covered claim when ACE American and ACE Property knew or should have known that their liability under the policy was reasonably clear.

360. ACE American and ACE Property's breach of duty proximately caused injury to Espada, which resulted in loss of policy benefits.

361. ACE American's bad faith denial of its duty to defend approximately sixty-one (61) days before trial, after controlling Espada's defense for over two years, prejudiced Espada and proximately caused injury to Espada, which resulted an excess judgment being entered against Espada. *See Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136 (Tex. 2010) ("But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions."); *Sentry Ins. v. Just Right Prod., Inc.*, No. 4:14-CV-30-O, 2015 WL 10819157, at *7 (N.D. Tex. Jan. 7, 2015) ("However, 'if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.' *Ulico Cas. Co.*, 262 S.W.3d at 787; *see also Gilbert Tex. Constr., LP v. Underwriters at Lloyd's London*, 327

S.W.3d 118, 136–38 (Tex.2010). 'Although courts cannot judicially rewrite the parties' agreement to create new coverage terms, estoppel does not create a new contract: it only compensates for reliance damages that the insured suffers when the insurer takes over the insured's defense.' *Canal Indem. Co.*, 750 F.Supp.2d at 750. Thus, Just Right may succeed on an estoppel theory if it can establish that Sentry assumed control of the underlying suit and it was prejudiced as a result of Sentry's actions.").

362. CBX asserts this bad faith claim inclusive of the estoppel theory discussed by several Texas courts. *See Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136 (Tex. 2010) ("But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions."); *Sentry Ins. v. Just Right Prod., Inc.*, No. 4:14-CV-30-O, 2015 WL 10819157, at *7 (N.D. Tex. Jan. 7, 2015) ("However, 'if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.' *Ulico Cas. Co.*, 262 S.W.3d at 787; *see also Gilbert Tex. Constr., LP v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 136–38 (Tex.2010). 'Although courts cannot judicially rewrite the parties' agreement to create new coverage terms, estoppel does not create a new contract: it only compensates for reliance damages that the insured suffers when the insurer takes over the insured's defense.' *Canal Indem. Co.*, 750 F.Supp.2d at 750. Thus, Just Right may succeed on an estoppel theory if it can establish that Sentry assumed control of the underlying suit and it was prejudiced as a result of Sentry's actions.").

363. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages in the amount of at least $105,674,240, together with interest at the rate

of five percent (5%) per annum, compounded annually from the date of judgment until paid in full, which is the amount of the judgment rendered against Espada in the underlying suit. This amount is within the jurisdictional limits of this Court.

C. COUNT 3 – BREACH OF CONTRACT

364. Plaintiff incorporates herein, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

365. CBX is the owner of Espada's contractual and extra-contractual claims against ACE.

366. In addition to other counts, CBX sues ACE American and ACE Property for breach of contract.

1. ACE American

367. ACE American and Espada entered into a valid and enforceable contract attached hereto as Exhibit A and incorporated herein by reference.

368. The contract provided that ACE American would defend and indemnify Espada from covered claims and that Espada would pay a premium in exchange.

369. Espada fully performed its contractual obligations.

370. ACE American breached the contract by failing to defend Espada in the Underlying Lawsuit.

371. ACE American's breach caused injury to Espada, which resulted in the damages described below.

372. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages resulting from that breach in the amount of $105,674,240.

373. As a matter of Texas law, the recovery of attorney's fees is permitted to a party prevailing upon a claim for breach of an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).

2. ACE Property

374. ACE Property and Espada entered into a valid and enforceable contract represented in part by Exhibit B.

375. The contract provided that ACE Property would defend and indemnify Espada from covered claims and that Espada would pay a premium in exchange.

376. Espada fully performed its contractual obligations.

377. ACE Property breached the contract by failing to indemnify Espada with regard to the Underlying Lawsuit.

378. ACE Property breached the contract by failing to defend Espada in the Underlying Lawsuit.

379. ACE Property breached the contract by failing to indemnify Espada with regard to the Underlying Lawsuit.

380. ACE Property's breach caused injury to Espada, which resulted in the damages described below.

381. CBX, as the owner of Espada's contractual and extra-contractual claims, seeks damages resulting from that breach in the amount of $105,674,240.

382. As a matter of Texas law, the recovery of attorney's fees is permitted to a party prevailing upon a claim for breach of an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).

VII. COUNT 4 – DECEPTIVE INSURANCE PRACTICES

383. Plaintiff incorporates here, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

384. Plaintiff is a "person" within the meaning of Texas Insurance Code §§ 541.002(2) and 541.151 and therefore has standing to bring this claim.

385. ACE American and ACE Property are both "persons" within the meaning of Texas Insurance Code § 541.002(2) and 541.151 and therefore subject to liability for this claim.

386. ACE American and ACE Property engaged in acts and/or practices that violated Texas Insurance Code chapter 541, Subsection B. Specifically, such acts and/or practices include the following:

a. Failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim in violation of Texas Insurance Code § 541.060(a)(3); and

b. Failing within a reasonable time to: (A) affirm or deny coverage of a claim to a policyholder; or (B) submit a reservation of rights to a policyholder in violation of Texas Insurance Code § 541.060(a)(4)

387. ACE American and ACE Property's acts and/or practices were a producing cause of Plaintiff's actual damages described below.

VIII. COUNTY 5 - DECLARATORY JUDGMENT

388. Plaintiff incorporates here, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

389. Plaintiff seeks a declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§2201 and 2202.

390. CBX seeks the following declarations:

a. Espada was covered by the CGL Policy.

b. Espada was covered by the Umbrella Policy.

c. The Occurrence was covered by the CGL Policy.

d. The Occurrence was covered by the Umbrella Policy.

e. ACE American had a duty to defend Espada in the Underlying Lawsuit.

f. ACE American has a duty to indemnify Espada with regard to the Underlying Judgment.

g. ACE Property had a duty to defend Espada in the Underlying Lawsuit.

h. ACE Property has a duty to indemnify Espada with regard to the Underlying Judgment.

391. As a matter of Texas law, the recovery of attorney's fees is permitted to a party seeking declaratory relief. *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

IX. CONDITIONS PRECEDENT

392. All conditions precedent have been performed or have occurred.

X. JURY DEMAND

393. Plaintiff requests a trial by jury.

XI. EXEMPLARY DAMAGES

394. Plaintiff incorporates here, by reference, any and all statements made throughout this Complaint as if fully set forth in this count.

395. Plaintiff's injury resulted from Defendant's gross negligence, malice, or actual fraud, which entitles Plaintiff to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a).

XII. DAMAGES

396. As a direct and proximate result of defendants' conduct, plaintiff suffered the following injuries and damages.

a. Actual damages in the amount of the February 10, 2016 judgment,

b. Actual damages in the amount of the unpaid policy limits,

c. Exemplary damages,

d. Prejudgment and postjudgment interest,

e. Court costs, and

f. Attorneys' fees.

XIII. PRAYER

397. Plaintiff CBX Resources, LLC prays that Defendants ACE American Insurance Company and ACE Property and Casualty Insurance Company answer herein, that this case be set for trial, and that Plaintiff recover a judgment of and from Defendants for damages in such amount as the evidence may show and the jury may determine to be proper, in addition to pre-judgment interest, post-judgment interest, costs, and all other and further relief to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

By: /s/ Mark A. Fassold
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ATTORNEYS FOR PLAINTIFF CBX RESOURCES, LLP

CERTIFICATE OF SERVICE

On July 10, 2017, I electronically submitted the foregoing document to all counsel of record via electronic email. I hereby certify that I will serve all counsel of record electronically or by other means authorized by the Court or the Federal Rules of Civil Procedure.

Daniel McNeel Lane, Jr.
Email: neel.lane@nortonrosefulbright.com
Manuel Mungia Jr.
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Norton Rose Fulbright US LLP
300 Convent St., Ste. 2200
San Antonio, Texas 78205
Counsel for Defendant ACE American Insurance Company and ACE Property and Casualty Insurance Company

/s/ Mark A. Fassold
MARK A. FASSOLD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 5:17-cv-00017-DAE
	§	
ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY,	§	JURY REQUESTED
	§	
	§	
Defendants.	§	

JOINT STATUS REPORT TO THE COURT

Plaintiff CBX Resources, LLC ("CBX") and Defendants Ace American Insurance Company and Ace Property and Casualty Insurance Company (collectively, "Ace") file this Joint Status Report in response to this Court's June 28, 2018 Order directing CBX and Ace to provide a joint status report, or separate reports if the parties do not agree, on the remaining issues in this case after the October 16 and June 28 Orders.

As multiple rounds of briefing have demonstrated, CBX and Ace strongly disagree about coverage and the binding effect of the Underlying Judgment. Despite those disagreements, CBX and Ace do agree on a number of points:

1. In the Live Petition, CBX asserts the following claims:
    a. a negligent settlement practices claim (a so-called *Stowers* claim), (Docket Entry 33 at 64-65);
    b. a breach of duty of good faith and fair dealing claim (a so-called "bad faith claim" or "estoppel claim"), (Docket Entry 33 at 65-68),
    c. a breach of contract claim, (Docket Entry 33 at 68-69), and

d. a violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims (the so-called "Deceptive Insurance Practices" (Docket Entry 33 at 70);

2. the Court's October 16 Order negated one or more elements on which Plaintiff had the burden of proof with regard to the first three claims;
3. the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims remain viable despite the Court's October 16 and June 28 Orders; and
4. the Court's October 16 Order may significantly limit the damages recoverable vis-à-vis the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims.

Accordingly, the parties respectfully propose the following course:

1. CBX will voluntarily dismiss its violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims without prejudice;
2. Ace stipulates that, should the Fifth Circuit reverse and remand, Ace will not object to CBX's motion for leave to amend its complaint to re-assert a claim for violations of Texas Insurance Code §§ 541.060(a)(3)–(4);
3. Ace stipulates that, should the Fifth Circuit reverse and remand, Ace will not object to CBX resuming discovery to which it is entitled on all claims remanded;
4. Ace stipulates that, should the Fifth Circuit reverse and remand, Ace waives any and every statute of limitations defense applicable to the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims; and
5. Upon dismissal of CBX's Insurance Code violation, the Court will enter a Final Judgment from which CBX may take an appeal as of right.

The parties are available for a status conference if the Court deems it helpful.

Dated: July 19, 2018

Respectfully submitted,

/s/ Mikal C. Watts
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Counsel for Defendants Ace American Insurance Company, And Ace Property And Casualty Insurance Company

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's electronic filing system on July 19, 2018.

/s/ Daniel McNeel Lane Jr.
Daniel McNeel Lane Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, vs. ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § § § §	NO. 5:17-CV-17-DAE

ORDER ON PARTIES' STATUS REPORT

The matter before the Court is the status of this case. Following the Court's ruling on two rounds of summary judgment motions in this case (Dkts. ## 45, 76), the Court ordered that the parties provide a joint status report, or separate reports if the parties do not agree, on the remaining issues in this case. (See Dkt. # 76.) The Court informed the parties that, to the extent the Court's rulings, in effect, dismiss some of the claims in the case, the parties should so instruct the Court and move to dismiss such claims. (Id.)

On July 19, 2018, in accordance with the Court's order, the parties filed a joint status report. (Dkt. # 78.) The parties represented to the Court that

although they still strongly disagree about the coverage and the binding effect on the underlying judgment in the state court case, they agree to the following:

(1) in the Live Petition, Plaintiff CBX Resources, LLC's ("CBX") asserts the following claims:

a. a negligent settlement practices claim (a so-called Stowers claim), (Docket Entry 33 at 64-65);

b. a breach of duty of good faith and fair dealing claim (a so-called "bad faith claim" or "estoppel claim"), (Docket Entry 33 at 65-68),

c. a breach of contract claim, (Docket Entry 33 at 68-69), and

d. a violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims (the socalled "Deceptive Insurance Practices" (Docket Entry 33 at 70);

(2) the Court's October 16 Order negated one or more elements on which Plaintiff had the burden of proof with regard to the first three claims (a–c);

(3) the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims remain viable despite the Court's October 16 and June 28 Orders; and

(4) the Court's October 16 Order may significantly limit the damages recoverable vis-à-vis the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims.

(Dkt. # 78 at 1–2.) In light of the foregoing, the parties propose that:

(1) CBX will voluntarily dismiss its violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims without prejudice;

(2) Defendants Ace American Insurance Company ("Ace American") and Ace Property and Casualty Insurance Company ("Ace Property") (collectively, "Defendants" or "Ace") stipulate that,

should the Fifth Circuit reverse and remand, Ace will not object to CBX's motion for leave to amend its complaint to re-assert a claim for violations of Texas Insurance Code §§ 541.060(a)(3)–(4);

(3) Ace stipulates that, should the Fifth Circuit reverse and remand, Ace will not object to CBX resuming discovery to which it is entitled on all claims remanded;

(4) Ace stipulates that, should the Fifth Circuit reverse and remand, Ace waives any and every statute of limitations defense applicable to the violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims; and

(5) Upon dismissal of CBX's Insurance Code violation, the Court will enter a Final Judgment from which CBX may take an appeal as of right.

(Id. at 2.)

Upon consideration of the matters raised in the status report, the Court finds the parties' proposed course of action an acceptable resolution to the remaining matters in this case. As soon as CBX voluntarily dismisses its violation of Texas Insurance Code §§ 541.060(a)(3)–(4) claims without prejudice, the Court will enter a Final Judgment in this case upon which the parties may appeal to the Fifth Circuit Court of Appeals. The Court requests that CBX dismiss such claims within twenty-one days of this Order.

IT IS SO ORDERED.

DATED: San Antonio, Texas, July 20, 2018.

David Alan Ezra
Senior United States Distict Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § §	Civil Action No. 5:17-cv-00017-DAE

STIPULATION OF DISMISSAL

Plaintiff and Defendants file this stipulation of dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii):

1. Plaintiff is CBX Resources, LLC; Defendants are Ace American Insurance Company and ACE Property and Casualty Insurance Company.

2. On January 10, 2017, Plaintiff sued Defendants.

3. Plaintiff moves to dismiss without prejudice its violation of Texas Insurance Code §§ 541.060(a)(3)-(4) claims.

4. Defendant, who has served a Motion for Summary Judgment, agrees to the dismissal.

5. This case is not a class action under Federal Rule of Civil Procedure 23, a derivative action under Rule 23.12 or an action related to an unincorporated association under Rule 23.2.

6. A receiver has not been appointed in this case.

7. This case is not governed by any federal statute that requires a court order for dismissal of the case.

8. Plaintiff has not previously dismissed any federal- or state-court suit based on or including the same claims as those presented in this case.

9. The dismissal is without prejudice.

Dated: August 8, 2018

Respectfully submitted,

By: */s/ Mark A. J. Fassold*
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Attorneys For Plaintiff CBX Resources, LLP

CERTIFICATE OF SERVICE

This is to certify that on August 8, 2018 I electronically filed the foregoing document with the Clerk of the Court using the Court's electronic filing system, which will send notification of such filing to all attorneys of record.

/s/ Mark A. J. Fassold

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
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NEW ORLEANS, LA 70130

July 05, 2019

IMPORTANT NOTICE

TO ALL COUNSEL LISTED BELOW

No. 18-50740 CBX Resources, L.L.C. v.
ACE American Insurance Company, et al

Projected Week of Hearing **09/02/19**

Dear Counsel:

We have tentatively scheduled this case for oral argument during the week shown.

If you have a serious, irresolvable conflict, contact us **IMMEDIATELY** via e-mail (clerk_calendaring@ca5.uscourts.gov), stating your conflict or request. Do not ask to reschedule argument unless you can find no other solution. **GENERALLY, ENGAGEMENT OF COUNSEL IN ANOTHER COURT IS NOT AN "IRRESOLVABLE CONFLICT."**

So we can provide all pertinent information to the court before argument, and barring an emergency, we must receive all additional filings by noon on the workday immediately preceding argument.

If you are arguing before the Fifth Circuit for the first time, please visit our Internet site at "http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/oral-argument-notices/handout.pdf" for "Preparing for Oral Argument in the Fifth Circuit" and at "http://www.ca5.uscourts.gov/documents/ltsig-e.pdf" for "Notice to Counsel Attending Oral Argument". If you do not have Internet access, please call and we will send you the information.

Counsel are advised it is almost invariably more helpful, in lieu of large exhibits, to furnish the courtroom deputy four smaller sized (not larger than about 8 X 14 inches) copies of charts, diagrams, etc., for the judges' use. If counsel believe it necessary to use large exhibits, please also furnish the small copies.

CALENDARING DEPARTMENT
clerk_calendaring@ca5.uscourts.gov

Mr. Mark Anthony John Fassold
Ms. Allison Gold
Mr. Travis Carey Headley
Mr. Daniel McNeel Lane Jr.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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NEW ORLEANS, LA 70130

August 19, 2019

TO COUNSEL LISTED BELOW:

No. 18-50740 CBX Resources, L.L.C. v. ACE American Insurance Company, et al **(Oral Argument 9/4/19)**

Dear Counsel:

The parties are instructed to address in supplemental letter briefs not to exceed 5 pages whether CBX's dismissal of remaining claims without prejudice precludes this court's appellate jurisdiction. *See Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495 (5th Cir. 2004); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978). The letter briefs should be filed by August 27.

Your supplemental letter brief should be in letter form addressed to the Clerk of Court. See FRAP 32 (a) (4), (5), and (6) for format guidelines. When electronically filing the brief, either ECF Appellant's Supplemental Brief Filed or ECF Appellee's Supplemental Brief Filed should be selected and the docket text should be edited to reflect that it is a 'supplemental letter' brief. Paper copies are not required for this type of filing. The following link provides instructions on filing a brief in a Fifth Circuit case: http://www.ca5.uscourts.gov/cmecf/file%20a%20brief.pdf

Sincerely,

LYLE W. CAYCE, Clerk

Pam Trice

By: Pamela F. Trice, Deputy Clerk
504-310-7633

Mr. Mark Anthony John Fassold
Mr. Daniel McNeel Lane Jr.

cc: Ms. Allison Gold
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August 27, 2019

Mr. Lyle W. Cayce, Clerk
United States Court of Appeals, Fifth Circuit
600 S. Maestri Place, Ste. 115
New Orleans, LA 70130

Re: No. 18-50740, *CBX Resources, L.L.C. v. ACE American Ins. Co., et al.*, Supplemental Letter Brief

Dear Mr. Cayce:

Unlike the prior cases in which the "finality trap" came into play, the reduction of CBX's claims to a final judgment (bearing full preclusive effect as to all claims and parties to this litigation) ensures that the exercise of appellate jurisdiction by the Court is appropriate. That outcome is fully consonant with the Court's existing decisional law in this area, including the cases specifically referenced in the panel's order. But even if that might be disputed, the record in this matter reflects the district court's unequivocal intention that its rulings be made immediately appealable.

This Court's appellate jurisdiction obviously extends to final judgments of the district courts. *See* 28 U.S.C. § 1291. A final judgment of the district court is one "that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499 (5th Cir. 2004). That is precisely what the district court's judgment was meant to accomplish in this litigation, and that is precisely the effect that the judgment will have.

After the District Court granted Ace's second motion for partial summary judgment, ROA.5330, the parties filed a joint status report recognizing the effect of that ruling: it had "negated one or more elements on which [CBX] had the burden of proof" as to three of its four claims, and rendered a statutory claim non-viable. ROA.5349-5350. As CBX lacked any remaining viable claim, the parties recommended immediate dismissal of

the lone statutory claim. ROA.5350. Judge Ezra considered the status report and found "the parties' proposed course of action an acceptable resolution of the remaining matters in this case." ROA.5354. At the Court's invitation, the parties then stipulated to the dismissal of the statutory claim, ROA.5355, and Judge Ezra entered Final Judgment stating "the action [was] dismissed on the merits," and denying all relief not granted. ROA.5359. Importantly, CBX expressly noticed its appeal from that Final Judgment. ROA.5361.

Under well-established principles of judgment finality, upon its entry, Judge Ezra's order immediately precluded further litigation of all claims CBX made or could have made in this case, regardless of how any actually asserted claims were resolved. *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000) (res judicata "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the 'claim' or 'cause of action.'"); *see also Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013) ("a case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal."); 18A WRIGHT & MILLER, FEDERAL PRAC. & PROC. § 4427 (3d ed. 2019) ("res judicata ordinarily attaches to a final lower-court judgment even though an appeal has been taken and remains undecided.").

That is the fundamental distinction between the factual circumstances of this case and others in which a dismissal without prejudice had failed to fully resolve the litigation and did not vest this Court with jurisdiction. In the recent *Williams* decision, for instance, the judgment was not final under § 1291 because the claimant had stipulated to the dismissal of his claims against several defendants without prejudice. *Williams v. Taylor Seidenbach Inc.*, No. 18-31159, 2019 WL 3822147, at *1-2 (5th Cir. Aug. 15, 2019). In the first appeal, that disposition put the cause squarely within the prudential prohibitions against manufacturing appellate jurisdiction. *See Ryan v. Occidental Pet. Corp.*, 577 F.2d 298, 301-03 (5th Cir. 1978). Significantly, that was true because the resulting judgment in *Williams* could have no preclusive effect upon the dismissed defendants: the dismissed claims had not been resolved on the merits, and there was no suggestion that those parties were in privity with the remaining defendants. *See Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (a judgment or order is preclusive of further claims relating to the same transaction or occurrence only where there is an identity of parties or those in privity with them); *see also Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (Texas law).

Accordingly, had the Court resolved that appeal on the merits against the claimants, the resulting mandate would not have prohibited those claimants from filing another lawsuit based upon the same transactions and asserting identical claims against the dismissed defendants. *Id.; Luvata Grenada, L.L.C. v. Danfoss Indus. S.A. de C.V.*, 813 F.3d 238, 239-40 (5th Cir. 2016) (after dismissal of claims against one defendant, stipulation to dismissal without prejudice as to a different defendant did not confer appellate jurisdiction "because the district court retained jurisdiction" over claims against second defendant). Thus, the dismissal had served only to manufacture otherwise non-existent appellate jurisdiction.

The same is true of the facts in *Marshall*, where the claimants sought to expedite appellate review by dismissing their claims against an independent party without specifying whether that dismissal was one intended to be with prejudice or not. *See Marshall*, 378 F.3d at 498. When presumed to be a dismissal without prejudice, the order appealed in that case resolved the merits of the claims against the non-diverse defendants who were improperly joined, but not against the diverse defendant; that left open the very same possibility that existed in *Williams* -- a reassertion of claims, even if an adverse judgment had been affirmed. That possibility does not exist here, since the preclusive effect of Judge Ezra's judgment - dismissing all claims by CBX against Ace and barring all future claims, whether asserted in the litigation or not - wholly precludes any further action by CBX in the event the judgment is affirmed.[1] *See Blue v. District of Columbia Pub. Sch.*, 764 F.3d 11, 16-17 (D.C. Cir. 2014) (suggesting that case may be deemed appealable where the dismissal serves to "create a single, final disposition for appellate review" through merger of all claims into a single judgment).

Here, unlike the prior cases, the Final Judgment has the effect of disposing of all claims and all parties, both through its express language and by its legal effect. While there is some superficial similarity between this case and its predecessors, there is a fundamental difference that should be dispositive here: no matter the nature of the dismissal of any of CBX's claims

[1] Indeed, the operative documents in the record recognize this very fact. The parties' status report recognized that the statutory claim encompassed by the stipulation could be pursued if (but only if) the existing judgment is reversed. That would be true even if the claim had been dismissed with prejudice. *See Williams*, 2019 WL 3822147, at *2 (Haynes, J., concurring) (recognizing that cases dismissed with and without prejudice may be pursued anew in the district court if the appellate court reverses).

against Ace, the Final Judgment merged those claims (and all others that were or could have been asserted) into that decree and immediately precluded their re-litigation, unless this Court reverses the judgment.[2]

Even if the judgment did not have that effect, Judge Ezra's express rulings make clear his intention that an appeal of his rulings be available immediately. As *Ryan* and its progeny make clear, its rule is aimed to prevent *parties* from manipulating procedural vehicles to manufacture appellate jurisdiction that would not otherwise exist. *See 84 Lumber Co. v. Continental Cas. Co.*, 914 F.3d 329, 333 (5th Cir. 2019). The facts of cases like *Marshall* and *Ryan* demonstrate the reasons for recognizing that deterrent where the parties' machinations distort the litigation altogether or ignore the function of the court. *See Marshall*, 378 F.3d at 499 (claimants sought to manufacture appellate jurisdiction, despite the district court's express refusal to certify an appeal); *Ryan*, 577 F.2d at 300 (district court refused to certify appeal and procedural posturing left the case with a "much-truncated complaint, consisting only of the initial jurisdictional allegations.").

But a through line in the case law is the recognition that a *district court judge* may exercise authority to certify a matter for appeal, even if there may not be a truly final judgment. *See Williams*, 2019 WL 3822147, at *1 (noting that appealable judgment could have been created through certification by the trial court); *Marshall*, 378 F.3d at 499 (noting district court's refusal to certify ruling for appeal). This exception to a rigid rule of finality contemplates that the district court may act as a "dispatcher . . . permitted to determine in the first instance, the appropriate time when each final decision upon one or more but less than all of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956).

In this cause, Judge Ezra's Final Judgment should not be read in isolation. Indeed, the parties' stipulation of dismissal occurred only after they had submitted a joint status report and received an order from Judge Ezra explaining that the parties' proposals were "an acceptable *resolution to the remaining matters in this case.*" ROA.5354 (emphasis added). The order

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[2] The Eleventh Circuit has recently held, in very similar circumstances, that this sort of partial dismissal may be wholly ineffective. *See Perry v. Schumacher Group of La.*, 891 F.3d 954, 958 (11th Cir. 2018) ("There is no mention in [Rule 41(a)(1)(A)] of the option to stipulate dismissal of a portion of a plaintiff's lawsuit - *e.g.*, a particular *claim* - while leaving a different part of the lawsuit pending before the trial court.").

on the status report went one step further, expressly contemplating an immediate appeal. *Id.* (following stipulation of dismissal, "the Court will enter a Final Judgment in this case upon which the parties may appeal to the Fifth Circuit Court of Appeals."). In the finality calculus, "the district judge's intention is 'crucial.'" *Johnson v. Davis*, 746 Fed. App'x 375, 379 (5th Cir. 2018). Thus, the Court has treated judgments as final "if it is clear that the district court intended by the [judgment] to dispose of all claims." *McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 351 (5th Cir. 2004). And unlike *Marshall* or *Ryan* (or other similar cases), Judge Ezra's rulings made clear his intention that his judgment should be both final and immediately appealable -- he had dispatched the cause for appellate review. *See Gray ex rel. Rudd v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400, 404 (5th Cir. 2004) (rejecting need for "talismanic words" to invoke Rule 54(b) where the district court's "unmistakable intent" was "readily apparent from the face of [its] order."); *see also Blue*, 764 F.3d at 18 ("The judge . . . is meant to be the dispatcher who controls the circumstances and timing of the entry of final judgment.").

Whether under § 1291 by virtue of a final judgment that expressly disposed of all claims and parties, or via an unmistakable intent to certify the case for appeal as contemplated by Rule 54 (which finds no analogue in other cases applying the "finality trap") Judge Ezra's Final Judgment furnishes appellate jurisdiction.

Respectfully submitted,

/s/ Mark A.J. Fassold

Mark A.J. Fassold

MAF/kh

cc: Daniel McNeel Lane, Jr.
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United States Court of Appeals

FIFTH CIRCUIT
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NEW ORLEANS, LA 70130

November 19, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-50740 CBX Resources, L.L.C. v. ACE American Insurance Company, et al
USDC No. 5:17-CV-17

Your appeal has been placed in abeyance this date pending this court's en banc decision in Williams v. Lockheed Martin Corp., case number 18-31159 (consolidated with 18-31161). You have fourteen (14) days to file a letter in response if you believe this stay is inappropriate. All responses will be forwarded to the court for a determination. If developments arise that would impact the stay, you must notify the court. Once the case has been removed from abeyance, you will receive notification from this court with any additional instructions.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

Mr. Mark Anthony John Fassold
Ms. Allison Gold
Mr. Travis Carey Headley
Mr. Daniel McNeel Lane Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § §	Civil Action No. 5:17-cv-00017-DAE JURY REQUESTED

PLAINTIFF'S MOTION TO SET STATUS CONFERENCE

Plaintiff, CBX Resources, LLC ("CBX"), files this Motion to Set Status Conference. In support thereof, Plaintiff would respectfully show the Court as follows:

PROCEDURAL BACKGROUND

1. Plaintiff filed its Original Complaint on January 10, 2017 (Doc. #1).

2. On July 10, 2017, Plaintiff filed its Motion for Leave to File First Amended Complaint, seeking to add a cause of action for violations of the Texas Insurance Code. (Doc. #31). By text order, the Court granted the Motion for Leave on July 11, 2017.

3. On October 16, 2017, the Court granted Defendants' Motion for Partial Summary Judgment as to Defendants' duty to defend (Doc. #45).

4. On June 28, 2017, the Court granted Defendants' Motion for Partial Summary Judgment as to whether the underlying judgment was the result of a fully adversarial trial. (Doc. #78).

5. On July 20, 2018, the Court entered its Order on Parties' Status Report, instructing Plaintiff—pursuant to the Parties' agreement—to voluntarily dismiss its

remaining claims for violations of the Texas Insurance Code so that the Court could enter a final, appealable judgment in the case. (Doc. #79).

6. Accordingly, on August 8, 2018, Plaintiff filed its Stipulation of Dismissal, dismissing, **without prejudice**, its remaining claims for violations of the Texas Insurance Code. (Doc. #80).

7. Thereafter, on August 20, 2018, the Court entered its Final Judgment, purportedly disposing of all remaining claims and parties. (Doc. #82).

8. Plaintiff filed its Notice of Appeal on September 7, 2018. (Doc. #83).

9. On May 12, 2020, the Fifth Circuit issued its opinion, dismissing Plaintiff's appeal for lack of jurisdiction. (Doc. #88). More specifically, the Court held that because Plaintiff had dismissed its claims for violations of the Texas Insurance Code without prejudice, there was "not *yet* a final appealable judgment." (*Id.* at 1 (emphasis added)). Further, the Fifth Circuit held that there was no "unmistakable intent" in the record that the district court entered a final partial judgment under Rule 54(b) before this appeal was filed." (*Id.* at 5).

10. Finally, on May 13, 2020, the Fifth Circuit sent its Judgment/Mandate to this Court. (Doc. #88)

ARGUMENT & AUTHORITIES

I. The District Court Once Again Has Jurisdiction Over this Action

11. "When an appellate mandate is issued, the district court reacquires jurisdiction." *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986). Moreover, this reacquisition of jurisdiction by the district court occurs "even if the mandate does not explicitly remand the case." *Martin v. Magee*, No. 10-2786, 2014 WL 12730527, at *1 (E.D. La. Jan. 27, 2014) (citing *Newball*, 803 F.2d at 826). "This is because the appellate

court's powers necessarily operate in conjunction with the district court, where actual closure of cases occurs." *Id.* (internal citations omitted).

12. Accordingly, this Court has reacquired jurisdiction over Plaintiff's action, even though the Fifth Circuit's opinion did not use "remand" language. Indeed, the Fifth Circuit's recognition of the district court's reacquisition of jurisdiction after issuance of the mandate can be seen from the language of the opinion itself, wherein the Fifth Circuit stated that there was "not *yet* a final appealable judgment." (Doc. #88 at 1 (emphasis added)). Thus, the Fifth Circuit acknowledged that this Court can and should make whatever rulings necessary to assure a final appealable judgment.

II. A Status Conference with the Court Is Necessary to Discuss the Options Available to Assure a Final Appealable Judgment

13. Plaintiff hereby requests a status conference with the Court to discuss the options available to ensure a final appealable judgment—including, without limitation, permitting Plaintiff to reassert its claims for violations of the Texas Insurance Code so those claims can be dismissed *with prejudice* and/or the entry of a Rule 54(b) order permitting Plaintiff to appeal the two interlocutory summary judgment orders. To that end, simultaneous with the filing of this Motion, Plaintiff as filed a Motion for Leave to File Second Amended Complaint, adding back in the claims Insurance Code violation claims that the Court previously dismissed without prejudice.[1]

14. For these reasons, Plaintiff prays that this Court grant this Motion and set a status conference at its earliest available opportunity, and grant Plaintiff all other proper relief to which it may be justly entitled.

[1] Plaintiff's proposed Second Amended Complaint also seeks to add in allegations related to the citizenship of its sole owner and member, Bill Rowsey.

Dated: May 26, 2020

Respectfully submitted,

By: /s/ Mark A. J. Fassold

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CERTIFICATE OF CONFERENCE

The undersigned authority hereby certifies he contacted opposing counsel for Defendants and they oppose said motion.

/s/ Mark A. Fassold
MARK A. FASSOLD

CERTIFICATE OF SERVICE

On May 26, 2020, I electronically submitted the foregoing document to all counsel of record via electronic email. I hereby certify that I will serve all counsel of record electronically or by other means authorized by the Court or the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § §	Civil Action No. 5:17-cv-00017-DAE JURY REQUESTED

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff CBX Resources, LLC ("CBX"), pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, files its Motion for Leave to Amend Complaint against Defendants ACE American Insurance Company ("ACE American") and ACE Property and Casualty Insurance Company ("ACE Property") (collectively, "ACE" or "Defendants"). Plaintiff has filed its First Amended Complaint simultaneously with this motion.

PROCEDURAL BACKGROUND

1. Plaintiff filed its Original Complaint on January 10, 2017 (Doc. #1).

2. On July 10, 2017, Plaintiff filed its Motion for Leave to File First Amended Complaint, seeking to add a cause of action for violations of the Texas Insurance Code. (Doc. #31). By text order, the Court granted the Motion for Leave on July 11, 2017.

3. On October 16, 2017, the Court granted Defendants' Motion for Partial Summary Judgment as to Defendants' duty to defend (Doc. #45).

4. On June 28, 2017, the Court granted Defendants' Motion for Partial Summary Judgment as to whether the underlying judgment was the result of a fully adversarial trial. (Doc. #78).

5. On July 20, 2018, the Court entered its Order on Parties' Status Report, instructing Plaintiff—pursuant to the Parties' agreement—to voluntarily dismiss its remaining claims for violations of the Texas Insurance Code so that the Court could enter a final, appealable judgment in the case. (Doc. #79).

6. Accordingly, on August 8, 2018, Plaintiff filed its Stipulation of Dismissal, dismissing, **without prejudice**, its remaining claims for violations of the Texas Insurance Code. (Doc. #80).

7. Thereafter, on August 20, 2018, the Court entered its Final Judgment, purportedly disposing of all remaining claims and parties. (Doc. #82).

8. Plaintiff filed its Notice of Appeal on September 7, 2018. (Doc. #83).

9. On May 12, 2020, the Fifth Circuit issued its opinion, dismissing Plaintiff's appeal for lack of jurisdiction. (Doc. #88). More specifically, the Court held that because Plaintiff had dismissed its claims for violations of the Texas Insurance Code without prejudice, there was "not *yet* a final appealable judgment." (*Id.* at 1 (emphasis added)). Further, the Fifth Circuit held that there was no "unmistakable intent" in the record that the district court entered a final partial judgment under Rule 54(b) before this appeal was filed." (*Id.* at 5).

10. Finally, on May 13, 2020, the Fifth Circuit sent its Judgment/Mandate to this Court. (Doc. #88)

ARGUMENT & AUTHORITIES

2. The standards for granting leave to amend a complaint under Rule 15(a)(2) are well-established.

> A district court should "freely give leave" to amend a complaint "when justice so requires." FED. R. CIV. P. 15(a)(2). Denial of leave to amend may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment. *See Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 419 (5th Cir. 2010) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). We have held that a district court abuses its discretion, however, when it gives no reasons for denying a timely motion to amend, at least when the defendant would not be unduly prejudiced by the amendment. *See Griggs v. Hinds Junior Coll.*, 563 F.2d 179, 180 (5th Cir. 1977) (per curiam); *see also State of Louisiana v. Litton Mortg. Co.*, 50 F.3d 1298, 1302-03 (5th Cir. 1995) (observing that "[a] decision to grant leave is within the discretion of the court, although if the court lacks a substantial reason to deny leave, its discretion is not broad enough to permit denial" (quotations omitted)).

United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 270-71 (5th. Cir. 2010).

3. Here, justice requires that the Court grant leave for Plaintiff to file its Second Amended Complaint attached hereto as Exhibit A. The only additions to the Second Amended Complaint are (1) to reassert the cause of action for deceptive insurance practices pursuant to Chapter 541, Subchapter B of the Texas Insurance Code which Plaintiff previously had dismissed **without** prejudice; and (2) to include jurisdictional allegations as to the citizenship of Plaintiff's sole owner and member, Bill Rowsey. With respect to (1), Plaintiff is reasserting these claims only so that the Court may dismiss them **with** prejudice and thereby issue a final appealable judgment in the case. With respect to (2), in an abundance of caution, Plaintiff seeks to allege these jurisdictional facts which are undisputed from the factual record, so as to eliminate any doubt as to the existence of diversity jurisdiction. There is no evidence of undue delay, bad faith or dilatory motive on the part of Plaintiff, repeated failure to cure deficiencies, undue prejudice to the

Defendants, or futility of the proposed amendment. Indeed, the lack of prejudice to Defendants is particularly evidenced by the fact that Plaintiff is reasserting the Insurance Code violation claims only so that they can be immediately dismissed **with** prejudice.

4. For these reasons, Plaintiff prays that this Court grant this motion, grant Plaintiff leave to file its Second Amended Complaint, and grant Plaintiff all other proper relief to which it may be justly entitled.

Dated: May 26, 2020

Respectfully submitted,

By: /s/ Mark A. J. Fassold

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CERTIFICATE OF CONFERENCE

The undersigned authority hereby certifies he contacted opposing counsel for Defendants and they oppose said motion.

/s/ Mark A. Fassold
MARK A. FASSOLD

CERTIFICATE OF SERVICE

On May 26, 2020, I electronically submitted the foregoing document to all counsel of record via electronic email. I hereby certify that I will serve all counsel of record electronically or by other means authorized by the Court or the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CBX RESOURCES, LLC, Plaintiff, vs. ACE AMERICAN INSURANCE COMPANY, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants.	§ § § § § § § § § § § § §	NO. 5:17-CV-17-DAE

ORDER DENYING MOTION TO SET STATUS CONFERENCE AND DENYING MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

The matter before the Court is Plaintiff CBX Resources, LLC's ("CBX") Motion for Status Conference (Dkt. # 89) and Motion to File a Second Amended Complaint (Dkt. # 90). CBX's motions indicate that they are opposed; however, Defendants Ace American Insurance Company and Ace Property and Casualty Insurance Company (collectively, "Ace American") filed a response indicating no opposition to CBX's second amendment of its complaint. (Dkt. # 92.) Despite Ace American's lack of opposition, CBX's motions are **DENIED** for lack of jurisdiction.

PROCEDURAL BACKGROUND

CBX filed its original complaint in this Court on January 10, 2017. (Dkt. # 1.) On July 11, 2017, the Court granted CBX's unopposed motion to amend its complaint to add a cause of action for violations of the Texas Insurance Code. (See Dkt. # 31.) On October 16, 2017, the Court granted Ace American's motion for partial summary judgment as to Ace American's duty to defend. (Dkt. # 45.) Subsequently, on June 28, 2018, the Court granted Ace American's second motion for partial summary judgment as to whether the underlying judgment in this case was the result of a fairly adversarial trial. (Dkt. # 76.) By the parties own admission, these rulings negated one or more elements on which Ace American had the burden of proof with regard to CBX's claims for: negligent settlement practices (Stowers claim), breach of duty of good faith and fair dealing ("bad faith" or "estoppel claim"), and breach of contract. (Dkt. # 78.) Nevertheless, according to the parties, CBX's claim for violations of the Texas Insurance Code §§ 541.060(a)(3)–(4) remained viable although the Court's first partial summary judgment order may have significantly limited the damages recoverable for this claim. (Id.)

As a resolution to this case the parties proposed to this Court that CBX would voluntarily dismiss its Texas Insurance Code claim without prejudice. (Dkt. # 78.) The parties further proposed that upon dismissal without prejudice of

CBX's Texas Insurance Code claims, the Court would enter a Final Judgment in this case. (Id.) In accordance with its proposal to the Court, on August 8, 2018, the parties filed a "Stipulation of Dismissal" pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure which dismissed without prejudice CBX's claims for violations of Texas Insurance Code §§ 541.060(a)(3)–(4). (Dkt. # 80.) Thereafter, on August 17, 2018, the parties filed a proposed Final Judgment in this case, dismissing the case. (Dkt. # 81.) On August 20, 2018, the Court entered the parties' proposed Final Judgment, which closed this case.[1] (Dkt. # 82.) CBX filed its Notice of Appeal on September 7, 2018. (Dkt. # 83.)

On May 12, 2020, in a published opinion, the Fifth Circuit Court of Appeals held that CBX suffered from the "finality trap" after dismissing its Texas Insurance Code claims without prejudice. CBX Resources, L.L.C. v. Ace American Insurance Company, 959 F.3d 175, 176 (5th Cir. 2020). The Court stated that "[b]ecause those statutory claims were not resolved on the merits, CBX 'is entitled to bring a *later* suit on the same cause of action,'" and that "there is not yet a final appealable judgment." (Id. (emphasis added).)

Following the Fifth Circuit's dismissal of this case for lack of jurisdiction, CBX filed the instant motions for status conference and for leave to file a second amended complaint. (Dkts. ## 89, 90.) CBX contends that justice

[1] As indicated in the Fifth Circuit's opinion in this matter, no Federal Rule of Civil Procedure 54(b) certification was sought from this Court nor issued by this Court.

requires the Court to grant it leave to amend its complaint to: (1) reassert the cause of action for violations of the Texas Insurance Code which were previously dismissed without prejudice; and (2) include jurisdictional allegations as to the citizenship of CBX's sole owner and member, Bill Rowsey.[2] (Dkt. # 90 at 3.) Thereafter, according to CBX, it will ask for a dismissal of the Texas Insurance Code claims *with* prejudice this time so that there will be a final appealable judgment in this case. (Id.)

ANALYSIS

The Fifth Circuit Court of Appeals explicitly stated that CBX finds itself squarely in the "finality trap." CBX, 959 F.3d at 175 (citing Williams v. Taylor Seidenbach, Inc., 958 F.3d 341, 343 (5th Cir. 2020) (en banc)). Pursuant to Ryan v. Occidental Petroleum Corp., 577 F.2d 298, 303 (5th Cir. 1978), a partial entry of summary judgment followed by a voluntary dismissal of all remaining claims without prejudice does not create a final appealable judgment. See also CBX, 959 F.3d at 176; Marshall v. Kan. City S. Ry. Co., 378 F.3d 495, 500 (5th Cir. 2004) (per curiam). As recognized by several courts, although initially designed to prevent parties from manufacturing premature appellate jurisdiction, the rule detailed in Ryan often creates "an admittedly troubling result." Perry v.

[2] CBX states that it seeks to add these allegations "in an abundance of caution" in order "to eliminate any doubt as to the existence of diversity jurisdiction." (Dkt. # 90 at 3.)

Schumacher Grp. of La., No. 2:13-CV-36, 2015 WL 2157475, at *1 (M.D. Fla. May 7, 2015). This rule, referred to as the "finality trap," "threatens an unwelcome surprise to unwary litigators: Parties who, during litigation, dismiss claims without prejudice under Rule 41(a) of the Federal Rules of Civil Procedure may thereby lose any right to appeal at the litigation's end." Terry W. Schackmann & Barry L. Pickens, The Finality Trap: Accidentally Losing Your Right to Appeal (Part I), 58 J. Mo. B. 78, 78 (2002).

Undoubtedly, CBX's motion to amend seeks to circumvent the rule pronounced by Ryan and reaffirmed by the Fifth Circuit's opinion in this case. (Dkt. # 90.) CBX seeks to reopen this closed case and convert the Texas Insurance Code claims dismissed without prejudice into a dismissal with prejudice. (Id.) However, the Court sees no clear way to grant CBX the relief it requests. The Fifth Circuit's rule in this case makes it unmistakable that CBX is entangled in the finality trap—the Fifth Circuit did not order that this case be remanded so this Court could enter a final appealable judgment since there was no case to remand. See CBX, 959 F.3d at 176–77. Instead, the Fifth Circuit used language indicating that CBX "'is entitled to bring a *later* suit on the same cause of action.'" Id. (citing Ryan, 577 F.2d at 302) (emphasis added). Thus, the Fifth Circuit did not return jurisdiction to this Court. Furthermore, neither the Fifth Circuit nor the Federal Rules of Civil Procedure provide any mechanism by which this Court can reopen

this closed case and reinstate claims previously dismissed without prejudice. As indicated above, this case was closed, and judgment entered.

Instead, it appears that this Court relinquishes jurisdiction over those claims once they are voluntarily dismissed pursuant to Federal Rule of Civil Procedure 41(a). See Ryan, 577 F.2d at 302 ("[I]n a voluntary dismissal a plaintiff gets what he seeks, i.e., a dismissal without an adjudication on the merits, and he is entitled to bring a later suit on the same cause of action."); see also Santiago v. Victim Servs. Agency of Metro. Assistance Corp., 753 F.2d 219, 221 (2d Cir. 1985) ("Once the plaintiff has dismissed the action under [Rule 41(a)], the court loses all jurisdiction over the action." (citation omitted)); State Nat'l Ins. Co. v. County of Camden, 824 F.3d 399, 407 (3d Cir. 2016) ("A voluntary dismissal deprives the District Court of jurisdiction over the action." (citation omitted)); Commercial Space Mgmt. Co. v. Boeing Co., 193 F.3d 1074, 1079–80 (9th Cir. 1999) ("It follows . . . that the district court has no role to play once a notice of dismissal under Rule 41(a)(1) is filed. The action is terminated at that point, as if no action had ever been filed."); Anago Franchising, Inc. v. Shaz, LLC, 677 F.3d 1272, 1278 (11th Cir. 2012) ("[C]ourts need not and may not take action after the [Rule 41(a)] stipulation becomes effective because the stipulation dismisses the case and divests the district court of jurisdiction."); Versata Software, Inc. v. Callidus Software, Inc., 780 F.3d 1134, 1136 (Fed. Cir. 2015) (vacating its own

opinion because it was issued after the parties voluntarily dismissed their case under Rule 41(a)); Smith v. Phillips, 881 F.2d 902, 904 (10th Cir. 1989) (same); Adams v. USAA Cas. Ins. Co., 863 F.3d 1069, 1078 n.9 (8th Cir. 2017) (collecting relevant cases). Furthermore, it is axiomatic that counsel cannot confer jurisdiction upon a federal court where such jurisdiction does not exist.

Accordingly, upon careful consideration, CBX's requests must be denied. This Court is not free to disregard Circuit Judge Costa's plain and clear ruling in this matter. As indicated by the Fifth Circuit, CBX is free to bring a later suit, i.e. a new suit, with the exception of those claims this Court has already ruled upon and for which res judicata applies. If CBX were correct in its position there would have been no need for the Fifth Circuit's clear and unmistakable opinion and there would in effect be no "finality trap" as described in that opinion. And, as recognized in Circuit Judge Willett's concurrence in Williams, "allowing the district court to recapture jurisdiction . . . over previously entered voluntary dismissals and convert them from 'without prejudice' to 'with prejudice' is alien to any circuit." Williams, 958 F.3d at 356–57 (Willett, J., concurring). Therefore, because this Court lacks jurisdiction to reopen this case and convert the voluntary dismissal without prejudice into a voluntary dismissal with prejudice, CBX's motion to amend is denied. The Court also finds no reason to hold a status conference in this case and the motion for such is also denied.

CONCLUSION

For the foregoing reasons, the Court **DENIES** CBX's Motion for Status Conference (Dkt. # 89) and Motion to File a Second Amended Complaint (Dkt. # 90). This case shall remain closed.

IT IS SO ORDERED.

DATED: San Antonio, Texas, June 25, 2020.

David A. Ezra
Senior U.S. District Judge