IN THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY,

Respondent,

Case No.: SC21-172
L.T. Case No.: 2D19-0130

vs.

JON PARRISH,

Petitioner.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Jon Parrish purchased an all-risk insurance policy from State Farm Florida Insurance Company ("State Farm") to protect his home located in Naples, Florida. (R. 19, 144.) While the policy was in effect, Hurricane Irma devastated Southwest Florida and damaged Mr. Parrish's home. (R. 7.) Mr. Parrish timely reported the loss to State Farm. (R. 7.)

Following the loss, Mr. Parrish retained Keys Claims Consultants, Inc. ("KCC") to provide public adjusting services with regard to the subject claim on a contingent fee basis ("All-Risk Agreement"). (R. 35-26.) John Waligora and Casey James Sims executed the All-Risk Agreement on behalf of KCC. (R. 26.) Bobby Sims, a licensed public adjuster, handled the claim on behalf of KCC prior to any appraisal demands. (R. 23-24.) In October of 2017, Mr. Sims mailed the All-Risk Agreement to State Farm. (R. 23-28.)

In early January of the following year, Mr. Sims forwarded Mr. Parrish's duly executed Sworn Statement in Proof of Loss to State Farm. In his cover letter, Mr. Sims demanded appraisal, named George Keys as Mr. Parrish's appraiser, provided Mr. Key's contact information, and requested that State Farm appoint its appraiser. (R.

29.) Mr. Parrish's proof of loss valued the damage at $495,079.25. (R. 30.) In pertinent part, the policy's appraisal provision provides:

> Appraisal. If you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal. A demand for appraisal must be in writing. You must comply with Your Duties After Loss before making a demand.
>
> Each party will select a qualified, **disinterested** appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. **Each party shall be responsible for the compensation of their selected appraiser.** The two appraisers shall then select a qualified, disinterested umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. Reasonable expenses of the appraisal and the reasonable compensation of the umpire shall be paid equally by you and us.

(R. 40) (emphasis added).

State Farm acknowledged receipt of Mr. Parrish's Sworn Statement in Proof of Loss but disagreed with the amount claimed. (R. 31.) In the same letter, State Farm, despite acknowledging a dispute on the damage amount, refused to participate in appraisal. (*Id.*) State Farm claimed appraisal was premature because it needed to "continue to evaluate the damages." (*Id.*) Finally, State Farm incorrectly contended that Mr. Keys was not disinterested because

he was the "assigned public adjuster who is representing Mr. Parrish in this claim." (*Id.*)

On January 26, 2018, Attorney Ted Corless, on behalf of Mr. Parrish, wrote State Farm to explain that State Farm's position was inconsistent with Florida law. (R. 45-48.) In February of 2018, State Farm sent its estimate and payment to Mr. Sims. (R. 49.) The amount of State Farm's estimate was $295,298.70 and the amount of the payment was $107,156.84. (R. 110.) Although State Farm had concluded its evaluation of the claim and there was a clear dispute as to the amount of loss, State Farm still refused to name an appraiser. (R. 49.) Then, in April, State Farm demanded appraisal, despite Mr. Parrish's previous appraisal demand. (R. 52.) State Farm appointed Bob Davis as its appraiser. (*Id.*) The letter says nothing about Mr. Keys. (R. 51-54.)

Instead of simply proceeding to appraisal, State Farm petitioned the trial court to compel Mr. Parrish to select a different appraiser. At the hearing, the trial court denied State Farm's Petition. (R. 169.) The trial court found that Mr. Keys was "disinterested." (R. 114-115.) The trial court also found that Mr. Keys should not be disqualified in light of the disclosure of the contingency payment. (R. 114-115.)

Further, the trial court specifically rejected the argument that the case of *Fla. Ins. Guar. Ass'n, Inc. v. Branco*, 148 So.3d 488 (Fla. 5th DCA 2014), should be applied to treat the relationship between an insured and a public adjuster the same as the relationship between an insured and his attorney, with regard to the appraisal provision. (R. 115.) State Farm appealed. (DCA R. 5.)

The Second District reversed. The Second District found that the Policy's appraisal provision disqualifies appraisers who hold an interest, whether it be pecuniary, proprietary, or personal, in the outcome of the appraisal process. (DCA R. 310.) The Second District then found that KCC's contingency fee necessarily rendered its president, Mr. Keys, interested in the outcome of the appraisal process. (DCA R. 311.)

The Second District then further held that Mr. Keys was disqualified because KCC represented Mr. Parrish in the underlying claim. (DCA R. 312-13.) Though the court did not decide whether or not Mr. Keys owed Mr. Parrish a fiduciary duty, it nonetheless determined that KCC's contractual and regulatory obligations rendered it interested in the outcome of the appraisal process. (*Id.*) Thus, Mr. Keys could not serve as Mr. Parrish's appraiser.

The Second District recognized that its holding was in direct and express conflict with the Third District's decision in *Brickell Harbour Condo. Ass'n v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018). (DCA R. 314.) Therefore, a conflict was certified and this Court subsequently accepted jurisdiction.

SUMMARY OF ARGUMENT

This case is about the proper interpretation of an insurance policy. Insurance companies control the insurance policy form. Property insurance carriers typically, as an element of exercising that control, place appraisal provisions in their policies to resolve disputes over the value of a loss. More recently, insurers have required that party appointed appraisers be "independent," "impartial," or "disinterested." Such a provision exists in the instant case. As is typical, the appraisal provision in this case makes no reference to the type of authorized compensation a party-appointed appraiser can be paid, nor does the appraisal provision disallow use of public adjusters as appraisers. Read *in pari materia*, the term "disinterested"—which only requires each party to select an appraiser capable of exercising independent judgment—cannot be interposed

to restrict the type of compensation an insured is permitted to use in retaining their appraiser.

The absence of terms restricting party-appointed appraisers' compensation or prohibiting public adjusters is also striking given that Florida, until recently, had over 25 years of uninterrupted case law allowing public adjusters to serve as the appraiser for the insured who hired them. Florida's historical treatment of this issue is consistent with authorities from across the country. Most of these authorities permit the use of contingency fees, even in the cases where the party-appointed appraisers are required to be "disinterested." The existence of this wide swath of authority is, definitionally under Florida law, an ambiguity that must be construed against the insurer.

In contrast to the absence of terms specifying the methods of compensation of the party appraisers, the policy in this case has very specific limitations and specifications for the compensation of the neutral umpire. If State Farm wanted similar limitations to apply to party appraisers, it should have so specified. The term "disinterested," and other similar analogues found in property policies, should not be interpreted to disallow the appointment of any

appraiser unless the appraiser is incapable of exercising their independent judgment in the appraisal process.

State Farm believes each party should only be permitted to hire appraisers who are paid by the hour or by a flat fee. Even this paradigm involves some level of bias. Someone hired by the hour or with a flat fee by another person, lawyer, or insurance company has their judgment influenced by the possibility of future work. The dictionary definition of disinterested does not differentiate between the bias created by the possibility of future work, the bias created by appointment, and pecuniary interests. Under State Farm's interpretation as adopted by the Second District, all are disqualifying.

At bottom, if State Farm wanted a truly neutral process, it can have one: our judicial system—a forum where detailed rules of neutrality exist. What State Farm cannot do, however, is pick and choose the types of interests that are and are not disqualifying after the insured has suffered a covered loss.

The practical effects of the Second District's adoption of State Farm's paradigm will be a significant increase in pre-appraisal litigation which will ultimately undermine the entire purpose of appraisal—the efficient resolution of claims. This is more than a

hypothetical fear. Following the Second District's opinion, the pre-appraisal disqualification battles have already begun.

Finally, should appraisal even remain a viable method of dispute resolution, the hourly/flat fee only model necessarily benefits insurance companies at the expense of insureds—particularly in small losses. If an insured with a small loss is required to hire someone on an hourly basis and does not have access to the court system with the accompanying right to pursue attorney's fees under FLA. STAT. § 627.428, the appraisal process will be stacked heavily against insureds at a time where they are paying more and more money, for less and less benefits.

STANDARD OF REVIEW

"With regard to an order compelling appraisal, we review the trial court's factual findings under a competent, substantial evidence standard. Our review of the trial court's application of the law to the facts is *de novo*." *Fla. Ins. Guar. Ass'n, Inc. v. Lustre*, 163 So. 3d 624 (Fla. 3d DCA 2015) (citation omitted).

ARGUMENT

I. THE SECOND DISTRICT ERRED BY HOLDING GEORGE KEYS IS NOT QUALIFIED TO SERVE AS JON PARRISH'S APPRAISER.

If State Farm desired a prohibition on contingency fees, it, as the master of its own policy, could have included language that limited how Mr. Parrish paid his appointed appraiser. *See Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828, 830 (Fla. 1997) (discussing how insurers bear the burden of incorporating unambiguous language into policies). Such limiting language is not foreign to State Farm; indeed, State Farm placed limitations on how the parties paid the umpire. (R. 40.) State Farm cannot use the judicial process to engage in post-loss underwriting. State Farm must live with the same interpretation of "disinterested" set forth in *Rios*, *Galvis*, and *Brickell Harbour*: that "disinterested" does not preclude an insured from paying an appraiser a contingency fee or using his public adjuster.

The Second District then held that Mr. Keys was also disqualified as a result of KCC's contractual relationship with Mr. Parrish. In essence, the court found that because KCC was authorized to negotiate with State Farm on Mr. Parrish's behalf, and because Florida law regulating the activities of public adjusters prohibited Mr. Keys from acting in any way that would be prejudicial towards Mr. Parrish, Mr. Keys was interested in the outcome of the

appraisal. Thus, the contractual relationship served as an independent basis for Mr. Keys' disqualification.

The Second District's holding is contrary to the express terms of the policy and established Florida law. Therefore, the Second District erred when it ruled that a contingency fee agreement precludes an appraiser from being disinterested as a matter of law and when it held the All-Risk Agreement also precluded Mr. Keys from being disinterested. Thus, Mr. Parrish requests that this Court reverse.

A. THE POLICY DOES NOT PROHIBIT MR. PARRISH FROM COMPENSATING HIS APPRAISER WITH A CONTINGENCY FEE.

The Second District concluded that Mr. Keys is not qualified to serve as Mr. Parrish's adjuster because he is not "disinterested," as a result of the contingency arrangement contained in the All-Risk Agreement. (DCA R. 312.) The Second District reached this conclusion despite the fact that "the policy does not proscribe a particular method of payment (the policy simply states each party is 'responsible for the compensation' of their respective appraisers)." (*Id.*) This is peculiar because since 1998, the law in Florida has been that the terms "disinterested," "impartial," and "independent" do not

preclude an insured from paying its appraiser a contingency fee. *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998); *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998); *Brickell Harbour*, 256 So. 3d 245; *see State Farm Fla. Ins. Co. v. Sanders*, 327 So. 3d 342 (Fla. 3d DCA 2020); *but see State Farm Fla. Ins. Co. v. Crispin*, 290 So. 3d 150 (Fla. 5th DCA 2020).

Florida's Third District has repeatedly addressed the question of whether a contingency fee precludes an appraiser from being "disinterested" or "impartial." *Rios*, 714 So. 2d 547; *Galvis*, 721 So. 2d 421; *Brickell Harbour*, 256 So. 3d 245; *see Sanders*, 327 So. 3d 342. Without waiver, the Third District has held paying an appraiser a contingency fee does not preclude an appraiser from being "disinterested," "impartial," or "independent." *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 248-49; *see Sanders*, 327 So. 3d 342.

In *Rios*, the appointed appraiser was "to be compensated on a contingency percentage of the award." *Rios*, 714 So. 2d at 549. The court stated that "[t]he threshold question presented by the parties is how to interpret the term 'independent appraiser' as used in the policy." *Id.* Just as State Farm argued below, the insurer in *Rios*

urged the court to "rule that an appraiser cannot be 'independent' whose pay is based, in whole or in part, on a contingent fee percentage of the award." *Id.* The insurer, like State Farm, argued "that a contingent fee arrangement gives the appraiser a direct financial interest in the award, and renders the appraiser not 'independent' under this insurance contract." *Id.*

The court rejected the insurer's argument for two reasons. *Id.* First, "the appraisal clause now before us states that **'each appraiser shall be paid by the party selecting that appraiser.' It does not limit the type of compensation which may be paid."** *Id.* (emphasis added). Applying Florida's well-established rule requiring an insurance policy be interpreted in favor of the insured, the court refused to interpret the term "independent" to limit how a party compensates its appointed appraiser. *Id.* at 549-50.

Second, the court used the framework set forth in the code of ethics for arbitrators as a guidepost for appraisals. *Id.* at 550. The court noted that under the arbitration ethics code, an arbitrator must disclose a direct or indirect financial interest in the outcome. *Id.* Disclosure, according to the court, cures any prejudice and prevents needless court intervention. *Id.*

Shortly after deciding *Rios*, the Third District considered *Galvis*. *Galvis* presented the same issue as *Rios*. *Galvis*, 721 So. 2d at 421. The only difference between *Rios* and *Galvis* was that the policy in *Galvis* required "each party to select a 'competent and **disinterested** appraiser,'" rather than an "independent one." *Id.* (emphasis added). The court held the distinction did not make "any legal difference." *Id.* Thus, for the reasons set forth in *Rios*, the *Galvis* Court also declined to adopt a blanket rule that a contingency fee renders an appraiser incompetent and interested. *Id.*

Twenty years later, the Third District again discussed the impact of a contingency fee arrangement and whether such an arrangement rends an appraiser partial, interested, or incompetent. *Brickell Harbour*, 256 So. 3d at 248-49. For a third time, the court held "an appraiser's direct or indirect financial interest in the outcome of the arbitration, including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser." *Id.* at 249 (cleaned up). The court premised this holding on the policy's requirement that the respective parties pay for their own appraiser:

But tellingly, the appraisal provision in the Policy states

> that "Each party will: a. Pay its chosen appraiser; and b. Bear the other expenses of the appraisal and umpire equally." The tie-breaking third appraiser—often referred to as the "umpire" (as in the Policy before us) or "neutral"—provides the real impartiality. If an appraiser acts unprofessionally, skews what should be objective calculations regarding materials and labor costs, and puts the proverbial thumb on the scale, the umpire is the safeguard empowered to reject such efforts by siding with the other party-appointed appraiser. Alternatively, a professionally-qualified umpire may negotiate one or both of the party-appointed appraisers into a reasonable compromise.
>
> We conclude, after consulting our own decision in *Rios*… that **'impartiality' means something other than the 'dictionary definition' as it relates to appraisers appointed and paid by the parties.**

Id. (citations omitted) (emphasis added).

Like, *Rios*, *Galvis*, and *Brickell Harbour*, the policy's appraisal provision requires each party to pay for its own appraiser. (R. 9.) And, similar to *Rios*, *Galvis*, and *Brickell Harbour*, the policy does not address how a party pays its appraiser. (R. 9.) Finally, like, *Rios*, *Galvis*, and *Brickell Harbour*, the policy does not define the term State Farm contends precludes a contingency fee— "disinterested." (R. 9.) Thus, as in *Rios*, *Galvis*, and *Brickell Harbour* the term "disinterested" cannot be interpreted to "limit the type of compensation which can

be paid." *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 249.

State Farm has characterized *Rios* and *Galvis* as outdated because those cases "incorrectly placed substantial reliance on the Code of Ethics," which has since changed. (DCA R. 55-57.) State Farm overlooks that *Branco* did not disagree with the policy interpretation analysis conducted by *Rios*, *Galvis*, and *Brickell Harbour* in deriving the meaning of "independent," "disinterested," and "impartial." Indeed, *Branco* did not concern an appraiser paid on a contingency fee. Regardless of how this Court addresses the appraisal versus arbitration analogy, *Branco* does not undermine the true rationale of *Rios*, *Galvis*, and *Brickell Harbour*: an undefined term ("independent," "disinterested," or "impartial") cannot limit how a party pays its appointed appraiser where the policy requires each party to pay for its own in appraiser without express limitation. *Rios*, 714 So. 2d at 549-50; *Galvis*, 721 So. 2d at 421; *Brickell Harbour*, 256 So. 3d at 249. Further, *Brickell Harbour*, which was decided after the Code of Ethics was modified, reaffirmed the Third District's reasoning and holding in *Rios* and *Galvis* and confirmed that those

courts simply used the code as a guide and did not rely upon them. *Brickell Harbour*, 256 So. 3d 249.

Verneus v. Axis Surplus Ins. Co., Case No. 16-21863-CIV, 2018 WL 3417905 (S.D. Fla. 2018) (Goodman, Mag.), does not compel a different conclusion. First, *Verneus* did not concern interpretation of an insurance policy—it concerned the application of a court order. *Id.* at *4-5. Therefore, the rules of interpretation used in *Rios*, *Galvis*, and *Brickell Harbour* did not apply. This, in turn, caused the court to disregard the policy interpretation analysis used in *Rios*, *Galvis*, and *Brickell Harbour*.

Second, *Verneus* never held a contingency fee rendered an appraiser interested or partial as a matter of law. *Id.* at *5. The Magistrate indicated that if, as here, the assessment was limited to an appraiser being paid on a contingency fee basis, then the appraiser could, in fact, serve as an appraiser. *Id.* In sum, *Verneus* is a federal decision "[b]ased on [its] unique and special combination of circumstances…" that do not exist here, and, therefore, does not require Mr. Keys be disqualified as Mr. Parrish's appraiser because he is paid a contingency fee. *Id.* at *7.

Despite its self-professed unique circumstances, several recent cases have purported to follow *Verneus*. These decisions incorrectly apply *Verneus*. Though purportedly relying on *Verneus*, the court in *Landmark Am. Ins. Co. v. Richardt*, Case No. 2:18-cv-600, 2019 WL 2462865 (M.D. Fla. Jun. 13, 2019) (Steele, J.), disregarded *Verneus'* statement that if the only issue was an appraiser being paid on a contingency fee, then the appraiser should not be disqualified. *Compare Richardt*, 2019 WL 2462865 at *3; *with Verneus*, 2018 WL 3417905 at *5.

Richardt also relied on *The Shores at Coco Plum Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.*, Case No. 18-23910-Civ, 2019 WL 2223172 (S.D. Fla. Apr. 29, 2019) (Cooke, J.). While *The Shores* considered *Rios'* code of ethics analysis, it never addressed the policy interpretation analysis utilized by *Rios*, *Galvis*, or *Brickell Harbour*. *The Shores*, 2019 WL 2223172 at *2. *Richardt* suffers from the same deficiency—it failed to consider the policy interpretation analysis conducted by *Rios*, *Galvis*, and *Brickell Harbor* and focused on the code of ethics analysis.

Most courts that conduct a policy interpretation analysis, however, arrive at the same conclusion as *Rios*, *Galvis*, and *Brickell*

Harbour. In *Owners Ins. Co. v. Dakota Station II Condo., Ass'n, Inc.*, 443 P. 3d 47 (Colo. 2019), the Colorado Supreme Court considered whether a contingency fee agreement rendered an appraiser partial as a matter of law. *Id.* at 53-4. The Colorado Supreme Court "decline[d] to hold that [contingency fee arrangements] render appraisers partial as a matter of law." *Id.* at 54.

In *White v. State Farm Fire & Cas. Co.*, 809 N.W. 2d 637 (Mich. Ct. App. 2011), State Farm, like it did below, argued that an insured's appraiser was not "independent" because the insured paid the appointed appraiser a contingency fee. *Id.* at 421. In *White*, like here, the appointed appraiser was a public adjuster that had a signed agreement with the insured for ten percent of the overall amount paid by State Farm. *Id.* at 424. The court looked to other jurisdictions for assistance and turned to *Rios* and *Galvis*. *Id.* at 426. The *White* Court cited *Rios* and *Galvis* as cases where the terms "independent" and "disinterested" did not prevent an appraiser from receiving a contingency fee for the appraisal. *Id.* Ultimately, the *White* Court followed *Rios* and held "that a contingency-fee arrangement does not prevent an appraiser from being 'independent'...." *Id.* at 428.

Similarly, in *Hozlock v. Donegal Companies/Donegal Mut. Ins. Co.*, 745 A. 2d 1261 (Pa. Super. Ct. 2000), the court addressed "whether the mere existence of a contingency fee agreement between a party and his appointed appraiser renders the appraiser *per se* unfit…." *Id.* at 1263. The court held "that the mere existence of a contingency fee agreement does not, in and of itself, render an otherwise 'competent' appraiser unfit." *Id.* at 1265. In support, the court cited *Rios*. *Id.*

In its opinion, the *Hozlock* Court cited a *Branco-esq* decision: *Donegal Ins. Co. v. Longo*, 610 A. 2d 466 (Pa. Super. Ct. 1992). *Longo*, like *Branco*, involved a case where the insured attempted to appoint his attorney as his appraiser. *Longo*, at 468. The *Longo* Court held that the fiduciary relationship imposed by the attorney-client relationship precluded the attorney from exercising fair judgment in evaluating the loss. *Id.* at 468-69. The *Hozlock* Court distinguished the fiduciary duty flowing from an attorney-client relationship from the typical insured-appraiser relationship. *Hozlock*, 745 A. 2d at 1264.

Two district courts recently departed from the precedent set by *Rios*, *Galvis*, and *Brickell Harbour*. In *State Farm Fla. Ins. Co. v.*

Valenti, 285 So. 3d 958 (Fla. 4th DCA 2019), the Fourth District held that a public adjuster who was compensated with a contingency fee, had inspected the property prior to appraisal, and submitted the underlying claim to the insurer was not disinterested, and thus could not serve as the insured's appraiser. *Valenti*, 285 So. 3d at 960. The *Valenti* Court did not, however, accept State Farm's invitation to hold that an insured's appraiser who holds a contingency fee cannot be disinterested as a matter of law. *Id.* at 960.

State Farm was finally able to find a district court willing to reach such a conclusion in *Crispin*, 290 So. 3d at 150. There, the Fifth District held that "any ordinary meaning of the term 'disinterested' precludes a financial stake in the outcome." *Id.* at 153. The *Crispin* Court found that *Rios* was not instructive because "'[i]ndependent,'…carries a very different meaning than 'disinterested.'" *Id.* (citations omitted).

The *Valenti* and *Crispin* panels disregarded the precedents set by their sister courts without reasonable justification. *Valenti* relied upon a subsequently withdrawn Third District opinion to find that *Rios* and *Galvis* had "now-questionable futures." *Valenti*, 285 So. 3d at 959-60. In *Crispin*, the court merely certified conflict with *Galvis*

without any justification other than reaching a different conclusion. *Crispin*, 290 So. 3d at 153. Both courts wholly fail to even cite *Brickell Harbour*, which reaffirmed the precedent set by *Rios* and *Galvis*. *See Valenti*, 285 So. 3d at 958; *Crispin*, 290 So. 3d at 150.

But *Valenti* and *Crispin* suffer from an even more glaring infirmity. Insurance policies must be interpreted *in pari materia*. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007) (quoting *State Farm Fire and Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1074-75 (Fla. 1998)). Neither court conducted such an analysis. This is evidenced by their failure to analyze the fact that the policies, like the policy in this case, did not restrict the type of compensation either party could employ in paying their party-appointed appraiser. For this reason alone, this Court should decline to find these opinions persuasive.

Collectively, *Rios*, *Galvis*, *Brickell Harbour*, *Branco*, *Hozlock*, *Longo*, *White*, *Dakota Station*, and even *Verneus* are harmonized to hold that **the dispositive question in determining partiality or interest is whether the appointed appraiser can exercise his or her independent judgment in rendering the value of the loss.** Each of these cases recognize that compensation on a contingency

fee basis, though perhaps undesirable, does not, in and of itself, render an appointed appraiser partial, interested, or incompetent as a matter of law.

Regardless, at a minimum, even if this Court disagrees with this analysis, a conflict exists between *Verneus*, *The Shores*, *Valenti*, *Crispin* and *Richardt* on the one hand and *Rios*, *Galvis*, and *Brickell Harbour* on the other—which is proof that the phrase "disinterested" is ambiguous. *See Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (finding policy provision ambiguous and citing as "proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."). Florida's rules of insurance policy interpretation require this ambiguity be resolved in favor or Mr. Parrish to mean "disinterested" does not preclude him from paying Mr. Keys a contingency fee.

A contrary rule, like State Farm's, fails to recognize the reality that "in most cases, an appraiser will have at least some bias towards his appointing party, an appraiser paid with a contingency fee will not necessarily be more biased towards his appointor than one paid

with a flat fee." *Hozlock*, 745 A. 2d at 1265. "Caselaw should reflect that reality." *Id.* Indeed, the inherent bias of party-appointed appraisers is even recognized by the insurance defense bar. Trimble, John C. and Meghan Ruesch, *IT'S A TWISTER!: The Appraisal Process and the Insurer's Dilemma*, 58 NO. 10 DRI FOR DEF. 40 (Oct. 2016) ("It goes without saying that any appraiser chosen by either side will have some bias toward the party appointing that appraiser…."). Thus, even State Farm's preferred hourly/flat fee-only approach involves some level of bias because an individual or company hired by the hour necessarily has their judgment influenced by the possibility of future work. *Hozlock*, 745 A. 2d at 1265; *White*, 809 N.W. 2d at 643 (Shapiro, J. concurring) (noting that the hourly fees of insurer's appraiser exceeded contingency fees of policyholders' appraisers by 42% over the last fourteen appraisals conducted).

B. THE POLICY DOES NOT PROHIBIT MR. PARRISH FROM APPOINTING HIS PUBLIC ADJUSTER AS HIS APPRAISER.

The Second District also held that KCC has a "separate, broader, and glaringly apparent interest…in the appraisal process by virtue of the fact that *KCC is representing Mr. Parrish in the underlying dispute.*" (DCA R. 312) (emphasis original). According to the lower

court, KCC's obligations under the All-Risk Agreement, combined with KCC's professional obligations as public adjusters, barred its president, Mr. Keys, from being disinterested as a matter of law. (DCA R. 312-13.) The court so held despite failing to find the existence of a fiduciary duty. (*Id.*). This holding was also in error.

The lower court's departure from *Branco*'s duty threshold for disqualification is untenable. Such a broad definition of "disinterested" would lead to the disqualification of nearly, if not all, "competent" appraisers. Under the Second District's definition, even appraisers who are paid by the hour, or with flat fees, would be considered to be interested, despite their lack of a direct pecuniary interest in the outcome of any individual appraisal. Not only does this holding create a myriad of practical issues, but it is also inarguably not what was intended by the drafters of the policy, who attempted to create a system for the efficient resolution of claims.

This Court should apply the standard set forth in *Branco* and require disqualification only in circumstances where a legal duty overrides an appraiser's ability to exercise their own independent judgment. This standard is faithful to well-established Florida law which has long permitted the appointment of an insured's public

adjuster. Neither the All-Risk Agreement, nor Mr. Keys' obligations as a public adjuster stripped him of his independent judgment. To the contrary, his only obligations were to evaluate the claim fairly and honestly. Thus, he was not disinterested as a matter of law.

1. State Farm's rule leads to a significant increase in pre-appraisal litigation.

State Farm "suggests that payment of an appraiser by contingent fee is corrupting, but that payment by hourly fee is not." *White*, 293 Mich. App. at 431 (Shapiro, J., concurring). But "[t]his is a distinction without a difference." *Id.* An "appraiser appointed by [State Farm] …makes his living acting on behalf of insurance companies and **it is either naïve or disingenuous to suggest that he will continue to be hired by them if they do not feel that the results he obtains are in their interest.**" *Id.* (emphasis added). Indeed, "[i]t is too great a task for the average man, no matter how honest his intentions may be, to act as favorably to one side as to the other, when his livelihood in the past was derived from one of the parties, and the hope of future employment rests upon the same party." *Sterling Spinning & Stamping Works v. Knickerbocker Ins. Co.*, 137 Misc. 349, 351-52 (N.Y. Sup. Ct. May 8, 1930) (Spielberg, Ref.).

The disqualification of insurers' appraisers paid by the hour or with flat fees on the grounds that they are not disinterested is far from a hypothetical scenario. Courts applying the dictionary definition of disinterested to the entire appraisal clause have repeatedly disqualified insurance companies' appraisers due to their interest in current and/or future work from insurers. *See Coral Realty, LLC v. Federal Ins. Co.*, Case No. 157205/2016, 2017 WL 720294 (N.Y. Sup. Ct. Feb. 21, 2017) (Cohen, J.); *TAMKO Bldg. Products, Inc. v. Factual Mut. Ins. Co.*, 890 F. Supp. 2d 1129 (E.D. Mo. Aug. 12, 2012) (Perry, J.); *Gebers v. State Farm Gen. Ins. Co.*, 45 Cal. Rptr. 2d 725 (Cal. Ct. App. 1995); *Hill v. Star Ins. Co. of Am.*, 200 N.C. 502 (N.C. 1931); *Coon v. Nat'l Fire Ins. Co. of Hartford*, 126 Misc. 75 (N.Y. Sup. Ct. Sept. 29, 1925) (Devendorf, J.), *aff'd*, 246 N.Y. 594 (N.Y. 1925); *Sterling Spinning*, 137 Misc. at 349.

In *Coon*, 126 Misc. 75, a large cheese-storing and manufacturing plant was destroyed by fire. *Id.* at 75-76. The building was covered by a property insurance policy which contained an appraisal provision. *Id.* at 76. The provision, like the one in Parrish's policy, called for each party to appoint a "competent and disinterested" appraiser. *Id.*

The appraisal awarded the insured, Edward Coon, an amount that fell far short of the value of the loss. *Id.* Further, following the appraisal, Mr. Coon learned that the insurer's appraiser, Fred Millard, was actually a professional appraiser for insurers, contrary to the prior representation of the insurer, National Fire. *Id.* at 77. Mr.Coon then brought suit to set aside the appraisal award and recover the fair value of the loss, arguing that National Fire's appraiser was not disinterested as required under the policy. *Id.*

In determining whether or not the appraiser was qualified the court asked: "Was Millard disinterested? Were his relations with the adjustment bureau and the insurance companies such that he could and would act freely, without favor or fear?" *Id.* After examination of the record, the court determined the answer to those questions was a resounding "no":

> That he was not a disinterested appraiser is apparent. For years he had been associated with the insurance companies and their representatives. During this long period he received substantial sums of money from them to compensate him for his work and for representing them at those many appraisals and estimates. **Undoubtably he rendered satisfactory returns for his compensation. Otherwise he would not have been continuously designated by the insurers.** The appraisers should be disinterested, **not only without pecuniary**

> **interest, but impartial, fair, open-minded, and substantially indifferent in thought and feeling between the parties, and without partisanship and bias either way.**
>
> …
>
> He was not indifferent, not without pecuniary interest, not without prospect of gain or loss, but was in a close and continuing relationship to the insurers and the adjustment agency. He was experienced and trained, competent, of course; but, **from the sentiment of past service and hope that it continue, his position presumably was that of an advocate rather than of a disinterested appraiser.**

Id. at 78 (citing *Young v. AEtna Ins. Co.*, 101 Me. 294 (Me. 1906)) (emphasis added).

The *Coon* Court was far from alone in reaching such a determination. In *TAMKO Bldg. Products, Inc. v. Factual Mut. Ins. Co.*, 80 F. Supp. 2d 1129 (E.D. Mo. Aug. 12, 2012) (Perry, J.), the court found that "individuals selected to act as appraisers…must not be interested, biased, or prejudiced. An appraiser may be considered interested in a number of ways, such as being **'frequently or habitually employed by insurers as an appraiser**…An appraiser may also become biased by having a financial interest in the outcome of the appraisal, **even if indirectly**…**This is a strict standard.**'" *Id.* at 1140 (citations omitted) (emphasis added).

In light of decisions like *Crispin* and *Valenti* insureds in Florida are already following State Farm's lead in seeking the disqualification of the other side's appointed appraiser. In *Thomas v. State Farm Fla. Ins. Co.*, 314 So. 3d 653 (Fla. 3d DCA 2021), an insured, Sonia Trillo, was in a dispute with State Farm regarding the value of a loss caused by Hurricane Irma. *Thomas*, 314 So. 3d at 654. Ms. Trillo retained the services of Scott Thomas to act as her appraiser. *Id.* State Farm appointed Henry Diaz. *Id.* When the appraisers were unable to agree upon an umpire, State Farm filed a Petition to Select Umpire in the trial court. *Id.* Thereafter, Ms. Trillo filed a motion to disqualify Mr. Diaz on the grounds that Mr. Diaz was not disinterested "because he used to work for State Farm and now derives a significant amount of his income serving as State Farm's appraiser." *Id.* (cleaned up). State Farm decided to retaliate by serving Mr. Thomas with third-party discovery. *Id.*

Thomas is indicative of what the future will look like should State Farm prevail. Rather than quickly resolving disputes over the value of claims without the intervention of the courts, appraisal will turn into yet another significant burden on Florida's already strained judicial resources. In fact, the underlying claim at issue in *Thomas* is

still in *pre-appraisal* litigation. *State Farm Fla. Ins. Co. v. Trillo*, Case No. 2018-030480-CA (Fla. Cir. Ct. Aug. 11, 2021) (Johnson, J.). Undoubtably, this is not what was intended when the drafters of the policy included the term disinterested.

It is safe to say State Farm does not wish for a scenario where *their* appraisers would be subject to disqualification. In truth, State Farm doesn't actually want to ensure appraisers are disinterested. Their actual goal is to ensure that appraisers hold only the types of interests *State Farm prefers*. State Farm is free to employ such a paradigm. But in order to do so they must explicitly write such terms into the policy. Since they did not, this Court should follow *Rios*, *Galvis*, and *Brickell Harbor* and find that the term "disinterested" was intended to mean "something other than the dictionary definition[.]" *Brickell Harbour*, 256 So. 3d at 249.

2. Neither the All-Risk Agreement nor Florida law creates a fiduciary duty owed by Mr. Keys to Mr. Parrish.

Clearly, the standard set forth in *Branco* is more faithful to the intent of the drafters of the policy and should be employed by this Court. Below, State Farm relied on *Branco* to support its position that Mr. Keys owes Mr. Parrish a fiduciary duty and thus should be

disqualified. A careful reading of *Branco* and other Florida cases, however, reveals that a fiduciary relationship does not exist between Mr. Keys and Mr. Parrish. Thus, Mr. Keys would not be disqualified under that standard.

In *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005), *abrogated on other grounds by*, *Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567 (Fla. 2010), Home Insurance Company ("Home") retained a Crawford & Company insurance adjuster, Rinker, to service its insurance claims, including a December 1992 automobile accident involving Home's insured, Mr. James. Home only extended $99,000 in settlement authority to Rinker. Home required Rinker to obtain Home's direct involvement for any claim that exceeded this authority. Rinker failed to timely advise Home of the James claim. The James claim went to trial and resulted in a verdict of $743,857 in favor of James. Rinker's alleged mishandling of the James claim forced Home to settle with James for the full verdict amount. *Home*, 890 So.2d 1186, at 1187. Home then sued Rinker for breach of contract, fraudulent concealment, and breach of fiduciary duty. The trial court granted directed verdict on Home's claims for fraudulent concealment and breach of fiduciary

duty in favor of the defendant. The jury, however, found in favor of Home on the contract claim and awarded the full amount claimed for compensatory damages of $243,537. *Id.*

In defining Home's remedies against Rinker, the Fourth District centered its analysis on the parties' contractual relationship. The court noted that under Florida law, an independent insurance adjuster's duties arise out of the contract between the company and adjuster. *Id.*, at 1189 (citing *King v. Nat'l Sec. Fire & Cas. Co.*, 656 So. 2d 1338, 1339 (Fla. 4th DCA 1995)). "An insurance adjuster acts on behalf of the insurer. The duties of an insurance adjuster vary and are defined by the terms of the contract between the insurer and the adjuster." *Id.* (citations omitted). "[B]reach of this duty subjects the adjuster to liability for the insurer's resulting loss and the insurer can seek indemnity for liability accruing from the adjuster's negligence." *Id.* The *Home* Court then opined:

> In this case, the contract between the parties imposes contractual duties upon Crawford. **It did not impose any fiduciary duties.** The parties were dealing at arm's length. Neither can be considered unsophisticated. There was no evidence that the failure to notify Home of the verdict for sixty-six days was anything other than negligent. A final judgment in the amount obtained was not going to be concealed.

Id. at 1188 (emphasis applied).

Home holds that a fiduciary relationship does not exist between an adjuster and person or entity by operation of law. If, as State Farm contends, Florida's Administrative Code ("Code") or the Ethical Requirements for All Adjusters ("Ethical Requirements") automatically imposed on an adjuster a fiduciary duty, then *Home* need not have engaged in the contract analysis it did.[1] As illustrated by *Home* then, any attempt by State Farm to analogize public adjusters to lawyers, like in *Branco*, fails.

Further, contrary to the holding of the Second District, there is nothing in the Code or the Ethical Requirements that require an adjuster to take on the role of an advocate in appraisal proceedings. (DCA R. 312-13); *see* FLA. ADMIN. CODE 69B-220-201; *see also* FLA. STAT. § 626.878. The Second District fails to explain how an insured would be prejudiced by a fair and honest evaluation of the loss. (DCA

[1] The regulations do not describe: (i) the insurance adjuster as an "agent" of the insured, (ii) recognize the insured as being the "weaker party" in the insured/insured adjuster relationship, or (iii) otherwise describe the insurance adjuster's role as one of dispensing advice or counsel. The regulations do not demand the insurance adjuster's loyalty to an insured, or even prioritization of the insured's interests, but, rather, only mandates fair and honest treatment of the insured.

R. 313.)

Nothing in the All-Risk Agreement creates a principal/agent relationship between Mr. Keys and Mr. Parrish. Further, the All-Risk Agreement does not state Mr. Keys shall be Mr. Parrish's agent. Like *Home*, the All-Risk Agreement makes clear that KCC is an independent party and that KCC does not provide any legal representation, legal advice, or legal interpretations. Indeed, the All-Risk Agreement gives KCC the exclusive right to designate "…[e]xperts who may be necessary to properly evaluate the damages…" and "…incur expert costs KCC deems necessary to substantiate this claim." Mr. Parrish and KCC are sophisticated parties—just like in *Home*. (R. 144:2-3). Thus, as in *Home*, an arms-length transaction between sophisticated parties resulted in Mr. Keys becoming Mr. Parrish's appraiser. Further, business relationships are not confidential relationships that impose a fiduciary duty. *See Linville v. Ginn Real Estate Co., LLC*, 697 F. Supp. 2d 1302 (M.D. Fla. Mar. 10, 2010) (Scriven, J.) (applying Florida law).

3. Prohibiting public adjusters from serving as appraisers will deny access to appraisal for insureds and allow insurers to take advantage of insureds.

Insurance companies possess superior economic power to the vast majority of Florida insureds. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000). "[T]o level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts," Florida enacted FLA. STAT. § 627.428. *Id.* Despite being a condition precedent to suit, appraisal does not have a fee-shifting provision like § 627.428. *See* FLA. STAT. § 627.428.

Galvis and *Rios*, however, rectify this problem by permitting insureds to pay their appointed appraisers a contingency fee. Contingency fee payments enable insureds of limited economic means to access competent individuals thereby leveling the playing field. Adopting State Farm's hourly/flat fee only rule embraces a framework favoring insurance companies that have the economic means to pay for representation on an hourly/flat fee basis. Most insureds, however, cannot afford to pay an appraiser an hourly or flat rate up front to evaluate their claims and will not be able to avail themselves of the appraisal process. Thus, insurance companies, like State Farm, are incentivized to invoke appraisal when they know an

insured cannot afford to pay an appraiser as a coercive tactic to induce an insured to accept the insurer's "low-ball" evaluation of the amount of loss.

The effect of such a rule becomes particularly wanting when viewed through the lens of smaller claims—the reality of the overwhelming majority of residential property claims. In such cases, contingency fees actually provide the insured with the most economic protection because the contingency fee percentage pales in comparison to the hourly cost. In such instances fighting insurance companies just to attain benefits already paid for will be cost prohibitive for large swaths of Floridians.

Finally, State Farm's purported rule creates an untenable process because if the insured cannot represent him or herself, and an insured cannot ask a lawyer to be its appraiser, *Branco*, 148 So. 3d at 495-96, and, under State Farm's rule, cannot appoint a public adjuster, then an insured is left without anyone to appoint as an appraiser in a meaningful cost effective manner. Thus, from the perspective of an insured, they will be forced to incur great expense to secure a benefit already paid for, at a time when insureds are paying more money, for less benefits. *Compare e.g.*, FLA. STAT. §

627.7011 (2021); *with* FLA. STAT. § 627.7011 (2020) (abandoning requirement that insurers provide reimbursement for the repair, replacement, and installation of roofs where the roof insured is over ten years old); *see* Leslie Scism and Arian Campo-Flores, *Insurance Costs Threaten Florida Real-Estate Boom*, WALL ST. J. (Apr. 25, 2021 5:07 PM), https://www.wsj.com/articles/insurance-costs-threaten-florida-real-estate-boom-11619343002 (noting double-digit rate increases in 2021).

CONCLUSION

The Second District erred by reversing the trial court's order permitting Mr. Keys to serve as Mr. Parrish's party-appointed appraiser. Accordingly, Mr. Parrish requests this Court reverse and remand with instructions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with font requirements; it is typed in Bookman Old Style 14-point font and type, has been typed using the Bookman Old Style 14-point font, is proportionately spaced, and contains 7,468 words, as required by the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2022, a true and correct copy of the foregoing was electronically filed with the Florida Supreme Court through Florida E-Filing Portal, which will send a copy to the following:

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