

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 4:18-cv-10186-KMM

ISLAMORADA LEISURE  
PROPERTIES, INC.,

Plaintiff,

v.

BANKERS INSURANCE GROUP,

Defendant.

---

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS CAUSE came before the Court following a bench trial held on November 4, 2019. (ECF No. 38); (“Trial Tr.”) (ECF No. 44). Plaintiff Islamorada Leisure Properties, Inc. (“Plaintiff”) filed a breach of contract claim against insurer Defendant Bankers Insurance Group (“Defendant”), alleging that Defendant failed to fully compensate Plaintiff under the terms of Plaintiff’s flood insurance policy. Complaint (“Compl.”) (ECF No. 1). The parties submitted post-trial proposed findings of fact and conclusions of law. *See* Plaintiff’s Post-Trial Findings of Fact and Conclusions of Law (“Pl.’s Proposed Findings”) (ECF No. 43); Bankers Insurance Group’s Proposed Findings of Fact and Conclusions of Law (“Def.’s Proposed Findings”) (ECF No. 45). Having reviewed the pleadings, examined the evidence, observed the witnesses, and considered the arguments of counsel as well as the remainder of the record, the Court makes the following findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52(a).<sup>1</sup>

---

<sup>1</sup> To the extent that any finding of fact is more aptly characterized as a conclusion of law, or any conclusion of law is more aptly characterized as a finding of fact, the Court adopts it as such.

## I. FINDINGS OF FACT

### A. Background

Plaintiff owns Pines & Palms Resort located at 80401 Old Highway, Islamorada, Florida, 33036, which includes a duplex containing Units 26 and 27 (the “Property”). Trial Tr. 11:24–25, 14:4–5. Plaintiff purchased Standard Flood Insurance Policy No. 09-6600049394-04 (the “Policy”), Pl.’s Trial Ex. 2<sup>2</sup> (ECF No. 39–2), for the Property through Defendant, a Write-Your-Own Program carrier participating in the United States Government’s National Flood Insurance Program (“NFIP”), pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. § 4001, *et seq.*<sup>3</sup> Joint Pretrial Stipulation, (ECF No. 31) at 4. The Standard Flood Insurance Policy General Property Form is a federal regulation codified at 44 C.F.R. Part 61, Appendix A(2). *See* Standard Flood Insurance Policy General Property Form (“SFIP”), 44 C.F.R. Pt. 61, App. A(2), Pl.’s Trial Ex. 1 (ECF No. 39–1). The Policy was effective from August 28, 2017 to August 28, 2018 and provided Coverage A (Building) limits of \$500,000.00 and Coverage B (Contents) limits of \$14,500.00, both subject to a \$2,000.00 deductible. Policy at 1.

---

<sup>2</sup> References to exhibits propounded by Plaintiff at trial shall be in the following format: “Pl.’s Trial Ex. \_\_\_.” References to exhibits propounded by Defendant at trial shall be in the following format: “Def.’s Trial Ex. \_\_\_.”

<sup>3</sup> The Federal Emergency Management Agency (“FEMA”) uses private insurance companies, known as Write Your Own (“WYO”) companies, to issue flood insurance policies in carrying out its statutory duty to administer the NFIP. *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308 (11th Cir. 2001) (citing 42 U.S.C. § 4081(a); 44 C.F.R. § 62.23(a)–(d)). WYO companies are considered “fiscal agents of the United States.” *Id.* at 1311 (citing 42 U.S.C. § 4071(a)(1) (authorizing use of “insurance companies . . . as fiscal agents of the United States”); 44 C.F.R. § 62.23(f) (“[T]he primary relationship between the WYO Company and the Federal Government will be one of a fiduciary nature.”)). “WYO companies may not alter the terms of SFIPs” and “must adjust claims under NFIP guidelines.” *Id.* (citing 44 C.F.R. § 62.23(c), (h)(6), (i)(1)). FEMA pays flood insurance claims, reimburses costs for adjustment and payment of claims by WYO companies, and indemnifies and defends WYO companies from insurance and litigation expenses. *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397, 402 (5th Cir. 2012).

The Property is a two-story, elevated residential structure with a foundation system that consists of concrete Piles (“Piles”), steel reinforced columns extending therefrom (the “Columns”), and a reinforced concrete beam assembly (the “Beam Assembly”).<sup>4</sup> Trial Tr. 14:4–19, 94:7–15. In addition, a concrete slab on grade (the “Slab”) is located beneath the Property. Trial Tr. 17:22–18:8. On September 10, 2017, while the Policy was in effect, Hurricane Irma caused flooding at the Property. Trial Tr. 25:4; Report of Findings (“Benton Report”), Def.’s Trial Ex. 6 (ECF No. 40–9) at 3. The floodwaters rose to a height of approximately thirty (30) inches above the grade surrounding the Property. Benton Report at 3.

Within a week after Hurricane Irma, Plaintiff had its insurance agent submit a claim to Defendant under the Policy. Trial Tr. 35:2–16. Defendant assigned an independent adjuster, Dustin Rhodes (“Rhodes”), an NFIP authorized independent flood adjuster, to inspect the Property. *See* Narrative Report Recommendation for Payment Below Deductible (“Rhodes Report”), Def.’s Trial Ex. 3 (ECF No. 40–6). Rhodes inspected the Property on October 6, 2017 and prepared an estimate of the flood damage. *See generally id.* The Rhodes Report stated that the Slab required replacement and calculated the replacement cost value of the flood loss at \$1,426.43 and, after depreciation, its actual cash value (“ACV”)<sup>5</sup> at \$1,312.74. *Id.* at 2, 5. Rhodes additionally

---

<sup>4</sup> At trial, the Parties and their witnesses implemented differing nomenclature to refer to the components at issue in this case. For purposes of this Order, the Court uses the following nomenclature: “Piles” refers to the concrete component sunken into the ground; “Columns” refers to the square concrete components that extend vertically from the Piles to the Beam Assembly; “Beam Assembly” refers to the system of concrete beams that extend between the Columns and support the first inhabitable floor of the Property; and “foundation system” refers to the Piles, Columns, and Beam Assembly collectively.

<sup>5</sup> The SFIP defines “Actual Cash Value” as “[t]he cost to replace an insured item of property at the time of loss, less the value of its physical depreciation.” SFIP art. II(B)(2).

submitted a request for an engineer to inspect the Property to determine if the cracking Rhodes observed during his inspection was caused by flood. *Id.* at 3.

Upon Rhodes' request, Defendant retained Joseph N. Benton, P.E. ("Benton") to evaluate the structure and determine the cause and extent of the damage Plaintiff reported. Benton Report at 4. Benton inspected the Property on October 22, 2017. Trial Tr. 86:21–23; Benton Report at 15. Benton concluded, *inter alia*, that: (1) "[n]o wind-related damages were observed below the elevation of the first floor" of the Property; (2) soils along the rear and side elevations of the Slab were scoured and the Slab had sustained physical damage; (3) there were no indications of damage to the foundation or structural frame of the Property; (4) the structure of the Property was not damaged due to buoyant or hydrostatic forces; and (5) the stucco finishes of the Beam Assembly had not sustained damage due to hydrodynamic forces but the stucco finishes on the Columns had sustained damage due to hydrodynamic forces. Benton Report at 3; Trial Tr. 108:20–109:3. Therefore, Benton recommended that the Slab be demolished and re-constructed according to the original permitted construction plans. Benton Report at 13.

Based on the Rhodes and Benton Reports, Defendant did not issue any payments to Plaintiff because the adjusted loss did not exceed the Policy's \$2,000.00 deductible. *See* Def.'s Trial Ex. 9 (ECF No. 40–12) at 1. Plaintiff thereafter retained Vandin Calitu, P.E. ("Calitu"), to assess the damage to the Property, determine the cause of the damage, and prepare a cost estimate to repair the damage. Trial Tr. 52:19–22. Calitu inspected the Property on November 9, 2017 and provided a cost estimate of \$308,939.81. ("Calitu Estimate"), Pl.'s Trial Ex. 13 (ECF No. 39–12) at 12. Unlike the Rhodes and Benton Reports, the Calitu Estimate includes the cost of repairing damage to the Piles, the concrete Columns and Beam Assembly, and the stucco on the exterior of the Property. *See id.*

On August 8, 2018, Plaintiff submitted a supplemental proof of loss, together with the Calitu Estimate, claiming \$303,939.82 after applying a \$5,000.00 deductible. (“Supplemental Proof of Loss”), Pl.’s Trial Ex. 15 (ECF No. 39–15). In a letter dated September 7, 2018, Defendant denied Plaintiff’s Supplemental Proof of Loss for lack of supporting documentation. Pl.’s Trial Ex. 8 (ECF No. 39–8).

On September 21, 2018, Plaintiff filed the instant case, alleging that Defendant failed to fully compensate Plaintiff under the terms of Plaintiff’s flood insurance policy. *See generally* Compl. Subsequently, Defendant retained Benton to review documentation received after his initial report and provide a written report of findings that addresses the cause and extent of the reported damages to the Property. Report of Findings (“Benton Supp. Report”), Def.’s Trial Ex. 7 (ECF No. 40–10). In the Benton Supplemental Report dated August 5, 2019, Benton reaffirms his opinion in the Benton Report and disagrees with Calitu’s assessment that the Property sustained structural damage and requires stabilization. *See generally* Benton Supp. Report. Further, Benton therein reports that he did not note any photographic depictions that indicated that the concrete piles and beams were measured out of plumb. *Id.* at 5. On October 4, 2019, Benton authored a clarification letter report, wherein Benton clarifies that the Slab is not integrated with the foundation system. Clarification Letter Report (“Benton Letter”), Def.’s Trial Ex. 8 (ECF No. 40–11).

Plaintiff also retained Sunil Gulati, P.E., S.I., R.E.P.A. (“Gulati”), to prepare a supplemental review letter regarding the Property’s foundation system. (“Gulati Letter”), Pl.’s Trial Ex. 20 (ECF No. 39–19). The Gulati Letter states that although the Slab is not an integral part of the foundation system, it provides lateral support to the Columns. *Id.* at 1. The Gulati Letter further provides that Gulati took measurements as to the plumbness of the Columns and that

“it is evident that the elevated concrete beam assembly has undergone significant cracking and spalling caused by the lateral movement/displacement of the concrete support columns as a result of erosion/scouring, hydrostatic, hydrodynamic, and impact forces caused by storm surge/flooding.” *Id.* Gulati estimates that the cost to repair or replace the Piles would be on the order of \$175,000.00–225,000.00. *Id.*

**B. The Bench Trial**

i. Fact Witness and Evidence Presented

During the bench trial, the Court heard testimony from James I. Bernardin (“Bernardin”), Plaintiff’s corporate representative, regarding the damage to the property from Hurricane Irma. Specifically, Bernardin testified that prior to Hurricane Irma, he did not observe cracks in the Columns or Beam Assembly and that the Slab was in good condition. Trial Tr. 16:11–14, 17:15–21, 18:5–6. He further testified that after Hurricane Irma, the Slab was “buckled,” the Columns and Beam Assembly were cracked and had “chunks of concrete missing,” the paint on the Property was destroyed, the Property was out of plumb, and the pipes inside the concrete beams between the second and third floors of the Property had broken. Trial Tr. 27:20, 28:15–25, 29:6–17, 29:24–30:24. In addition, at trial, Plaintiff presented copies of the Calitu Estimate, the Gulati Letter, and a summary of Plaintiff’s expenditures to perform repairs from Hurricane Irma, Pl.’s Trial Ex. 18 (ECF No. 39–18), and Defendant presented the Benton Report, the Benton Supplemental Report, and the Benton Letter.

ii. Expert Testimony

The Court also heard testimony from Plaintiff’s expert witnesses, Calitu and Gulati, and Defendant’s expert witness, Benton. The experts’ testimony primarily focused on whether the

Piles sustained damage from flood, but also addressed the cause of cracks in the concrete Columns and Beam Assembly and the stucco on the Property's exterior.

Calitu testified that the Property sustained damage to the Piles as a direct result of flood, evidenced by the flood-induced scour, cracking and listing in the Columns, and horizontal and step-down cracking in the Beam Assembly. Trial Tr. 58:19–25, 62:3–7. Specifically, Calitu testified that “there [were] signs of erosion that [were] caused, obviously, by the moving water around the entire structure; then also the effect of scouring, which [were] caused by the moving water around the columns; and then the obvious damage on the slab and the damage on the [C]olumns and [Beam Assembly].” *Id.* 61:25–62:7. Calitu also testified that the Piles moved or shifted because “there were signs of slight misalignment of the columns, which, you know, at that particular time, like two years ago, you know, were not that dramatic.” *Id.* 62:8–13.

Benton, by contrast, testified that the Property performed as designed during Hurricane Irma and that the foundation system is not in need of repair. *Id.* 88:20–24. Specifically, Benton testified that he did not observe any flexural-based cracks at the joints between the Columns and Beam Assembly and that the cracks he observed in the concrete Columns and Beam Assembly resulted from corroding rebar. *Id.* 89:10–13, 90:15–24. As to the stucco, Benton testified that he observed damage to the stucco on the Columns due to hydrodynamic forces but did not observe damage to the stucco on the Beam Assembly due to the hydrodynamic forces. *Id.* 108:4–109:3.

In rebuttal, Gulati testified that the Piles sustained damage, as all but four of the Columns were listing. *Id.* 119:3–16. He further testified that the cracking in the Beam Assembly was due to hydrodynamic forces, not rebar corrosion, and were indicative of damage to the Piles. *Id.* 120:11–13, 125:1–6. As to the stucco, Gulati testified that the damage to the stucco was cosmetic,

but the damage to the underlying concrete Columns and Beam Assembly was caused by hydrodynamic forces. Trial Tr. 121:1–6, 124:22–25.

Upon consideration of the evidence, the Court finds Benton’s expert opinion more credible and helpful than that of Calitu or Gulati. As to the damage to the Piles, Benton generally provided specific, compelling testimony that aligned with the testimony of Bernardin. Bernardin testified that prior to Hurricane Irma, Plaintiff’s maintenance personnel filled any cracks in the Columns or Beam Assembly with “material . . . so that the paint job look[ed] nice.” *Id.* 38:14–17. However, Bernardin testified that he did not know what material or process his personnel used to fill the cracks. *Id.* 39:1–4. Bernardin then testified that after the hurricane, cracks were visible. *Id.* 28:15–25. Benton testified that if cracks are not properly repaired by removing the damaged concrete, treating and coating the rebar, and patching the concrete, the result will be more cracking in the future. *Id.* 98:21–99:3. He testified that because Bernardin did not know the process or material used to repair the cracks prior to Hurricane Irma, he did not know whether the cracks were properly repaired. *Id.* 98:19–20. Based on these facts, Benton testified that cracks were likely cosmetically hidden prior to Hurricane Irma and caused by corroding rebar, not by damage to the Piles. *Id.* 90:15–24, 98:9–10.

Bernardin did not testify to any vertical or diagonal cracks at the joints Columns or Beam Assembly and none of the exhibits about which Bernardin testified depict such cracks. Rather, the exhibits about Bernardin testified only depict horizontal cracks. Benton testified that if there was structural damage, he would have expected to see vertical or diagonal cracks near the joints between the Beam Assembly and the Columns, which he did not observe during his inspection. *Id.* 89:10–13. Further, Benton testified that the horizontal cracks aligned with the reinforcing rebar in the concrete Columns and Beam Assembly. *Id.* 90:15–16. Accordingly, Benton opined that the



cracks in the Columns and Beam Assembly were caused by corroding rebar and therefore did not indicate that the Piles were damaged. *Id.* 90:2–91:7. Because Benton’s opinion regarding the Piles coincides with the facts as presented by Bernardin, it is more credible and persuasive than the opinions of Calitu or Gulati.

As to the concrete Columns and Beams, Benton testified that the cracks in the Columns and Beam Assembly were caused by corroding rebar and not from flood, as discussed above. *See supra.* The Court finds that Benton credibly testified that the location of the cracks in the Columns and Beam Assembly corresponded with the location of the rebar therein and that the rebar that he observed during his inspection was corroded. *Id.* 90:15–19. In support of his opinion, Benton provided a thorough explanation of how corroding rebar would cause the rebar to expand, resulting in cracks in the concrete. *Id.* Accordingly, the Court finds Benton’s testimony on this issue compelling.

As to the stucco, Benton testified that he observed damage to the stucco on the Columns due to hydrodynamic forces but did not observe damage to the stucco on the Beam Assembly due to the hydrodynamic forces. *Id.* 108:4–109:3. In response, Plaintiff did not provide a compelling explanation for the damage to the stucco. Neither Calitu nor Gulati testified directly regarding the cause of the damage to the stucco. Indeed, the only mention of the stucco in Calitu’s testimony was the explanation of how Calitu estimated the area of stucco requiring repair. *Id.* 76:4–12. And, Gulati’s testimony regarding the stucco only explained that the damage to the stucco was cosmetic, but the damage beneath the stucco to the concrete indicated damage to the Piles. *Id.* 124:22–125:6. Accordingly, the Court finds persuasive Benton’s testimony that the damage to the stucco on the Beam Assembly was not from flood. Nonetheless, the Court finds that there was damage to the stucco on the Columns from flood.

In contrast to Benton, Calitu largely provided a general explanation of the damages he observed on the Property but did not provide a persuasive explanation of how the observed damages were caused. Instead, as to the alleged damage to the Piles, Calitu conclusively opined that the damages were caused by flood without further explanation. *See, e.g., id.* 61:12–62:16. Further, while Calitu testified that the Columns shifted due to flood, Calitu did not take any measurements to support his finding. *Id.* 67:16–22. Moreover, Calitu admitted that the Property suffered wind damage, but did not precisely delineate between the damages caused by wind versus those caused by flood. *Id.* 81:6–19.

Additionally, the Court cannot rely upon Calitu’s expert opinion and his estimate for several reasons. First, the Calitu Estimate includes damage to the Property that Calitu acknowledged is not covered under the SFIP and Calitu did not testify as to which items were covered under the SFIP. *Id.* 79:16–19 (“Q. If the [Slab] is not tied into the foundation system, do you know if damage to that slab is covered under this policy? A. Well, I know it’s not covered.”), 76:16–21 (“Q. Is [compaction grouting] covered by the policy? A. Well, the thing is, if it’s the only way to repair the structure, it has to be, you know. And if its – because in my opinion, the same thing, I mean, if you have to do something to comply with the current code, even if it’s not covered by the policy, like it should be paid by the insurance.”);<sup>6</sup> Calitu Estimate at 12. Second, Calitu testified that his estimate comprises the ACV of the repairs, but his estimates do not abide by the definition of ACV. *Id.* 63:12–15, 75:2–6; SFIP art. II(B)(2) (defining ACV as “[t]he cost to replace an insured item of property at the time of loss, less the value of its physical

---

<sup>6</sup> In addition, Calitu appears to be unfamiliar with the SFIP because Calitu testified, “I mean, if you have to do something to comply with the current code, even if it’s not covered by the policy, like it should be paid by the insurance.” Trial Tr. 76:19–21. However, the SFIP explicitly excludes coverage for “[t]he cost of complying with any ordinance or law requiring or regulating construction, demolition, remodeling, renovation, or repair of the property[.]” SFIP art. V(A)(6).

depreciation”). Specifically, the Calitu Estimate does not account for depreciation of the items, as required by the definition of ACV. *Id.* 75:2–6 (Calitu testifying that he did not account for depreciation of the Piles); Calitu Estimate at 12; SFIP art. II(B)(2). Further, the Calitu Estimate includes compaction grouting and underpinning, which did not exist on the Property prior to Hurricane Irma and therefore would not be a replacement of an insured item within the definition of ACV. Calitu Estimate at 12; Trial Tr. 76:13–15. Third, Calitu applied an overhead rate of fifteen percent (15%) and profit of twenty-five percent (25%), when the Claims Manual only allows for ten percent (10%) overhead and ten percent (10%) profit. Calitu Estimate at 19; National Flood Insurance Program Claims Manual (“Claims Manual”), Def.’s Trial Ex. 5 (ECF No. 40–8) at 255 (“Overhead and Profit . . . is added to an estimate when the complexity of the repairs requires coordination by a general contractor at a typical industry standard of 10 percent overhead, 10 percent profit.”). Finally, this Court has previously found Calitu to lack credibility based on similar deficiencies. Findings of Fact and Conclusions of Law at 8, *Cosgrove v. Wright Nat’l Flood Ins. Co.*, Case No. 4:18-cv-10117-KMM (S.D. Fla. Feb. 4, 2020), (ECF No. 45). For these reasons, the Court finds Calitu’s expert opinion to lack credibility and be unpersuasive, and the Calitu Estimate to be unreliable.

The Court likewise finds Gulati’s rebuttal testimony less credible than Benton’s testimony for several reasons. First, Gulati largely provided general, unsubstantiated critiques of Benton’s conclusions. Second, to the extent Gulati expressed opinions to support his conclusions or explained his opinions, they primarily consisted of gestures, which are not reflected in the record. *See, e.g.*, Trial Tr. 118:3–21 (“Q. All right. There was the opinion that the concrete piles did not settled. Was there evidence that you noticed that the concrete piles . . . settled or listed? A. Mr. Laurato, one clarification I want to make right here. When we are talking about the settlement,

settlement can come in different forms. If you have – this is my foundation system, if that foundation goes like this, is that settlement? Yes. If this foundation system moves like this location, is that settlement? Yes. The type of foundation system we have here, . . . you have a concrete piling, the slab is here, your pile goes below the slab, sitting on the Key Largo limestone. And because this is sitting on the limestone, this will not go down like this; because of the lateral stresses we are getting from the flood forces, very, very high forces, this foundation system will move like this.”), 120:18–25. Third, although Gulati testified that he observed that the Columns were not plumb and level, he also contradicted this testimony in stating that “there was no evidence of vertical deflection of the columns.” *Compare id.* 119:3–5, *with id.* 124:6–9. Fourth, Gulati inspected the Property on July 2, 2019, nearly two years after Hurricane Irma, which means the condition of the Property may have changed in the intervening time period. *Id.* 127:18–25, 141:5–8. Therefore, Gulati’s observations and conclusions regarding the damage to the Property allegedly due to flood are less reliable than Benton’s observations and conclusions regarding the damage during his inspection performed on October 22, 2017, approximately one and a half months after Hurricane Irma. For these reasons, the Court finds Gulati less persuasive and credible than Benton.

In sum, upon consideration of the evidence and testimony presented, the Court finds Benton’s testimony and reports persuasive and finds that (1) the foundation system performed as designed and the Piles did not suffer damage from flood; (2) the cracks in the Columns and Beam Assembly were the result of corroding rebar; and (3) the damage to the stucco on the Beam Assembly was not from flood but there was damage to the stucco on the Columns that was from flood.

## II. CONCLUSIONS OF LAW

This Court has subject matter jurisdiction over this matter pursuant to 42 U.S.C. § 4072 and 44 C.F.R. Part 61, Appendix A(2), Article IX. Jurisdiction is also proper under 28 U.S.C. § 1331 because the legal questions at issue with respect to the SFIP involve federal law.

### A. Applicable Law

“SFIPs are governed by statute, FEMA regulations, and federal common law.” *Tuircuit v. Wright Nat’l Flood Ins. Co.*, No. 13-6268, 2014 WL 5685222, at \*4 (E.D. La. Nov. 4, 2014) (citing *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5th Cir. 2005)). Courts also look to FEMA’s interpretation of the FEMA regulations, “as long as that interpretation is not inconsistent with the regulations or plainly erroneous.” *Id.* (citing *Worthen v. Fid. Nat. Prop. & Cas. Ins. Co.*, 463 F. App’x 422, 426 (5th Cir. 2012)). “[S]trict compliance with the provisions of federal flood insurance policies is required because payments are drawn from the federal treasury.” *Shuford v. Fid. Nat’l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1343 (11th Cir. 2007) (citation omitted); *Talerico Family Ltd. P’ship v. First Cmty. Ins. Co.*, No. 12-62232-CIV-ROSENBAUM/SELTZER, 2014 WL 11600913, at \*5 (S.D. Fla. Mar. 20, 2014) (citations omitted). Individuals who choose to participate in federal programs have a legal duty to “familiarize” themselves with the requirements of those programs. *Allstate*, 415 F.3d at 388 (citing *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984)). Further, “general principles of state insurance law may be useful in determining federal law.” *Worthen*, 463 F. App’x at 425; *see also Furrow v. Wright Nat’l Flood Ins. Co.*, No. 14-10497-PBS, 2016 WL 6818345, at \*3 (D. Mass. Nov. 17, 2016) (“[I]n enacting the NFIP, Congress did not intend to abrogate standard insurance law principles. Courts are free to apply the traditional common-law technique of decision by drawing upon standard insurance principles.”) (citations and internal quotations marks omitted).

Pursuant to the SFIP, if an insured complies with all terms and conditions of the SFIP, the insurer will pay the insured “for direct physical loss by or from flood to [the] insured property.” SFIP art. I. The SFIP defines “direct physical loss by or from flood” as “[l]oss or damage to insured property, directly caused by a flood.” *Id.* art. II(B)(12). “There must be evidence of physical changes to the property.” *Id.* The SFIP defines “flood” as:

[a] general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from: (a) Overflow of inland or tidal waters; (b) Unusual and rapid accumulation or runoff of surface waters from any source; (c) Mudflow.

*Id.* art. II(A)(1). The SFIP further defines “flood” to include: “[c]ollapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A.1.a. above.” *Id.* art. II(A)(2).

The FEMA regulations, which govern the SFIP pursuant to Article IX, define “flood” or “flooding” as follows:

The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

44 C.F.R. § 59.1.

The SFIP also includes certain exclusions and limitations, including an exclusion for damage caused by earth movement, even if that earth movement is caused by flood. *See* SFIP arts. IV, V. The earth movement exclusion states as follows:

We do not insure for loss to property caused directly by earth movement even if the earth movement is caused by flood. Some examples of earth movement that we do not cover are:

1. Earthquake;
2. Landslide;
3. Land subsidence;
4. Sinkholes;
5. Destabilization or movement of land that results from accumulation of water in subsurface land area; or
6. Gradual erosion.

*Id.* art. V(C). However, this exclusion has an exception (which thus affords coverage), for “losses from . . . land subsidence as a result of erosion that [is] specifically covered under [the SFIP’s] definition of flood.” *Id.* This exception cites Article II(A)(2), reproduced above, for the applicable definition of “flood.” *Id.*

The insured has the burden to prove that (1) the damages are covered under the SFIP (*i.e.*, that the damages constitute direct physical loss by or from flood) and (2) the amount of those damages. *See Slater v. Hartford Ins. Co. of the Midwest*, No. 3:13-CV-345-J-34JBT, 2015 WL 1310984, at \*7 (M.D. Fla. Mar. 24, 2015); *Mahood v. Omaha Prop. & Cas.*, 174 F. Supp. 2d 284, 293 (E.D. Pa. 2001); *see also Monistere v. State Farm Fire & Cas. Co.*, 559 F.3d 390, 398 (5th Cir. 2009). Although the insured has the initial burden to prove that the loss is covered under the SFIP, the insurer bears the burden to prove that an exclusion to the SFIP applies. *See Furrow*, 2016 WL 6818345, at \*3. However, the burden then shifts back to the insured to the extent that the insured relies on any exception to an exclusion. *Id.*

As to the amount of damages, failure to prove the specific, additional amount owed under the SFIP precludes any further award. *Mahood*, 174 F. Supp. 2d at 293. The Court is not permitted to, and will not, speculate as to damages. *See id.* (“The court may not guess the reasonable price for repairs covered under the policy.”).

## **B. Damages to the Property Are Not Covered Under the SFIP**

The Court first determines whether the damages to the Property are covered under the SFIP. Plaintiff seeks to recover for the cost to repair damage from flood to (1) the Piles, (2) the concrete Columns and Beam Assembly, and (3) the stucco on the building's exterior. *See* Calitu Estimate at 12. The Court addresses each of the damages in turn.

First, the Parties dispute whether the Piles suffered structural damage from flood. As set forth in the above Findings of Fact, Plaintiff presented the testimony of Calitu and Gulati to demonstrate that flood caused damage to the Property's Piles.<sup>7</sup> *See supra* Section I.B.ii. Calitu testified that the Property sustained damage to the Piles as a direct result of flood, evidenced by the flood-induced scour, cracking and listing in the Columns, and horizontal and step-down cracking in the Beam Assembly. Trial Tr. 58:19–25, 62:3–7. In response, Benton testified that the Property performed as designed during Hurricane Irma and that the foundation system, including the Piles, is not in need of repair. *Id.* 88:20–24. Specifically, Benton testified that he did not observe any flexural-based cracks at the joints between the Columns and Beam Assembly and that the cracks he observed in the Columns and Beam Assembly resulted from corroding rebar. *Id.* 89:10–13, 90:15–24. In rebuttal, Gulati testified that the Piles sustained damage, evidenced by

---

<sup>7</sup> Here, the Slab is not covered under the SFIP. The National Flood Insurance Program Claims Manual provides that “[i]f a concrete slab is installed within the foundation’s perimeter, the slab is not considered structural to the foundation, unless it is six inches thick and reinforced with ‘rebar’ which is driven into the building’s foundation.” Claims Manual at 273. Although the Parties disagree regarding the thickness of the Slab, both of Plaintiff’s experts agree that the Slab is not part of the foundation system and therefore not covered. Trial Tr. 49:9–11, 56:8–10 (Calitu testifying that the Slab “provides lateral support to the [C]olumns, but it’s not, per se, like a foundation . . . element” and is not tied to the foundation), 58:3–8, 79:16–19 (Calitu testifying: “Q. If the [Slab] is not tied into the foundation system, do you know if damage to that slab is covered under this policy? A. Well, I know it’s not covered.”); 93:6–10; 117:3–8 (Gulati testifying that the Slab is not part of the foundation system). Therefore, the Court finds that the Slab is not covered by the SFIP.



that all but four of the Columns were listing. *Id.* 119:3–16. He further testified that the cracking in the Beam Assembly was due to hydrodynamic forces, not rebar corrosion, and was indicative of structural damage to the foundation system, including the Piles. *Id.* 120:11–13, 125:1–6.

Weighing the testimony and evidence presented, the Court finds that Plaintiff failed to meet its burden to demonstrate that the Piles suffered “direct physical loss by or from flood,” SFIP art. I, and are thus a covered loss under the SFIP. Rather, as set forth in the above Findings of Fact, the Court finds that the Property’s Piles were not damaged as a result of flood in light of the testimony and evidence showing (1) that there was an absence of flexural cracks in the Columns and Beam Assembly; and (2) that the horizontal cracks in the Columns and Beam Assembly likely predated Hurricane Irma and resulted from corroding rebar, which may have been the product of improper repair of cracks. *See supra* Section I.B.ii. Further, as set forth in the Findings of Fact, the Court finds Calitu’s opinions not credible because of the litany of flaws in his methodology. *See supra* Section I.B.ii. Finally, Calitu and Gulati’s general opinions and unsubstantiated conclusions and critiques were unpersuasive. *See id.* Therefore, Plaintiff did not satisfy its burden to show that the Piles sustained damage from flood.

Second, Plaintiff seeks to recover the cost to repair the concrete Columns and Beam Assembly. *See* Calitu Estimate at 12. At trial, Bernardin testified that there was damage to the Columns and Beam Assembly, however, Calitu and Gulati did not provide compelling testimony as to whether this damage was from flood. Rather, Calitu and Gulati’s testimony focused on whether the cracks in the concrete Columns and Beam Assembly indicated that the Piles sustained damage from flood. As set forth in the Findings of Fact, the Court finds that the cracks in the concrete Columns and Beam Assembly were the result of corroding rebar in light of the evidence that (1) Bernardin and his maintenance team may not have used the proper method to repair cracks

prior to Hurricane Irma and (2) Benton observed that the cracks' locations coincided with the location of rebar within the Columns and Beam Assembly and credibly explained that corroding rebar expands, which results in cracking of the surrounding concrete. *See supra* Section I.B.ii. Therefore, the Court finds that Plaintiff did not satisfy its burden to prove that the Columns and Beam Assembly sustained damage from flood.

Third, Plaintiff seeks the cost to repair the stucco on the exterior of the Property. *See Calitu Estimate* at 12. Benton testified that the Beam Assembly did not sustain damage from dynamic forces related to the flood. Trial Tr. 108:13–109:3. However, Benton admitted that the stucco on the Columns suffered damage from the dynamic forces related to the flood. *Id.* 108:4–12. By contrast, Plaintiff's experts did not testify regarding the cause of the damage to the stucco. Calitu's only mention of the stucco was to describe how he measured the area of stucco requiring repair. *Id.* 76:4–12. And, Gulati's testimony regarding the stucco explained that the damage to the stucco was cosmetic, but that damages to the underlying concrete Columns and Beam Assembly indicates structural damage to the foundation system. *Id.* 124:22–125:6. The Court notes that none of the experts explain which damages to the Columns are caused by flood as opposed to wind. Upon weighing the evidence and the testimony, the Court concludes that Plaintiff satisfied its burden to prove that at least some damage to the stucco on the Columns was from flood in light of Benton's admission. But, Plaintiff did not carry its burden to prove that the damage to the stucco on the Beam Assembly was from flood.

Accordingly, having examined the evidence and made the aforementioned findings of fact, the Court finds that Plaintiff has not satisfied its burden to show that the Piles, the concrete Columns or Beam Assembly, or the stucco on the Beam Assembly sustained damage from flood

and are thus covered under the SFIP. However, Plaintiff has satisfied its burden to show that damage to the stucco on the Columns was from flood and is thus covered under the SFIP.

**C. Plaintiff Has Not Satisfied Its Burden to Prove the Amount of Damages**

Next, the Court turns to determining whether Plaintiff has satisfied its burden to prove the specific, additional amount owed under the SFIP for the repairs to the Piles, concrete Columns and Beam Assembly, and stucco on the exterior of the Property. As an initial matter and as set forth above, the Calitu Estimate is unreliable in light of the testimony and evidence that (1) it includes repairs to the Property that Calitu acknowledges are not covered under the SFIP; (2) it does not follow the definition of ACV, despite Calitu claiming that it constitutes ACV; and (3) it includes erroneous rates for overhead and profit for a general contractor to oversee the repairs. *See supra* Section I.B.ii; *see also Mahood*, 174 F. Supp. 2d at 292 (finding that an estimate “cannot be relied on for an accurate evaluation of the covered loss” because it included items not covered by the policy); *Slater*, 2015 WL 1310984, at \*8 (discrediting an estimate because the estimate and testimony failed to address the question of whether the listed repairs were covered under the SFIP). Further, at trial, Plaintiff presented little evidence on the Calitu Estimate other than admitting the estimate into evidence. Therefore, the scope of these repairs and how Calitu arrived at these estimates remains unclear.

In addition, the line items for each repair included in the Calitu Estimate are unsubstantiated or not covered under the SFIP. First, the Calitu Estimate includes compaction grouting and underpinning to stabilize and reinforce the Piles. Calitu Estimate at 12. However, the compaction grouting and underpinning were not present at the time of Hurricane Irma. Therefore, the estimates to repair these items would not be considered ACVs under the SFIP, as Calitu testified, because an ACV covers the cost to replace an insured item, not repair it. *See SFIP*

art. II(B)(2) (defining actual cost value as “[t]he cost to replace an insured item of property at the time of loss, less the value of its physical depreciation”). Further, Calitu provided little testimony as to these repairs. For example, Calitu did not explain his methodology to calculating the cost of these repairs or what these repairs cover. *See Mahood*, 174 F. Supp. 2d at 293 (finding that the plaintiff failed to satisfy its burden because it was unclear what repairs the invoice covered). Accordingly, Plaintiff has not satisfied its burden to prove the specific, additional amounts owed under the SFIP for repairs to the Piles.

Second, although the Calitu Estimate provides for the repair of the Columns and Beam Assembly, Plaintiff did not present testimony regarding what these line items cover. *See generally* Trial Tr.; Calitu Estimate at 12; *see also Mahood*, 174 F. Supp. 2d at 293 (finding that the plaintiff failed to satisfy its burden because it was unclear what repairs the invoice covered). For example, Plaintiff’s experts did not explain their methodology to calculate the estimates. Accordingly, Plaintiff has not satisfied its burden with respect to the repairs to the Columns and Beam Assembly.

Third, while Plaintiff satisfied its burden to show that the stucco on the Columns suffered damage from flood, Plaintiff’s experts did not delineate between the damage to the stucco on the Columns that was caused from flood as opposed to wind, making it difficult for the Court to identify the amount of damage caused by flood. Further, although Calitu briefly testified as to his methodology to calculate the area of stucco requiring repair, Calitu’s testimony does not help in this regard. Calitu testified that he measured the area of stucco and then rounded up to calculate the area but did not explain why the 800 square feet of stucco required repair, where the 800 square feet of stucco was located, or what process would be performed to repair the stucco. Trial Tr. 76:4–12. Accordingly, Plaintiff has not satisfied its burden as to the repair of the stucco on the exterior of the Property.

Finally, because Plaintiff has failed to prove the amount of damages for the repairs in the Calitu Estimate, the taxes, insurance, permits, and fees estimates associated with those repairs are likewise not covered under the SFIP.

Accordingly, having examined the evidence and made the aforementioned findings of fact and conclusions of law, the Court finds that Plaintiff has not satisfied its burden to prove the specific, additional amount owed under the SFIP. *Mahood*, 174 F. Supp. 2d at 293; *Slater*, 2015 WL 1310984, at \*7. Further, “the [C]ourt may not guess the reasonable price for the repairs covered under the [SFIP].” *Mahood*, 174 F. Supp. 2d at 293. Because “Plaintiff did not meet his burden of proof as to the additional amount due [to it] under the insurance policy,” Plaintiff cannot recover any additional amount under the SFIP. *Id.*

### **III. CONCLUSION**

UPON CONSIDERATION of the foregoing, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Clerk of the Court is instructed to enter judgment in favor of Defendant Bankers Insurance Group against Plaintiff Islamorada Leisure Properties, Inc. The Clerk of the Court is instructed to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of March, 2020.



---

K. MICHAEL MOORE  
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record