IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANNY LEWIS	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:24-cv-02697
	)	
	)	
FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, DANNY LEWIS ("**Plaintiff**"), by and through his counsel pursuant to Fed.R.Civ.P. 56 and applicable Northern District of Illinois Local Rules, and for his Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (the "**Motion**"), submits the following:

I. INTRODUCTION

This matter is a declaratory relief, breach of contract, and insurance bad faith dispute brought by Plaintiff against his property insurance company, Foremost Insurance Company Grand Rapids, Michigan ("**Defendant**").

Defendant issued an insurance policy (the "**Policy**") to Plaintiff that provides coverage for direct physical loss to Plaintiff's property (the "**Property**") during the policy period. The Policy contains a provision on appraisals (the "**Appraisal Provision**") that can be invoked only if the parties "fail to agree on the amount of loss." If the parties "fail to agree on the amount of loss" and an appraisal determines the amount of the loss to equal or exceed the full amount which was demanded prior to the appraisal, then Defendant is mandated to pay Plaintiff's appraiser's fee.

As highlighted herein, Plaintiff is entitled to judgment as a matter of law on all three (3) counts of his Complaint. Specifically, Plaintiff is entitled to a judgment as a matter of law on Count I: Declaratory Relief and Count II: Breach of Contract, because there is no genuine dispute of material fact that Defendant has breached the Policy by refusing to pay for Plaintiff's appraiser's fee even though Plaintiff demanded Policy limits before the appraisal (i.e. $702,920.40), and the appraisal determined the amount of loss to be nearly double Plaintiff's Policy limits (i.e. $1,308,622.11).

Further, Plaintiff is entitled to a judgment as a matter of law on Count III: Violations of Section 155 of the Insurance Code, because there is no genuine dispute of material fact that Defendant has acted vexatiously, unreasonably, and in bad faith in its handling of Plaintiff's Claim.

For these reasons, and others detailed herein, Plaintiff is entitled to judgment as a matter of law on all three (3) counts of Plaintiff's Complaint, and all other relief this Honorable Court deems just and proper.

II. STATEMENT OF MATERIAL FACTS

The facts material to Plaintiff's Motion for Summary Judgment are undisputed.

At all times relevant to the Complaint, Plaintiff was the owner of a property located on and around 1308 N. Homan Ave., Chicago, IL 60651 (the "**Property**"). *See* Plaintiff's Statement of Material Undisputed Material Facts in Support Of Plaintiff's Motion. *See also* Affidavit of Plaintiff attached hereto as Exhibit 1, ¶9. On or around April 7, 2021, Plaintiff paid Defendant $3,404.00 in premiums to obtain insurance protection for the Property by and through Defendant's insurance policy number 381-5003582947-02 with all endorsements (the "**Policy**"). *Id.*, ¶10. The Policy was in effect from April 7, 2021 until April 7, 2022. *Id.*, ¶11.

The Policy contains a provision on appraisals (the "**Appraisal Provision**"), which the parties agree states the following in relevant parts:

> *5. **Appraisals** is changed to read:*
>
> ***Appraisals**. If you and we fail to agree on the amount of loss, then both you and we have the right to select an appraiser within 20 days from the day of disagreement. The appraisers will determine the amount of loss....*
>
> *If the amount of loss is determined to equal or exceed the full amount which you demanded prior to the appraisal, then we will pay for your appraiser's fee and the umpire's fee. Id.*, ¶12. *See also* a true and correct copy of the undisputed Appraisal Provision is attached hereto as **Exhibit 2.**

On or around May 19, 2021, the Property sustained a substantial fire loss (the "**Loss**") which resulted in "direct, sudden and accidental physical loss to the Property" that is covered by the Policy. *Id.*, ¶13. Plaintiff then filed a claim with Defendant in relation to the Loss under claim number 7002884694-1-1 (the "**Claim**"). *Id.*, ¶14. Defendant subsequently stated the Loss and the Claim were covered by Plaintiff's Policy, so coverage is not in dispute. *Id.*, ¶15.

Plaintiff submitted a Proof of Loss dated February 23, 2022 (the "**Rejected Proof of Loss**"). A true and correct copy of the Rejected Proof of Loss is attached hereto as **Exhibit 3.** *Id.*, ¶16. At the very top of the February 23, 2022 Rejected Proof of Loss, it provides a blank for "POLICY AMT AT TIME OF LOSS" and Plaintiff inserted $779,448.00. *Id.*, ¶17. The February 23, 2022 Rejected Proof of Loss also has a space that states "TOTAL" to the left of the space, and the amount inserted into that space is $779,448.00. *Id.*, ¶18. Note, the February 23, 2022 Rejected Proof of Loss does not have a space that expressly and clearly requests Plaintiff's demand prior to any appraisal. *Id.*, ¶19.

Because the "POLICY AMT AT TIME OF LOSS" and "TOTAL" on the Rejected Proof of Loss is the most Plaintiff could ever possibly recover (i.e. $779,448.00 which is what Plaintiff thought the Policy limits were at the time), the Policy limits is the most Plaintiff could have

possibly demanded prior to the appraisal. *Id.*, ¶20. Defendant has maintained the February 23, 2022 Rejected Proof of Loss somehow serves as Plaintiff's demand prior to appraisal. *Id.*, ¶21.

Specifically, Defendant has maintained Plaintiff demanded $1,808,702.80 by and through the February 23, 2022 Rejected Proof of Loss, because there is a space that states "THE WHOLE LOSS AND DAMAGE WAS ….. $1,808,702.80" even though that number is more than double the Policy Limits, and even though the Rejected Proof of Loss states the "TOTAL" is $779,448.00 and the "POLICY AMT AT TIME OF LOSS" is $779,448.00 in two (2) separate spaces on the same Rejected Proof of Loss. *Id.*, ¶22. Plaintiff most certainly did **not** demand $1,808,702.80 as his demand pre-appraisal, as this is a fiction formulated by Defendant in bad faith in an attempt to avoid paying Plaintiff's appraiser's fee. *Id.*, ¶23. Instead, the most Plaintiff could possibly recover from Defendant was the Policy limits, so Plaintiff demanded Policy limits pre-appraisal. *Id.*, ¶24.

Despite the aforementioned, in Defendant's Response to Plaintiff's Interrogatory Number 9, Defendant affirmatively states the following in relevant parts:

> ***Prior to the appraisal, Plaintiff submitted a sworn statement in proof of loss claiming that the. Whole Loss and Damage and Amount Claimed totaled $1,808,702.80****. The appraisers awarded $1,308,622.11 on a replacement cost basis, and $1,212,663.13 at actual cash value. Foremost paid the policy limits on the building to Plaintiff. Foremost did not pay Plaintiff's appraiser fee because the appraisers' determination of the amount of the loss was less than the full amount Plaintiff demanded prior to the appraisal. See* Defendant's Response to Interrogatory No. 10 attached hereto as **Exhibit 4.** (Emphasis added). *Id.*, ¶25.

Thus, as outlined in its Response to Interrogatory Number 9, it is undisputed that Defendant's position is that the Rejected Proof of Loss dated February 23, 2022 (attached hereto as Exhibit 2) that states "TOTAL" and next to that line includes $779,448.00 purportedly served as Plaintiff's demand prior to appraisal. *Id.*, ¶26. *See also* Exhibit 4.

However, *after* Plaintiff submitted the Rejected Proof of Loss dated February 23, 2022, Defendant sent a letter dated March 1, 2022 (the "**March 1, 2022 New Proof of Loss Letter**"), which states the following in relevant parts:

> ***This letter will acknowledge our receipt of the Proof of Loss form dated February 23, 2022..***
> ***We are returning a copy of it to you at this time and <u>expressly reject it</u>....***
> ***<u>You may, if you wish, submit a new Proof of Loss form that complies with the provisions of your policy and a new form is enclosed</u> for that purpose.***
> A true and correct copy of the March 1, 2022 New Proof of Loss Letter is attached hereto as **<u>Exhibit 5</u>**. (Emphasis added). *Id.*, ¶27.

As evidenced by Exhibit 4, the March 1, 2022 New Proof of Loss Letter expressly rejects the Rejected Proof of Loss, and attaches a new Proof of Loss Form (the "**Defendant's New Proof of Loss Form**") that Defendant states "complies with the provisions of [Plaintiff's] Policy. *See* Exhibit 5. *Id.*, ¶28. Therefore, because Defendant expressly rejected the February 23, 2022 Rejected Proof of Loss, that could not possibly have served as Plaintiff's demand prior to the appraisal. *See* Exhibit 5. *Id.*, ¶29. This material fact cannot reasonably be disputed by Defendant.

As evidenced by Exhibit 4, Defendant's New Proof of Loss Form contains a blank at the end that states "**Total Estimate Claim (<u>Subject to applicable policy limits</u>)**" and has a blank to the right of it that requests a dollar amount. *See* Exhibit 4 (highlighted below). (Emphasis added).

Total Amount of Claim for Personal Property	$	
Estimated Damage to Building	$	
Total Estimate Claim (Subject to applicable policy limits)	$	

Thus, the "Total Estimate Claim" on Defendant's Proof of Loss Form expressly states it is "(**<u>Subject to applicable policy limits</u>**)." *See* Exhibit 5. (Emphasis added). *Id.*, ¶31. By utilizing Defendant's Proof of Loss Form, any "demand prior to appraisal is "(**<u>Subject to applicable policy limits</u>**)." *See* Exhibit 5. (Emphasis added). *Id.*, ¶32. As such, Plaintiff could not have possibly

demanded anything in excess of the Policy limits, as Defendant's own New Proof of Loss Form expressly states the "Total Estimate Claim" is "**Subject to applicable policy limits**." *See* Exhibit 5. (Emphasis added). *Id.*, ¶33.

Also, Plaintiff did not, and would not, demand in excess of the Policy limits, because Defendant would only pay "(Subject to applicable policy limits)." *See* Exhibit 5. *Id.*, ¶34. Instead, Plaintiff demanded the Policy limits prior to the appraisal, which was $702,920.40. *Id.*, ¶35.

The appraisal award was $1,308,622.11. A true and correct copy of the Appraisal Award is attached hereto as **Exhibit 6**. *Id.*, ¶36.

Therefore, because Plaintiff demanded the Policy limits prior to the appraisal [i.e. $702,920.40], and because the appraisers determined the amount of loss [i.e. $1,308,622.11] is in excess of the full amount Plaintiff demanded prior to the appraisal, then Defendant must "pay [Plaintiff's] appraiser's fee and the umpire's fee. *Id.*, ¶37.

Once Defendant recognized Plaintiff's demand prior to the appraisal was the most Plaintiff could possibly recover, which was the Policy limits, and the appraisers set the amount of loss as almost double the Policy limits, Defendant retroactively changed its position that it maintained prior to appraisal. *Id.*, ¶38. Specifically, it was not until ***after*** the appraisal was performed, and the appraiser's determined the "amount of loss" was ***almost double*** of Plaintiff's Policy limits did Defendant state the following in a written letter:

> ***As we acknowledged prior to the appraisal demand that the damages exceeded the applicable policy limits and agreed to pay the increased payments up to the applicable limits*** *once the policy conditions were met,* ***the appraisal demand could not result in an award in excess of what we already agreed to pay once the policy conditions were met. Therefore, we are unable to pay for your appraiser fees***. *See* October 6, 2023 Letter from Defendant attached hereto as **Exhibit 7**. (Emphasis added). *Id.*, ¶39.

Thus, in the October 6, 2023 Letter from Defendant, Defendant is now stating "***we acknowledged prior to the appraisal demand that the damages exceeded the applicable policy***

limits and agreed to pay the increased payments up to the applicable policy limits...the appraisal demand could not result in an award in excess of what we already agreed to pay…." *See* Exhibit 7. *Id.*, ¶40.

As such, Defendant has now admitted "the damages exceeded the applicably policy limits" and agreed to pay "up to the applicable" Policy limits before the appraisal, thereby stating the amount of the loss before the appraisal was the Policy limits. *See* Exhibit 7. *Id.*, ¶41. Plaintiff has always maintained the amount of the loss is the Policy limits, as that is literally the "limit" that Plaintiff can recover from Defendant in relation to the claim. *Id.*, ¶42.

Therefore, the parties did not *"fail to agree on the amount of loss"* as required by the Appraisal Provision prior to the appraisal because both parties "acknowledged prior to the appraisal demand that the damages exceeded the applicable policy limits" prior to the appraisal. *See* Exhibit 7. *Id.*, ¶43. Because both parties agreed "on the amount of loss" prior to the appraisal as being the Policy limits, the appraisal was entirely meaningless. *Id.*, ¶44.

Defendant never told me or any of Plaintiff's representatives that Defendant "acknowledged prior to the appraisal demand that the damages exceeded the applicable policy limits" prior to the appraisal. *Id.*, ¶45. Also, Defendant never stated anything about any Policy conditions needing to be met in order to obtain Policy limits in the Claim. *Id.*, ¶46. Moreover, Defendant never even gave Plaintiff the opportunity to perform the work on the Property, and to show contracts regarding that work to get overhead and profit. *Id.*, ¶47. If Defendant had stated something about any policy conditions being met, and/or for Plaintiff to provide them with contracts for work to be performed, Plaintiff certainly would have done so. *Id.*, ¶48.

This fact has been confirmed by appraiser Zach Baker in his deposition in this case, as he is the only deponent thus far in this case. *Id.*, ¶49. Specifically, when Zach Baker was asked "*Do*

you have any knowledge of Foremost ever sending any document or ever stating to you that all [that] was needed was a signed contract to get overhead and profit, which would have exceeded applicable policy limits?" Mr. Baker responded with "*I have no knowledge, whatsoever*." *See* Relevant Pages of Mr. Baker's Deposition Transcript attached hereto as **Exhibit 8**, pg. 80. *Id.*, ¶50.

Mr. Baker testified how incredibly easy it would have been for Plaintiff to obtain overhead and profit had Plaintiff knew about this at the time, and stated the following:

> "*They're [i.e. Defendant] is saying, if you would have at least showed us a signed contract, we would have given you the O&P [i.e. overhead and profit], and that alone would have exceeded policy limits*." *Ex. 8* at 77. *See also Ex. 1.*, ¶51.

When Mr. Baker was asked "*at the time the appraisal was performed, Mr. Lewis hasn't even had the opportunity to replace anything, correct*?" Mr. Baker replied, "*Correct*." *Ex. 8* at 77. *See also Ex. 1.*, ¶52. Mr. Baker also stated the following in his deposition when asked if he knew about Defendant's newly found argument about overhead and profit:

> "*I didn't – I didn't even – I didn't even know about this. Any my question is, did anybody know about this prior to them receiving the appraisal award? ... An its – its kind of like Monday – the Monday morning quarterback...And its, like, well, if you would have sent that nine months ago, we wouldn't be here.*" *Ex. 8* at 77. *See also Ex. 1.*, ¶53.

Mr. Baker also confirmed Defendant rejected the February 23, 2022 Rejected Proof of Loss. *Ex. 1*, ¶54. When asked if Defendant "*denied the proof of loss dated February 23, 2022*" [i.e. the Rejected Proof of Loss], Mr. Baker stated "*Yeah. They rejected it*." *Ex. 8*, pg. 67. *See also Ex. 1.*, ¶55.

Further, when Mr. Baker was asked about Defendant's New Proof of Loss Form it sent Plaintiff after Defendant rejected the Rejected Proof of Loss it is somehow stating served as Plaintiff's pre-appraisal demand, Mr. Baker stated: "*I would treat the number that is subject to the applicable policy limits as the demand number*." *Ex. 8.*, pg. 69. *See also Ex. 1.*, ¶56. Thus,

Plaintiff's pre-appraisal demand is "subject to the applicable policy limits" and cannot possibly be in excess of the Policy limits. *Ex. 1.*, ¶57.

Mr. Baker goes on to state the following during his deposition under oath:

> *"**In this situation, because they denied the POL, then the demand number would have been the one that's subject to policy limits.**"* *Ex. 8.*, pg. 69. *See also Ex. 1.*, ¶58. (Emphasis added).

After further reviewing Defendant's New Proof of Loss Form, Mr. Baker states:

> The "*estimated damage to the building should be around the 1.8, where it was, and then **the total estimate claim should be the 779,000 number approximately***." *Ex. 8.*, pg. 70. *See also Ex. 1.*, ¶59. (Emphasis added).

Then, when Mr. Baker was asked about the $779,000 policy limit number, specifically "and to confirm, that would be the demand – the amount of Mr. Lewis's demand for appraisal [i.e. the Policy limits], pre-appraisal, correct? Mr. Baker replied:

> "*Now, **yes** [i.e. the pre-appraisal demand was the Policy limits], because they denied the POL.*" *Ex. 8.*, pg. 71. *See also Ex. 1.*, ¶60. (Emphasis added).

After Plaintiff brought the aforementioned to Defendant's attention, and before the filing of the Complaint, Defendant ignored numerous inquiries from Plaintiff and Plaintiff's counsel, failed to provide any reasonable justification for its position to refuse to pay Plaintiff's appraiser's fee, failed to answer straightforward questions, and instead, merely emailed, "You may proceed as you see fit." *Ex. 1.*, ¶61.

I should have never had to participate in the appraisal process in the first place, as Plaintiff and Defendant now agree the amount of loss "exceeded the applicably policy limits" before the appraisal. *Id.*, ¶63. However, even if the parties did *"fail to agree on the amount of loss"*, I demanded the Policy limits before the appraisal, and the appraisers determined the amount of loss as being nearly double my Policy limit, so Defendant must "pay for your [i.e. Plaintiff's] appraiser's fee. *Id.*, ¶64. As a result of the aforementioned, Defendant acted vexatiously and

unreasonably in the settlement of my Claim, and in flagrant violation of Section 155 of the Illinois Insurance Code. *Id.*, ¶62.

III. ARGUMENT

A. Legal Standard

Summary judgment is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill.2d 366, 376, 297 Ill.Dec. 268, 837 N.E.2d 48 (2005).

Under Illinois law, an insurance policy is a contract, and the standard rules of contract interpretation apply-the "primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language." *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777-78 (7th Cir. 2015) (internal quotations omitted). "[I]f the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy." *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1017 (Ill. 2010).

B. There Was No Dispute as to "The Amount of Loss", So the Appraisal Should Have Never Happened in the First Place

After engaging in discovery and reviewing documents from Defendant, it is now agreed that there was no dispute as the "the amount of loss" before the appraisal took place, because Plaintiff and Defendant both agreed the "amount of the loss" was the Policy limits. Therefore, the appraisal should have never happened in the first place, and Plaintiff is entitled to a judgment as a matter of law on all counts as a direct result.

In attempting to now explain why it has refused to pay Plaintiff's appraiser's fee, Defendant has backed itself into a corner by admitting the appraisal should have never occurred in the first place because both parties agreed that the "amount of the loss" was the Policy limits.

Specifically, Defendant has inserted this admission in its letter dated October 6, 2023, which is attached to Plaintiff's Motion as Exhibit 5. Please note Appraisal Award was signed on September 21, 2022. See Exhibit 6. Thus, the October 6, 2022 letter sent by Defendant was sent over a year after the appraisal took place, and after Plaintiff was forced to hire attorneys to send Defendant several letters to recoup his appraiser's fee that should have never been expended in the first place.

In its October 6, 2022, Defendant admits the following as an attempt to justify its refusal to reimburse Plaintiff's appraiser's fee:

> ***Prior to the demand for appraisal, our replacement cost for the damages was $807,101.07 exceeding the policy limit***...
> *We acknowledged that the damages exceed the policy limits*...
> ***As we acknowledged prior to the appraisal demand that the damages exceeded the applicable policy limits*** *and agreed to pay the increased payments up to the applicable limits once the policy conditions were met, the appraisal demand could not result in an award in excess of what we already agreed to pay once the policy conditions were met. Therefore, we are unable to pay for your appraiser fees*. *See* Exhibit 7.

Therefore, if Defendant acknowledged Plaintiff's damages exceeded the policy limits before the appraisal even took place, then why engage in an appraisal in the first place? It defies reason and logic.

More importantly, now that Defendant has (1) admitted it "acknowledged prior to the appraisal demand that the damage exceeded the applicable policy limits," (2) the parties agree Plaintiff's Policy limits are $702,920.40, and (3) Plaintiff has always maintained the most he has demanded in appraisal is the most he can recover, which is Policy limits, then the parties did not "fail to agree on the amount of loss" to trigger the Appraisal Provision in the first place. Instead,

both parties "acknowledged the damages exceeded the applicable policy limits" before appraisal. Thus, if Defendant was acting in good faith and not in breach of the Policy, it would have paid Policy limits before the appraisal. However, it refused to do so, and forced Plaintiff to incur damages in excess of the minimums for diversity jurisdiction for absolutely no justifiable reason.

Now it is anticipated that Defendant will now attempt to defend this issue by somehow arguing it did not agree with the amount of loss being in excess of Policy limits before the appraisal, even though it has stated the same in writing. Defendant is likely to argue just because the amount of "damages" exceeded the policy limits prior to appraisal, that is different than the amount of "loss" prior to the appraisal. However, the Policy does not define any such distinction, whatsoever. Therefore, because the "value" of the amount of "loss" and "damage" is undefined in Plaintiff's Policy that Defendant insurance company drafted, and is certainly susceptible to more than one meaning, "they are considered ambiguous and will be construed strictly against the insurer who drafted the policy." *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1017 (Ill. 2010). Thus, any ambiguities are construed against Defendant, the appraisal should have never occurred in the first place, and Plaintiff is entitled to a judgment as a matter of law on that basis alone.

It is also anticipated Defendant is going to continue its "Monday morning quarterbacking" efforts in defending its positions in this case, and argue certainly policy conditions were not met and that is why the appraisal moved forward. However, what are the specific Policy conditions? When was that argument ever presented to Plaintiff before he hired legal counsel? When did Defendant ever tell Plaintiff what he needed to do in order to get overhead and profit? The answer is never, because it never happened.

Instead, as is abundantly clear and undisputed from appraiser Zach Baker's testimony that "at the time the appraisal was performed, Defendant did not even provide Mr. Lewis [i.e. Plaintiff] with the opportunity to replace anything in order to prove incurred costs related to overhead and profit. Ex. 8, pg. 77. Mr. Baker further testifies based on over a decade of experience in the industry all that has to be done to obtain overhead and profit is to merely present a contract that work was going to be performed, and not even that the work had been performed, which is an astonishingly low bar that Plaintiff easily would have overcome had he known about this then. *Id.*

Then, when Mr. Baker was asked "if you would have known Foremost was going to pay the policy limits , and all Mr. Lewis has to do is just show a couple of contracts that work was performed, Mr. Baker states: "No, not that work was performed, that work will be performed. They're just asking for a signed contact. They're not asking for receipts. That's the difference. They're just asking for signed contracts." Ex. 8, pg. 77-78.

Then, when asked directly if Mr. Baker had "any knowledge of Foremost ever sending any document or ever stating to you that all was needed was a signed contract to get overhead and profit, which would have exceeded applicable policy limits? Mr. Baker quickly responded, "I have no knowledge whatsoever." Ex. 8, pg. 80. While Plaintiff will not insert all of Mr. Baker's testimony on this issue in this Motion, it is obvious it is something he never knew about, and if he would have known about it, the appraisal would have never taken place. That begs the question – if Mr. Baker, as Plaintiff's appraiser did not know about this new overhead and profit / cost incurred argument that Defendant is now asserting, then who did Defendant convey this to before the appraisal occurred? We look forward to Defendant's response on this issue.

In sum, the appraisal should have never happened in the first place because both parties did not "fail to agree on the amount of the loss" as mandated to activate the Appraisal Provision. Instead, it is now undisputed Plaintiff and Defendant agreed that the "amount of loss" exceeded Policy limits before the appraisal, and because the Policy limits is all Plaintiff could possibly recover from Defendant, the amount of loss prior to the appraisal should have been Policy limits. Any arguments that Defendant acting as a "Monday morning quarterback" now lack merit, because the Policy does not state what Defendant is alleging. Defendant never told Plaintiff all he needed to do was show a signed contract to get Policy limits, because if Defendant did that, Plaintiff obviously would have obtained a contract, especially with the amount of money at stake in this Claim. Also, at best, the distinction between "loss" and damage" is susceptible to more than one meaning, so any ambiguity must be construed in favor of non-drafting Plaintiff.

For these reasons, the undisputed material facts show the appraisal should have never happened in the first place because both parties agreed the amount of loss was in excess of Policy limits before the appraisal. The undisputed material facts also show how Defendant has acted vexatiously and unreasonably in its attempts to avoid reimbursing Plaintiff's appraiser's fee by attempting to misrepresent language in the Policy even though any and all ambiguities must be construed in favor of Plaintiff.

Therefore, Plaintiff is entitled to judgment as a matter of law on all counts in his Complaint on these bases alone.

C. Even If there Was A Dispute About the Amount of Loss, Then Defendant Must Pay Plaintiff's Appraiser's Fee Because Plaintiff Demanded Policy Limits Prior to The Appraisal, and the Appraisers Set The Amount of Loss Far In Excess of Plaintiff's Policy Limits

Plaintiff maintains that the appraisal should have never occurred in the first place because the parties both agreed the amount of loss was in excess of Policy limits before the appraisal took

place. However, assuming arguendo, this Honorable Court finds there was a dispute as to the amount of loss, Plaintiff is still entitled to judgment as a matter of law on all counts because the amount of the appraisal award far exceeded (in fact it nearly doubled) Plaintiff's demand before the appraisal.

Again, the Appraisal Provision states the following in relevant parts:

> *5.* ***Appraisals*** *is changed to read:*
>
> ***Appraisals.*** ***If you and we fail to agree on the amount of loss****, then both you and we have the right to select an appraiser within 20 days from the day of disagreement. The appraisers will determine the amount of loss....*
>
> ***If the amount of loss is determined to equal or exceed the full amount which you demanded prior to the appraisal, then we will pay for your appraiser's fee and the umpire's fee.*** *Id.*, ¶12. *See* Exhibit 2. (Emphasis added).

Focusing further on Exhibit 7 that postdates all letters before Plaintiff formally retained counsel, Defendant writes "Thank you for clarifying your demand was $779,000.00 as opposed to $1,808,702.80." *See* Exhibit 7. Despite acknowledging Plaintiff's demand pre-appraisal was $779,000 in this letter, and having acknowledged that the Appraisal Award was undisputably $1,308,622.11, Defendant has still refused to reimburse Plaintiff his appraiser's fee.

While it is frankly challenging to understand Defendant's logic on its position in this case given the record, it seems that Defendant is arguing the Rejected Proof of Loss dated February 23, 2022 somehow serves as Plaintiff's amount he demanded pre-appraisal. This is despite Defendant undeniably sending a letter after the Rejected Proof of Loss was sent which states:

> "We are returning a copy of it [i.e. the Rejected Proof of Loss] to you at this time and expressly reject it…". *See* Exhibit 5.

Based on the March 1, 2022 Letter attached as Exhibit 5, it is a sheer impossibility for Defendant to assert the Rejected Proof of Loss that Defendant stated in writing it "expressly reject[ed]" serves as a Plaintiff's demand prior to appraisal. Since the Rejected Proof of Loss

cannot possibly serve as Plaintiff's demand prior to appraisal because it was "expressly reject[ed]" by Defendant, Defendant must now either (1) concede this Motion or (2) create a dispute of fact that Plaintiff did not demand the Policy limits because he submitted some other form of a demand. However, this is a conundrum for Defendant, and it has stated in writing on multiple occasions, including in its responses to Interrogatories, that Plaintiff's demand pre-appraisal was on the Rejected Proof of Loss. Because this is impossible since Defendant "expressly reject[ed]" the Rejected Proof of Loss, Defendant cannot plausibly dispute the truth in this case, which is that Plaintiff obviously demanded the most be could possible recover – Policy limits.

Assuming, arguendo, this Court accepts that the February 23, 2022 Rejected Proof of Loss that was "expressly reject[ed]" in writing by Defendant as Plaintiff's pre-appraisal demand for appraisal, Plaintiff asks the Court to review the Rejected Proof of Loss. Please note the Rejected Proof of Loss does not provide a space for an "Appraisal Demand." However, the Rejected Proof of Loss does include a space that states "TOTAL" and next to it Plaintiff writes $779,448.00. *See* Exhibit 3. Also, please note the Rejected Proof of Loss states, "POLICY AMT AT TIME OF LOSS" and next to it Plaintiff writes $779,448.00. *See* Exhibit 3. Therefore, even though Plaintiff wrote $779,448.00 next to "TOTAL" on the Rejected Proof of Loss, Defendant has cherry picked where it states "LOSS…THE WHOLE LOSS AND DAMAGE was" and it states $1,808,702.80. Defendant conveniently concludes this higher number is somehow Plaintiff's demand pre-appraisal. *See* Exhibit 3.

However, similar to the ambiguity that is inherent in the Appraisal Provision, assuming Defendant drafted the Rejected Proof of Loss, any ambiguities must be construed in favor of non-drafting Plaintiff. Is the amount next to "TOTAL" [i.e. $779,448.00] the amount demanded

pre-appraisal, or is the amount next to "LOSS…THE WHOLE LOSS AND DAMAGE was" [i.e. $1,808,702.80] the amount demanded pre-appraisal? Certainly, these words on the Rejected Proof of Loss are unclear and ambiguous, and are susceptible to more than one meaning, so all ambiguities must be construed in favor of Plaintiff.

It is possible Defendant will argue it did not draft the Rejected Proof of Loss, and even though Defendant "expressly reject[ed]" it in writing, it still somehow serves as Plaintiff's demand pre-appraisal. However, this argument is negated by the March 1, 2022 New Proof of Loss Letter Defendant sent when it "expressly reject[ed]" the Rejected Proof of Loss. *See* Exhibit 5. In the March 1, 2022 letter that rejects the Rejected Proof of Loss, Defendant attaches a "new Proof of Loss form that complies with the provisions of [Plaintiff's] Policy, and a new form is enclosed for that purpose." *See* Exhibit 5.

On the final page of Defendant's New Proof of Loss Form, it states "**Total Estimate Claim (<u>Subject to applicable policy limits</u>)**." *See* Exhibit 5, pg. 5 of 7.

Total Amount of Claim for Personal Property	$	
Estimated Damage to Building	$	
Total Estimate Claim (Subject to applicable policy limits)	$	

Thus, Defendant's New Proof of Loss Form is clear that the "Total Estimate Claim" is (**<u>Subject to applicable policy limits</u>**). This means that on Defendant's own New Proof of Loss Form, the most an insured can state as the "Total Estimate Claim" is the Policy limits. This is blatant evidence of bad faith. Even though Defendant expressly rejected the Rejected Proof of Loss, it still has chosen to use a number that is not (Subject to applicable policy limits) which is a requirement on Defendant's New Proof of Loss Form. As such, per the instructions on Defendant's New Proof of Loss form, the "Total Estimate Claim" is (**<u>Subject to applicable policy limits)</u>** so a pre-appraisal demand on a Proof of Loss cannot possibly be in excess of

Policy limits because it is (**Subject to applicable policy limits).** The reason why it is (**Subject to applicable policy limits)** fully supports Plaintiff's argument since before this lawsuit was filed – based on the Appraisal Provision, why would anyone ever demand anything pre-appraisal that is in excess of Policy limits when Defendant is the only source of recovery? No reasonable person would demand in excess of Policy limits, and it is undisputed Plaintiff demanded Policy limits in this Claim.

This has all been confirmed by Mr. Baker in his deposition. After reviewing Defendant's New Proof of Loss Form, Mr. Baker states:

> The "*estimated damage to the building should be around the 1.8, where it was, and then* ***the total estimate claim should be the 779,000 number approximately***." *Id.*, pg. 70. (Emphasis added).

Then, when Mr. Baker was asked about the $779,000 policy limit number, specifically "and to confirm, that would be the demand – the amount of Mr. Lewis's demand for appraisal [i.e. the Policy limits], pre-appraisal, correct? Mr. Baker replied:

> "*Now,* ***yes*** *[i.e. the pre-appraisal demand was the Policy limits], because they denied the POL.*" *Id.*, pg. 71. (Emphasis added).

Since Plaintiff demanded Policy limits, and the appraisal award was nearly double the Policy limits, then Defendant must "pay for [Plaintiff's] appraiser's fee." *See* Ex., 1.

D. There Is No Dispute That Defendant Acted Vexatiously and Unreasonably in Its Handling of Plaintiff's Claim In Violation of Section 155 of the Illinois Insurance Code (215 ILCS 5/155).

Lastly, the record of undisputed material facts prove Defendant is in violation of Section 155 of the Illinois Insurance Code for its vexatious and unreasonable handling of Plaintiff's Claim. Not only did Defendant force Plaintiff to engage in an appraisal on a Claim that all parties knew (and now admit) was always far in excess of Policy limits as a large fire loss.

But after Defendant forced Plaintiff to participate in the unnecessary appraisal, and the appraisal almost doubled Plaintiff's pre-appraisal demand of the Policy limits, Defendant has attempted to double down on its refusal to pay the appraiser's fee by doubling down on its bad faith. This includes, but is not limited to stating Plaintiff's demand pre-appraisal was on the Rejected Proof of Loss Defendant expressly rejected. Further indication of bad faith is that Defendant chose to cherry pick the highest number off of the Rejected Proof of Loss, even though that clearly is not the demand pre-appraisal because Plaintiff can only recover Policy limits from Defendant. To make Defendant's actions even more egregious, its own New Proof of Loss Form expressly states the "Total Estimate Claim" is (**Subject to applicable policy limits)** so a pre-appraisal demand on a Proof of Loss cannot possibly be in excess of Policy limits because it is (**Subject to applicable policy limits).**

For these reasons, and others stated herein, there is no genuine material dispute of fact that Defendant is in violation of Section 155 of the Illinois Insurance Code, and judgment as a matter of law should be entered in favor of Plaintiff on all counts plead in his Complaint.

CONCLUSION

WHEREFORE, Plaintiff DANNY LEWIS respectfully requests this Court for the entry of an Order:

A. Granting Plaintiff's Motion for Summary Judgment in its entirety, and entering judgment in Plaintiff's favor on all counts: (1) Count I: Declaratory Judgment Relief; (2) Count II: Breach of Contract; and (3) Count III: Violations of Section 155 of the Illinois Insurance Code; and

B. For all other and further relief that this Court deems just and proper in light of the law, facts, and relevant circumstances.

Date: December 10, 2024

Respectfully submitted,

By: */s/ Steve McCann*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on or before **December 10, 2024,** a true and correct copy of the above and foregoing was field with the Clerk of Court using the CM/ECF e-filing system, which will automatically send notification of such filing to the below listed counsel of record.

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