No. 25-13710

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WESTCHESTER SURPLUS LINES INSURANCE COMPANY, ET. AL.,

Plaintiffs-Appellees-Cross-Appellants,

v.

PORTOFINO MASTER HOMEOWNERS ASSOCIATION, INC., ET AL.,

Defendants-Appellants-Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO.: 3:23-cv-00453-MCR-HTC

APPELLANTS' OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellants, the six Portofino Associations, request oral argument. This case involves the unprecedented vacatur of Appraisal Awards that were issued in favor of five condominium associations, and one homeowners' association, and totaled more than $187 million. The Insurers have claimed that these Awards (collectively) are the largest awards in the history of North America.

It is a case of importance to policyholders throughout the United States who, as here, have mandatory alternative dispute resolution provisions within their policies that are intended to have the benefits of finality, and avoidance of litigation to provide a quick and less-expensive method of fulfilling the sole purpose of a property insurance policy—*indemnity*. It is a case in which the parties to the insurance policies, collectively, spent more than $8 million and nearly two years of time to complete the appraisal process, which resulted in seven Appraisal Awards that have now been negated.

The decision below has far-reaching financial impacts on both the policyholders directly involved, policyholders throughout the nation, and lenders who finance properties in reliance on insurance to cover casualty losses. It is a case being closely watched nationally, and internationally, by insurance companies and those representing the interests of policyholders and their lenders. It is believed that

this case will result in a decision defining the limits of court review of appraisal awards.

This case involves issues of great public importance, including the degree to which a district court may "look behind the curtain" in its review of appraisal awards. The district court found it was permitted to do so. That view, it is respectfully submitted, was erroneous. If that view were to be followed, it would open the floodgates of litigation over appraisal awards, in contrast to the very purpose of appraisal, which is the avoidance of litigation. The court's conclusion in *Metalonis v. Boies Schiller Flexner LLP*, 350 So.3d 458 (Fla. 3d DCA 2022), based in part on a decision from the Eleventh Circuit, provides a good reason to grant oral argument in this case to ensure that the results of the alternative dispute resolution processes used widely around the country are given the dignity they deserve. As stated in *Metalonis*:

> "Everyone supposedly loves arbitration. At least until arbitration goes badly." *Saturn Telecomms. Servs., Inc. v. Covad Commc'ns Co.*, 560 F.Supp.2d 1278, 1279 (S.D. Fla. 2008). This appeal is yet another instance of a dissatisfied party attempting to "convert arbitration losses into court victories." *See Wiregrass*, 837 F.3d at 1092 (quoting *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006)).[1] "The more cases there are, like this one, in which the arbitrator

[1] In *B.L. Harbert Intern., LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006), the Eleventh Circuit expressed its great displeasure and *warning* to those that reflexively challenging ADR awards. "[M]ost importantly, when Harbert took its arbitration loss into the district court and then pursued this appeal, it did not have the benefit of the notice and warning this opinion provides. The notice it provides,

> is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be honored sooner instead of later." *Id.* (quoting *B.L. Harbert*, 441 F.3d at 913). Because the Arbitrator did not exceed his authority, we affirm.

Id. at 465.

The public policy considerations implicated by the district court's decision, including those described above, are discussed in more detail in Section I of Appellants' Argument and Citations of Authorities.

It is respectfully submitted that oral argument would be useful.

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hopefully to even the least astute reader, is that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards. The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases. While Harbert and its counsel did not have the benefit of this notice and warning, those who pursue similar litigation positions in the future will." *Id.* at 914.

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STATEMENT OF JURISDICTION

I. Basis for Subject Matter Jurisdiction in the United States District Court for the Northern District of Florida

The district court had jurisdiction based on 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.00.

II. Basis for Jurisdiction in the United States Court of Appeals for the Eleventh Circuit

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final decision that disposed of all the parties' claims. The district court ordered the clerk to "enter judgment in favor of the Insurers, tax and costs against Portofino, and close the file." (Doc 367, p. 28). The trial court has retained jurisdiction as to both fees (Doc. 387) and costs (Doc. 428) but has stayed the adjudication of those issues pending this appeal. In addition, 9 U.S.C. Section 16(a)(1)E provides for an immediate appeal from a court order vacating an appraisal award.

III. Timeliness of Appeal

On September 22, 2025, the district court granted the Appellee's Motion for Summary Judgment and alternatively, its Motion to Vacate, and disposed of all of Appellants' counterclaims. (Doc. 367). The district court entered judgment on

September 23, 2025. Appellants filed a timely Notice of Appeal on October 22, 2025. (Doc. 384).

IV. Verification of Appeal from Final Order

Appellants verify that this appeal is taken from a final order of the United States District Court for the Northern District of Florida, Pensacola Division, which disposed of all the parties' claims.

STATEMENT OF THE ISSUES

1. Did the district court commit reversible error by vacating the awards via summary judgment on unpled contractual grounds outside the exclusive grounds provided for in Section 682.13 of the Florida Arbitration Code (FAC)?

2. Did the district court commit reversible error by deeming an alleged breach of contract (an appraiser not doing enough) as "misconduct" under Section 682.13(1)(b)(3) rather than finding it an "appraiser exceeded the arbitrator's powers" under Section 682.13(1)(d)?

3. Did the district court commit reversible error by allowing the Insurers to attempt to recreate a non-existent record of the extensive deliberations and proceedings by the panel and then introduce testimony from the recreated record to seek vacatur?

4. Did the district court commit reversible error by granting summary judgment vacating the awards on an allegation that Portofino's appraiser failed to determine the amount of loss, a ground not pled in the Insurers' pleadings?

5. Did the district court commit reversible error by weighing disputed material facts in favor of the Insurers by finding that uncontroverted evidence established that appraiser Keys failed to develop and present his loss opinions to his counterpart appraiser and the Umpire?

6. Did the district court commit reversible error by vacating awards upon the Insurers' untimely filed Motion to Vacate that failed to satisfy the 90-day deadline under Section 682.13(2)?

7. Did the district court commit reversible error by dismissing Portofino's Counterclaims based on the erroneous conclusion that vacating awards made the counterclaims moot?

STATEMENT OF THE CASE

A. Preliminary, Threshold Issue

The "facts" presented are not taken from a record of the appraisal proceedings—no such record exists. (Doc. 247-1, p. 65:2-15). Over Portofino's continuing objection, the district court permitted the Insurers' attempts to use a "recreated" record, believing it had to "look behind the curtain" to determine whether there was fraud or misconduct. (Doc. 345, 53:21 – 54:19). As discussed below, any and all issues that were argued or in dispute during the appraisal are deemed to have been presented to and considered and resolved by the Panel when issuing the Awards.

B. The Policies and the Insured Loss

This action arises from hurricane damage caused to a condominium complex consisting of five separate high-rise towers and common areas (the "Portofino Properties"). (Doc. 104 at ¶ 31). Appellants are five condominium associations and one homeowners' association (the "Master Association"), collectively referred to as "Portofino," and are separately named insureds under the insurance policies at issue. (Doc. 104-1, p. 7). Appellees are eleven insurers (collectively the "Insurers") that insured the Portofino Properties (Doc. 104, p. 9, ¶¶ 28-31) under a "Tower of Insurance," pursuant to insurance policies that each contained the same Master Policy Form. (Doc. 104-1, pp. 5-36).

On September 16, 2020, Hurricane Sally struck the Portofino Properties. (Doc. 104, p. 21, ¶ 51). The separately owned properties of the six Portofino associations incurred separate and distinct damages. (Doc. 246-18). A dispute arose between Portofino and the Insurers, resulting in the Insurers invoking appraisal for the "entire loss." (Doc. 246-5, p. 2); (Doc. 104-1, p. 33, ¶ 50). The appraisal provision in the Master Policy Form established the procedure for selecting the panel and for determining the amount of loss. (Doc. 104-1, p. 33, ¶ 50).[2]

C. The Panel Set the Stage for Appraisal in Compliance with the Policy

After appraisal was invoked, George Keys served as Portofino's appraiser, and Patrick Lewis served as the Insurers' appraiser, (Doc. 247-17). They jointly selected Jon Doan as the Umpire. *Id*. The three of them constituted the appraisal panel ("Panel"). The Panel established procedures, including inspection schedules and deadlines for completing the investigation of the hurricane damages. (Doc. 246-7); (Doc. 250-5, p. 1). Reports from "scope of damages" experts (which were engaged by both appraisers) had to be exchanged by May 31, 2022. (Doc. 246-7, p. 1). Estimates as to the costs of repairing those damages had to be exchanged by July

[2] The language of the appraisal provision is slightly different in certain follow-form policies. Those distinctions are not relevant for this appeal. *See* (Doc. 367, p. 4 n.9).

11, 2022. (*Id*.). Both deadlines were met. (Doc. 246-10); (Doc. 257-18). They exchanged reports revealed major disagreements between the appraisers both as to scope and price. (Doc. 257-18, pp. 5, 165-169); (Doc. 346, p. 443:2-6). By agreement of the Panel, the proceedings were not recorded. (Doc. 247-1, p. 65:2-15).

D. The Appraisers Determined the Amount of Loss and Exchanged Expert Reports, Estimates, and Statements of Loss[3]

Establishing the amounts of loss required separately determining the scope of the damage to each property caused by the hurricane and the cost of repairing those damages. (Doc. 345, pp. 218:22 – 219:5). Both appraisers relied on experts to assist in determining the amounts of loss.[4] (Doc. 246-10). The appraisers and their experts spent months inspecting the properties to evaluate the loss. (Doc. 246-11, p. 3); *see* (Doc. 249-12—discussing logistics of various inspections). The scope experts drafted and issued lengthy and specific reports on the damages to each separately owned property. *See e.g.* (Doc. 318-3, pp. 66, 144, 236, 339, 351). Keys directed

[3] There was not one loss, but separate and distinct losses by separate and distinct named insureds owning separate and distinct properties. (Doc. 104-1, p. 7, ¶ 1).

[4] The Insurers were updated as to the experts' findings and party-appointed appraisers' estimates during the appraisal process. (Doc. 224-1, p. 63:6-11); (Doc. 246-6); (Doc. 255-3).

his costing expert estimator (Larry McCallister) to follow the experts regarding the scope of damages, and he did so.[5] (Doc. 225-1, p. 340:5-11); (Doc. 230-1, p. 46:4-12, p. 190:16-22). Likewise, the estimating expert for the other appraiser, Kevin Bryant, relied on the scope of damages Lewis gave him to price the cost of needed repairs. (Doc. 345, pp. 274:12 – 275:17); (Doc. 346, p. 416:12-21).

During the appraisal, Keys' experts concluded that Hurricane Sally was the cause of the extensive damage throughout the Portofino Properties. (Doc. 318-3, pp. 87, 150, 256). Keys testified that he trusted and relied on those experts, and that he used their conclusions to determine the scope of the damages to be addressed. (Doc. 225-1, p. 104:1-2, p. 233:1-2).

Although each appraiser hired their own experts, Lewis and Keys worked together during the process, often communicating regarding the logistics of the inspections and details regarding the type of expert attending on each date. (Doc. 246-7, pp. 24-36). The Panel met (and cross examined) those experts for nine days,

[5] Amongst other responsibilities, McCallister was responsible for determining feasibility of repair versus replacement for the Keys team. So, while the fenestration expert (GCI) believed that damages to fixed windows might be repaired, for example, the estimating expert found this was not feasible due to a lack of replacement parts. *See* (Doc. 318-3, p. 63); (Doc. 257-18, pp. 24, 55, 86, 117, 148).

for 75 hours, to discuss and address their conclusions. (Doc. 225-7, pp. 93-97); (Doc. 246-10); (Doc. 345, pp. 219:12 – 220:14).

The Umpire asked for stand-alone pricing, because it had not been determined by the Umpire as to how the Umpire would resolve the dispute as to scope. (Doc. 230-1, pp. 128:12 – 130:25). Thus, had he ruled that the only scope was roofs for the Tower Two Association, all general conditions associated with that item needed to be included in the price. This would have included, for example, the need for a crane to lift shingles to the roof of the 22-story tower. If the Umpire found that both roofs and sliding glass doors were damaged, items such as a crane, and job site trailer could have been split between those two. And if, as here, the Umpire agreed that all six scope items were damaged by the hurricane, there would be duplication in general conditions with the stand-alone pricing that would have to be adjusted.

McCallister thus testified that simply totaling all amounts for all components of all towers (based on the Umpire-requested standalone pricing) into one consolidated number (approximately $233 million) would overstate the cost of repairs given the inherent duplication of general conditions under that Umpire-prescribed methodology. (Doc. 230-1, pp. 41:2 – 42:12, pp. 48:17 – 49:13, pp. 128:12 – 130:25); (Doc. 246-11, p. 2, p. 11 – where Lewis acknowledged that scope and costing was submitted on a per building basis and the Umpire advising the goal was to establish the loss Tower by Tower). It was understood by all members of the

Appraisal Panel that estimates by both appraisers would need to be adjusted once the Umpire resolved the dispute as to scope. (Doc. 298-3, p. 1); (Doc. 225-1, 35:9-36:7).[6] There is no evidence that either appraiser objected to that procedure. There is no evidence that those adjustments were not made. (Doc. 225-1, pp. 35:6 – 36:7); (Doc. 246-11, p. 9); (Doc. 298-3, p. 1); (Doc. 345, p. 232:3-8). During this time, the Insurers were given updates regarding these issues. (Doc. 246-6); (Doc. 255-3).

According to the Insurers' estimator, William Klein, who was retained by them to critique the Keys' team's estimate for the purpose of litigation, all of the information needed to adjust for overlapping general conditions inherent in the Umpire-requested methodology was available from the detailed McCallister estimate, and Klein testified as to what he believed those adjustments should have been. (Doc. 346, pp. 563:3 – 565:18).[7]

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[6] Bryant and Lewis testified that they were aware that a "stand-alone" pricing methodology was used and this was requested by and presented to the Umpire. (Doc. 345, pp. 283:17 – 286:13); (Doc. 346, p. 437:9-23); (Doc. 225-1, pp. 35:9-36:7); (Doc. 246-11, p. 2).

[7] While his testimony was stricken by the district court for the purposes of the Motion to Vacate, the district court advised it might consider that testimony for the summary judgment record. (Doc. 346, pp. 468:15 – 469:2, pp. 593:21 – 594:4). It is unclear how or if the district court looked to the Klein testimony in its summary judgment rulings.

Although Lewis objected to the Keys' amount-of-loss determination, he did not allege at any time during the appraisal proceedings that Keys had failed to determine the amount of loss. In addition, Lewis neither alleged fraud nor found evidence of wrongdoing by Keys during the appraisal process. (Doc. 345, pp. 241:5 – 242:3). Lewis conceded that he was able to argue all disputes regarding scope and price before the Umpire, and that it was the Umpire's role to resolve those disputes. (Doc. 345, pp. 198:25 – 199:13, pp. 283:17 – 286:13); (Doc. 228-1, pp. 107:18 – 110:4). Lewis' estimating expert, Bryant, confirmed that every critique he had with McCallister's estimate was argued before the Umpire. (Doc. 345, 413:20 – 414:10). Lewis' presentation for the appraisal hearings acknowledged that Keys had given opinions as to the pricing of each building, each trade, and presented PowerPoint slides comparing the differences between the two appraisers. (Doc. 247-17); (Doc. 247-18).

E. The Appraisal Hearings

After the parties exchanged their expert reports, pricing estimates, and Statements of Loss, the Panel conducted a two-week hearing. (Doc. 246-7); (Doc. 345, p. 334:5-8). There is no written record of this hearing.

During the appraisal hearing, the Panel heard nine days of testimony from scope/causation experts, and all three Panel members had the opportunity to cross-examine them. (Doc. 246-10, pp. 2-3); (Doc. 345, pp. 219:21-220:6); (Doc. 225-7,

pp. 93-97). By day nine, all of the scope/causation experts had testified and the Panel (at the suggestion of Lewis) agreed to allow the cost experts to meet separately with the Umpire at a later date to discuss the cost of the repairs from the hurricane for each association. (Doc. 345, pp. 236:19-237:12).

Lewis testified as follows at the two-day evidentiary hearing on the Motion to Vacate:

> And so we need to schedule that [hearing]. And Mr. Keys and myself agreed because ***we had such disparity between the two of us*** why don't we get our two costing experts together with Mr. Doan and then they could resolve what, you know, each position was before Mr. Doan.

(Doc. 345, 237:5-7) (emphasis added). No one objected to this process. There is no evidence that the two appraisers were not able to fully discuss the differences in their estimates in an effort to narrow or resolve those differences—the primary purpose of that August 5, 2022 meeting.

On October 5, 2022, the pricing experts met to discuss disagreements in the competing estimates with hopes of narrowing those differences. (Doc. 345, pp. 236:2 – 237:12); (Doc. 257-23). There is no record of the exchange made between the appraisers in attempting to resolve their differences. The attempted reconstruction of the appraisal record provided testimony that there was agreement as to some adjustments, but the appraisers continued to have differences of opinion as to scope and price and that those differences had to be resolved by the Umpire.

(Doc. 225-1, pp. 35:6 – 36:7); (Doc. 298-3); (Doc. 257-23). There is no evidence that either party, directly or via their party-appointed appraiser, claimed that there was no dispute for the Umpire to resolve, or that it was premature for the Umpire to resolve the disputes.

The district court's conclusion that an out-of-context statement by Keys—i.e., that simply totaling component parts of the stand-alone-pricing (totaling $233 million) was not his opinion as to the amount of the loss—meant that he had no opinion as to the amount of the loss ignores the context of his testimony. Keys testified, and the other members of the Panel confirmed, that everyone knew those estimates would have to be adjusted to eliminate inherent duplication once the Umpire resolved the dispute as to the scope of damages. (Doc. 225-1, pp. 35:9-36:7); (Doc. 298-3, p. 1). And Keys' testimony that the Umpire agreed to, and did, make those adjustments was unrebutted. (Doc. 225-1, pp. 35:9-36:7).

F. The Umpire Considered the Disagreements Between the Appraisers Regarding the Amount of Loss, and Issued Draft Awards, Which Were Signed by Two Panel Members

After the inspections of the properties, exchange of expert reports and estimates, and hearings, the Umpire forwarded his proposed "scope of loss" to the two appraisers for their comments and consideration. Both appraisers signed the first Award, together with the Umpire. (Doc. 246-18, p. 2). The other six Awards were signed by the Umpire and Keys. (Docs. 246-11); (Doc. 246-18, pp. 9, 15, 21,

27, 33, 39). The appraisal provision provided that the awards had to be in writing, signed by at least two members of the Panel, and that those awards "shall determine the amount of loss." (Doc. 104-1, p. 33, ¶ 50).

The Umpire's "statement of loss" that went to the appraisers for their review was not an "independent estimate." The Umpire stated in his summary to the Panel: "As I have advised at our meeting, I do not do a third estimate, *I simply compare the two submitted* and reconcile differences based on our inspection and meeting." (Doc. 246-11, p. 13) (emphasis added).

A total of seven Awards were issued by the Panel, with each association/policyholder receiving a separate Award. (Doc. 246-18, pp. 1, 9, 15, 21, 27, 33, 39).

The appraisal took more than two years, at a cost of more than $8 million. (Doc. 246-5, p. 2); (Doc. 246-18); (Doc. 346, p. 542:8-18); (Doc. 344-3, pp. 16-17). All seven Awards were vacated by the district court. (Doc. 367).

G. The District Court Proceedings In Which The Insurers Sought to Avoid Honoring the Awards

The Insurers filed a Complaint for Declaratory Relief. (Doc. 1). The operative complaint is the Insurers' Amended Complaint for Declaratory Relief. (Doc. 104). The only count in the Amended Complaint seeking vacatur was Count X. It, like their Renewed Motion, relied solely on the Florida Arbitration Code (FAC). The

Amended Complaint, as with the Renewed Motion, did not seek vacatur on the grounds that "[a]n arbitrator exceeded the arbitrator's powers" pursuant to §682.13(1)(d). The Amended Complaint also contained no allegation that Keys failed to determine the amount of loss. The Insurers did not file a motion to amend.

H. No Allegations Were Made that Keys Failed to Determine the Amounts of Loss Until After the Appraisal Was Completed

During the appraisal, there is no evidence that objections were raised by the parties, the appraisers, or the Umpire, as to the adequacy or format of the exchanged scope or repair costs provided by either appraiser. Likewise, neither the parties, nor their appraisers, nor the Umpire claimed at any time before the multiple Awards were entered that there was no dispute between the appraisers as to the amounts of loss, or that one of the appraisers had failed to determine the amounts of loss for the six separately owned properties. (Doc. 257-5); (Doc. 345, pp. 216:17 – 217:25). Both appraisers and the Umpire deemed there to be a dispute that needed to be resolved by the Umpire. (Doc. 298-3, p. 1); (Doc. 246-11).

Westchester, the Insurer serving as the lead in challenging the Appraisal Awards,[8] admitted in its response to Portofino's counterclaim that there were major

[8] The Motion and Renewed Motion to Vacate the awards were filed by Westchester, with the other Insurers filing "joinders" to those motions. (Docs. 116, 117, 118, 119, 257, 258, 259, and 264).

disagreements over the party-appointed appraisers' conclusions and that those disagreements were submitted to the Umpire for resolution as called for by the appraisal provision. *See* (Doc. 130, p. 7, ¶ 45). In addition, the Insurers, in their amended declaratory judgment action, acknowledged that Keys' team submitted a "full claim demand" for the "damages allegedly resulting from Hurricane Sally" two weeks before the appraisal hearings began. (Doc. 104, p. 24, ¶ 67).

I. Date of Appraisal Awards Compared With Date of Motion to Vacate

The Insurers' Motion to Vacate all seven Appraisal Awards, (Doc. 116), was filed eighty-nine days after the last of the Appraisal Awards was issued. The district court denied the motion without prejudice and allowed the Insurers to file a renewed motion to vacate at the close of discovery. (Doc. 141). The Insurers then filed a Renewed Motion to Vacate. (Doc. 257). The Insurers' Renewed Motion to Vacate argued that all seven Appraisal Awards should be vacated pursuant to section 682.13(1)(a), (b)(2), (b)(3), and (c), Florida Statutes.

Only the last of the seven Appraisal Awards was issued and delivered within 90 days (89 days to be precise) of the Motion to Vacate. (Doc. 246-18, p. 40); (Doc. 116). The last Award (the only one for which a Motion to Vacate was timely filed) established the amounts of loss solely as to property owned and insured by the Master Association. (Doc. 246-18, pp. 39-40). The other six Awards were issued

and delivered more than 90 days before the 90-day deadline for a Motion to Vacate began to run. (Docs. 246-11); (Doc. 246-18, pp. 2, 9, 15, 21, 27, 33).

The Insurers claimed timely filing in their original motion to vacate based on the date of that last Award under a "one-award theory." (Doc. 116, p. 21). They removed that claim of timely filing from their Renewed Motion to Vacate, filed months later. (Doc. 257, pp. 31-32). The Renewed Motion—unlike the original—attached copies of the seven separate Awards. (Doc. 257-24).

J. The District Court Order on Appeal

At the hearing on the Renewed Motion to Vacate, the district court ruled that the Insurers' arguments that Keys (or the Umpire) exceeded his authority—a separate and distinct grounds for vacatur under section 682.13(1)(d), Florida Statutes—was not pled, was raised for the first time at the evidentiary hearing, and would not be heard because it would be "woefully prejudicial" to do so. (Doc. 346, pp. 622:24 – 624:25).

The only pled grounds for its order of vacatur as to the seven appraisal Awards was Section 682.13(1)(b)(3) of the FAC—alleged "[m]isconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding," which was raised in the Renewed Motion to Vacate. (Doc. 367, p. 3, n. 5). The district court's "factual" basis for finding "misconduct" was that Keys breached the appraisal provision by

not reaching "an" opinion as to the amounts of loss. *Id*. at 18-28. The district court equated that breach to "misconduct." *Id*.

When making the "Keys never submitted an estimate" argument at the two-day hearing, the Insurers argued that Keys "exceeded his authority" by not doing so, and forced the Umpire to exceed his authority in resolving a non-existent dispute. (Doc. 345, p. 14:4-17); (Doc. 346, pp. 622:24 – 624:25). The district court barred that argument in considering the Motion to Vacate, but ultimately allowed that same argument as a basis for granting vacatur via summary judgment under the complaint. (Doc. 367). The allegation also was not pled in the Amended Complaint.

In its ruling, the district court found that "[d]etermining the scope [of the damages] was … outsourced [by Keys] to the umpire." (Doc. 367, p 17). That finding was contrary to the unobjected memorandum to the Panel from the Umpire. (Doc. 298-3); (Doc. 225-1, pp. 35:9-36:7); (Doc. 246-11, p. 11).

The appraisal clause required the following: "at a reasonable time and place, the appraisers shall appraise the loss stating separately the value at the time of loss, and the amount of the loss. If the appraisers fail to agree, they shall submit their differences to the umpire." (Doc. 104-1, p. 33, ¶ 50). The appraisers did meet at agreed-upon times and places for ten days and 95 hours to "appraise the loss," and provided separate opinions as to the amounts of the loss. (Doc. 225-7, pp. 93-97, 107, 112); (Doc. 225-25, pp. 13-14). When they disagreed, their differences were

submitted to the Umpire. (Doc. 246-17); (Doc. 247-17); (Doc. 247-18); (Doc. 318-3); (Doc. 298-3, p. 1). The Umpire resolved those differences, his suggested resolution was approved by least one other member of the Panel, and the Panel issued seven written Appraisal Awards, signed by at least two members of the Panel.

STANDARD OF REVIEW

All issues now before this Court are to be reviewed "*de novo*." In "the unique context of arbitration,"[9] this means under the same "severely limited"[10] legal standard that bound the district court. That standard is established by the Federal Arbitration Act (FAA) that "presumes that arbitration awards will be confirmed." *See, e.g., Gulfstream Aero Corp. v. Oseltip Aviation*, 31 F.4th 1323 (11th Cir. 2022) (holding that if parties want certain rules to the arbitration, the "contract must say so clearly and unmistakably. Otherwise, the Federal Arbitration Act will apply."). The contract prescribed no rules regarding vacatur of the Awards, or the standard of review to be applied.

[9] *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992).

[10] *Booth v. Hume Publishing*, 902 F.2d 925, 931 (11th Cir. 1990).

The district court's finding of "misconduct," as that term is used in the FAC and FAA, is an issue of law, as it is based on the same facts that served as the basis of an unpled and excluded "exceeded authority" argument under 682.13(1)(d).

If the Court were to find that the district court could grant vacatur for a contractual reason outside of the narrow basis listed in the FAC or FAA via summary judgment, (and they are virtually identical), its grant of summary judgment as to an unpled allegation in an unspecified count within a complaint, the standard of review would also be *de novo* with this Court applying the same standard that should have been applied by the district court; i.e., viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in its favor. *Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1172 (11th Cir. 2024).

Here, the sole basis for vacatur was the FAC, and the provisions cited are not in conflict with the FAA. However, for purposes of appellate review, the standard of review of orders vacating the Awards is established by the legal authorities applying the FAA standard.

SUMMARY OF THE ARGUMENT

The district court below did what it said it would not do,[11] went where it said it could not go,[12] and granted vacatur on a basis that it said it would not consider.[13] In addition, the district court vacated six Appraisal Awards that were not timely challenged,[14] and granted summary judgment as to Portofino's counterclaim based on an erroneous conclusion that it was rendered moot by its vacatur of the seven Appraisal Awards.

This appeal involves the dissatisfaction by eleven insurers (the "Insurers") of the outcome of a property insurance appraisal stemming from a Hurricane Sally loss.

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[11] The district court held that considering unpled grounds for vacating an award; namely, that "[a]n arbitrator exceeded the arbitrator's powers." (Fla. Stat. 682.13(1)(d)), would be "woefully prejudicial" to Portofino, and granted Portofino's objection to that argument being made. (Doc. 36, p. 623:13-21).

[12] "Westchester is asking me to undertake … [an] after-the-fact evaluation of *the estimates that were submitted by Mr. McCallister* (estimator for the Keys appraisal team) and that's *exactly the kind of review* that … that case law interpreting my scope of review is *meant to avoid*." (Doc. 346, pp. 593:21 – 594:4) (emphasis added).

[13] The district court noted in an interim order that the *exclusive* basis for vacating an appraisal award was for one of the eight grounds delineated in Section 682.13. (Doc. 158, p. 2, n.5. - Magistrate's Order affirmed by the district court judge).

[14] The Motion to Vacate was not filed within 90 days of the issuance and delivery of six of the seven awards.

The Insurers acknowledged both coverage, and damages. Yet, at the eleventh hour—nearly two years into the appraisal—they initiated a "never-say-die attitude" to terminate the appraisal. When that failed, they moved to vacate the Awards pursuant to Fla. Stat. § 682.13 of the Florida Arbitration Code (FAC).

The sole basis under which vacatur was sought in the Insurers' Motion and Renewed Motion to Vacate was four subsections of 682.13 of the FAC. The Insurers did not plead, either in their Renewed Motion to Vacate, or in their complaint, a cause of action under 682.13(1)(d)—"[a]n arbitrator exceeded the arbitrator's powers." The district court sustained an objection to that argument being made during the hearing on the Renewed Motion to Vacate. Yet after that hearing, the court granted summary judgment of vacatur on the same facts that the Insurers argued supported their "exceeded authority" argument; i.e., that Portofino's appraiser, George Keys, failed to determine the amount of loss, leaving the Umpire to come up with his own estimate. That, however, was not asserted by the Insurers in their pleadings.

The facts establish that none of the parties and neither appraiser, at any time before all Awards were issued over a six-month period, claimed that Keys failed to reach an opinion as to the amount of loss during the appraisal. (Doc. 246-18). Neither appraiser objected to the Umpire resolving their differences.

The district court granted vacatur on all seven of the Awards, despite the Insurers neither pleading nor proving timely filing under Section 682.13(2). In doing so, and despite the assertion of an affirmative defense of untimeliness by Portofino, the district court found that Portofino waived the untimeliness argument by making an "admission" to a general allegation not in the Motion to Vacate but in the Insurers' declaratory judgment action. The allegation referenced by the district court, that there was only one award, was refuted by the plain reading of the Appraisal Awards. While the original Motion to Vacate alleged timely filing under an "one award" theory, it was deleted from the Renewed Motion. The facts established that the "admission" by Portofino was not made until all deadlines to file motions to vacate six of the seven Awards had expired. Moreover, the response to the allegation involved a legal question, which could not form the basis for an admission.

During written closings, the Insurers recharacterized their unpled and excluded "exceeded authority" argument into an equally unpled breach-of-contract argument that relied on the same purported facts. The only count in their complaint that asked for vacatur (Count X) did so pursuant to section 682.13. As with the motion, it did not allege that any member of the Panel exceeded their authority pursuant to 682.13(1)(d), or that Keys failed to reach opinions as to the amount of loss.

The district court's sole basis for vacatur under the FAC was that Portofino's appraiser allegedly never reached opinions as to the amount of the loss. This, the district court erroneously held, was "misconduct" under Section 682.13(1)(3). That argument, if true, would qualify as an "exceeded authority" argument that the district court had excluded as being unpled in the Motion. It also was not an allegation that appeared anywhere in the Insurers' complaint, answer to the counterclaims, affirmative defenses, or in any of their pleadings.

Evidence introduced at the two-day evidentiary hearing refuted the "no opinion" as to the amounts of the loss argument. This evidence revealed that even before the hearings began Keys and his experts had produced estimates totaling 155 pages, with 8,400 line items, estimates that priced the costs of correcting the hurricane damages down to the penny, down to the number and costs of the screws, for repair or replacement of property that the experts said was needed to remediate hurricane damage. Uncontroverted evidence established that the Keys estimates were prepared using the pricing methodology requested by the Umpire.

A wholly sufficient alternative basis for reversal of the vacatur of appraisal Awards to the Tower One, Two, Three, Four, and Five Associations is that the Motion to Vacate was filed more than 90 days after the Awards were delivered. The district court found that an outside-the-motion "admission," coming well after those deadlines expired, effectively revived the expired statutory deadline.

Last but not least, the district court granted summary judgment of dismissal as to Portofino's counterclaims on the erroneous premise that it was rendered moot by its vacatur of the seven Appraisal Awards.

ARGUMENT

I. Appraisal Generally.

Appraisal is an "alternative method[] of dispute resolution that provide[s] quick and less expensive resolution of conflicts" as to the amount of loss for disputed property insurance claims. *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001). "[T]he laudable goal of the appraisal process" is "to resolve disputes without litigation." *Federated Nat. Ins. Co. v. Esposito*, 937 So. 2d 199, 201 (Fla. 4th DCA 2006).

The same is true for arbitration. "The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *Ultracashmere House, Ltd. v. Meyer*, 664 F. 2d 1176, 1179 (11th Cir. 1981). "Arbitration proceedings are summary in nature to effectuate the national policy favoring arbitration, and they require expeditious and summary hearing, with only restricted inquiry into factual issues." *Legion Ins. Co. v. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (citations omitted). "Courts have repeatedly condemned efforts to depose members of an arbitration panel to impeach or clarify

their awards." *Id*. Parties are "not permitted to relitigate the merits" of the claim before the panel. *Ultracashmere*, 664 F. 2d at 1178.

Here, the parties spent over two years and millions of dollars to resolve their dispute as to the amounts of loss. (Doc. 246-5, p. 2); (Doc. 246-18); (Doc. 346, p. 542:8-18.); (Doc. 344-3, pp. 16-17). Now, the Insurers seek to avoid what they consider to be unfavorable results from the appraisal process.

A. The Meaning of "Amount of Loss" under Florida Law.

"Amount of loss" includes scope of damages, (*Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140 (Fla. 2d DCA 2014)), and cost of repair or replacement, (*State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996)).

B. Who Determines the Amount of Loss in Appraisal?

The appraisal panel has the *exclusive authority* to determine the amount of loss. *See Licea*, 685 So. 2d at 1287. No one, including a reviewing court, can second-guess the findings and decisions of an appraisal panel. *See Noa v. Fla. Ins. Guar. Ass'n*, 215 So. 3d 141, 144 (Fla. 3d DCA 2017)(holding that an amount-of-loss issue for the appraisal panel "should be 'baked into' the appraisers' and umpire's computations, and not left open for a re-appraisal *or for a determination by the court*," and that to allow someone other than the panel to set the amount of loss post-appraisal would improperly make them a "super-umpire.")(emphasis added).

Here, the only disputed portion of the appraisal provision at issue is the phrase that reads that the appraisers, "at a reasonable time and place, the appraisers shall appraise the loss, stating separately the value at the time of loss and the amount of loss," and 'if the appraisers fail to agree," they will "submit their differences to the umpire." (Doc. 104-1, p. 33, ¶50).

Once an award stating the amount of the loss is agreed to in writing by at least two of the members of the Panel, the Award "shall determine the amount of loss." *Id*. This provision does not require that the appraisers state the "amount of loss" in writing. Nor does it prescribe the methodology to be used for reaching the amount of the loss.

Although no record from the 95 hours of appraisal hearings exists, the uncontroverted evidence from the attempt to re-create the record shows that the two appraisers followed the unobjected-to methodology prescribed by the Umpire, the two appraisers submitted their amounts of loss estimates to the Umpire, the Umpire made any necessary adjustments to account for overlapping general conditions, the Umpire rendered his resolution of the disputes, and at least two members of the Panel signed the written Awards establishing the amounts of loss. (Doc. 225-7, pp. 93-97, 107); (Doc. 257-18, pp. 10-164); (Doc. 247-17); (Doc. 247-18); (Doc. 298-3); and (Doc. 246-18).

II. The District Court Erred by Vacating the Awards on Grounds Outside the Exclusive Statutory Basis of the FAC.

The FAC was the sole basis for the Insurers' "Renewed Motion to Vacate." The parties agreed that decisions interpreting the Federal Arbitration Act (FAA) are highly persuasive,[15] and that appraisal is treated the same as arbitration for purposes of vacatur. In fact, the district court, in one of its preliminary orders, correctly stated now well-settled law that "[i]n the absence of one of the reasons set forth in the statute (Section 682.13) 'a court may not vacate the award.'" (Doc. 158, p. 2, n.5). The Insurers pled four of those eight reasons in its Motion. The only one the district court employed to vacate the Awards was alleged "misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding." Section 682.13(1)(b)(3).

The only count in the Amended Complaint that sought vacatur was Count X, and it relied exclusively on Section 682.13. From the inception of the two-day evidentiary hearing, it was apparent that the Insurers' primary basis for vacatur was the allegation that Keys "exceeded the arbitrator's powers," allegedly by not following the procedure required by the appraisal provision. (Doc. 345, p. 14:4-17).

[15] This was a transaction involving interstate commerce. If there was a conflict between the FAC and FAA, the FAA would control. Neither party nor the court found a relevant conflict.

That is an expressly provided-for ground for vacatur under Section 682.13(1)(d). In sustaining a prompt objection to that argument, the district court correctly found that it would be "woefully prejudicial" to allow this unpled allegation. (Doc. 346, pp. 622:24 – 624:25).

In what can only be viewed as an "end run" of the district court's holding, and *despite the fact that the hearing was on the Insurers' Renewed Motion to Vacate only*, the district court looked to one of the motions for summary judgment filed by the Insurers as grounds for vacatur. (Doc. 251). Despite the fact that the allegation that Keys never reached opinions as to the amounts of the loss was never asserted in any of the Insurers' thirteen pleadings, the Insurers argued that vacatur could be granted on a breach-of-contract issue outside the confines of the FAC. It did so despite the fact that the only count in their ten-count Amended Complaint seeking vacatur was Count X. And as with the Motion, it relied solely on the FAC as authority for vacatur, and did not include the section regarding "exceeding authority," § 682.13(1)(d).

At the evidentiary hearing, the district court excluded that argument, in name at least, as being unpled, thus "woefully prejudicial" to Portofino. (Doc. 346, 622:24 – 624:25). But following the hearing, it granted summary judgment based on that same argument by reclassifying it as a "breach of contract."

This was error for multiple reasons.

Florida law, following the U.S. Supreme Court, holds that statutory grounds for vacatur are exclusive and cannot be supplemented judicially or contractually. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that the Federal Arbitration Act's ("FAA's") grounds for vacatur and modification "are exclusive," rejecting contractual expansion. 552 U.S. 576, 578 (2008). This rule was recognized by this Court in *Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010), citing the Supreme Court's holding that the statutory grounds listed in section 10 of the FAA are the exclusive means for vacatur; section 10 of the FAA is the same in all material respects to section 682.13 of the FAC.

The Florida Supreme Court adopted this rule for the FAC in *Visiting Nurse Association of Florida, Inc. v. Jupiter Medical Center, Inc*., explaining that section 682.13 provides the "only grounds" for vacating an award and that nonstatutory grounds are unavailable. 154 So. 3d 1115, 1131 (Fla. 2014). This limited review preserves arbitration's (and appraisal's) core purposes: efficient, prompt dispute resolution without protracted litigation. *See Esposito*, 937 So. 2d at 201 ("[T]he laudable goal of the appraisal process" is "to resolve disputes without litigation."); *First Protective Ins. v. Hess*, 81 So. 3d 482, 485 (Fla. 1st DCA 2011) ("Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits.").

Despite the binding precedent from *Visiting Nurses*, the district court deemed it inapplicable because it involved arbitration rather than appraisal and was not a property-insurance claim. But courts in Florida routinely use the FAC for certain post-appraisal purposes, including vacatur of awards. *See Three Palms Pointe, Inc. v. State Farm Fire & Cas.*, 250 F. Supp. 2d 1357, 1361 (M.D. Fla. 2003); *Mont Claire at Pelican Marsh Condo. Ass'n v. Empire Indem. Ins.,* 2021 WL 3476406, *3-4 (M.D. Fla. May 24, 2021), report and recommendation adopted, (M.D. Fla. July 29, 2021)(non-binding but persuasive authority). And the Insurers themselves relied on the FAC for vacatur, and the district court applied it.

The district court's citation to *American Coastal Ins. Co. v. San Marco Villas Condominium Ass'n, Inc.*, 379 So. 3d 1099 (Fla. 2024), is misplaced. That decision addressed only whether a trial court has discretion to compel appraisal before resolving coverage defenses (e.g., fraud); it did not involve vacating an appraisal award and said nothing about expanding vacatur grounds beyond Section 682.13.

Simply put, the district court could not supplement Section 682.13's narrow grounds (e.g., corruption, misconduct prejudicing rights, exceeding powers) by looking outside the Code. Doing so would make appraisal a nullity, as litigation inevitably would be brought under grounds not listed in the Arbitration Code. And if a party dissatisfied with an appraisal award cannot plead and prove one of the

narrow grounds for vacatur specified in the Code, it should not be allowed, as here, a "second bite at the appeal" under a complaint.

While this Court has not definitively resolved whether an appraisal process constitutes "arbitration" under the Federal Arbitration Act (FAA), it has provided guidance as to the applicable standards of review to apply. Specifically, in *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, the Court articulated that a dispute resolution procedure qualifies as arbitration under the FAA if it exhibits the "common incidents" of classic arbitration. 524 F.3d 1235, 1239-40 (11th Cir. 2008). Those include the involvement of an independent adjudicator, the application of substantive legal standards, the consideration of evidence and argument, and the issuance of a decision that resolves the parties' rights and obligations. *Id.* This standard was recently referenced in *Positano Place at Naples I Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, where the Court reiterated the importance of these elements in determining whether a process constitutes arbitration under the FAA. 84 F.4th 1241, 1255 (11th Cir. 2023). While trial court opinions are, of course, persuasive only, a district court reviewing authorities on this issue gave a scholarly summary: "In light of jurists within the Eleventh Circuit continuing to apply Fla. Stat. § 682.13 to motions to confirm or set aside appraisal awards and the Eleventh Circuit's affirmance of the district court's decision in *Three Palms Pointe, Inc. v. State Farm Fire & Casualty Company*, which specifically found that Florida's Arbitration Code

applied to motions to confirm appraisal awards, the Undersigned finds that Florida's Arbitration Code applies to motions to set aside invalid appraisal awards." *Mont Claire,* 2021 WL at *6.

All of the "hallmarks" of arbitration are present in this case. The issue submitted (amounts of the loss for six property owners) was established by a written award that the parties agreed in their appraisal provision "shall determine the amount of loss." The public policy of encouraging, enforcing, and giving great deference to alternative dispute resolution decisions supports finding this appraisal to have the hallmarks of arbitration as to the issue submitted for final resolution, with the parties having waived litigation of that issue. Alternative dispute resolution, whether called "appraisal" or "arbitration," is encouraged, and awards should be given great deference.

III. The District Court Erred by Granting the Insurers' Motion for Summary Judgment

A. The District Court Erred in Granting Summary Judgment on a Claim or Defense the Insurers Never Pled.

This Court reviews a district court's grant of summary judgment, applying the same legal standards as the district court, including viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party—here, Portofino. *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015); Fed. R. Civ. P. 56(a). In moving for summary judgment, a party must "identify[]

each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Because the Insurers identified no such claim or defense in their extensive pleadings, the order cannot stand.

The Insurers filed a detailed 50-page Complaint to initiate this case. (Doc. 1). Seven months later, they filed a 70-page Amended Complaint (Doc. 104). Both were loaded with specific allegations. Thereafter, the various Insurers filed eleven answers and defenses to Portofino's counterclaims. (Docs. 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133).

In those thirteen pleadings (spanning ten months and containing nearly 400 pages), *the Insurers never alleged that Portofino's appraiser failed to determine the amounts of loss.* (*See* Docs. 1, 104, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133). They suggested otherwise in their pleadings. For example, Westchester[16] admitted in its answer to Portofino's Counterclaim "that the appraisers reached differing conclusions as to the amount of loss, and the issue was then submitted to [the Umpire] Doan." (Doc. 130, p. 7, ¶45).

Federal Rule of Civil Procedure 56 states, in part, "[a] party may move for summary judgment, *identifying each claim or defense—or the part of each claim or*

[16] Westchester played lead, which the other insurers joined. (Docs. 116, 257).

defense—on which summary judgment is sought." *See* Fed. R. Civ. P. 56 (emphasis added). Here, the Insurers put their claims into ten counts. The only one seeking vacatur was Count X, and that count—as with their Renewed Motion to Vacate—was based exclusively on the FAC. As with their Motion, they did not allege that an appraiser exceeded his authority.

It is settled law in the Eleventh Circuit that a party may not amend a complaint with new claims presented in summary judgment papers. *See, e.g., Corey Airport Servs., Inc. v. Decosta*, 587 F.3d 1280, 1282 (11th Cir. 2009). This prohibition holds even absent objection below. *Flintlock Constr. Servs. v. Well-Come Holdings, LLC*, 710 F.3d 1221, 1227-1228 (11th Cir. 2013).

Nor may a district court create the appearance that it has become an advocate by *sua sponte* amending a party's pleadings to supply an unpled basis for summary judgment. *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 559 (11th Cir. 2013). Rather, "[a]t the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a)." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004).

In effect, the district court, in granting summary judgment, improperly amended the Insurers' pleadings to include a claim or defense that was never pled

based on an allegation that was inconsistent with admissions in their pleadings, and the record evidence. (Doc. 367, p. 9).

Not only did the Insurers never allege in their pleadings that Keys failed to determine the amount of the loss, their pleadings admit that he did, that there was a disparity between the appraisers, and that the disparity was submitted to the Umpire for resolution.

As discussed below, the unpled allegation is refuted by the evidence.

B. The District Court Erred in Granting Summary Judgment Because the Facts Demonstrate that Keys Determined the Amount of Loss; at the Very Least, There Were Disputed Facts on that Point.

Even if the Insurers had pled that Keys failed to determine the amounts of loss (and they did not), and even if such a contractual theory could support vacatur under the exclusive grounds of the FAC (it cannot), summary judgment in favor of the Insurers was improper. The district court lacked the benefit of any record from the appraisal proceeding. But even the attempt to recreate that "record" before the district court shows evidence that Keys performed his obligation under the appraisal clause to "appraise the loss, stating separately . . . the amount of loss." (Doc. 104-1, p. 33, ¶50). The evidence demonstrates that Keys went to great lengths to investigate the loss and compute the costs of repairing or replacing property damaged by the insured event.

These facts create—at minimum—a genuine dispute as to whether Keys determined the amounts of loss in substantial compliance with the Policies. The district court lacked an appraisal record, yet resolved this disputed factual issue against Portofino, weighing evidence and credibility in the Insurers' favor—precisely what summary judgment forbids. *Buending v. Town of Redington Beach*, 10 F.4th 1125, 1130 (11th Cir. 2021). Thus, reversal is required.

C. The District Court Erred in Granting Summary Judgment After Impermissibly Reviewing the Adequacy and Accuracy of the Amount of Loss Determined by Keys.

Under Florida law, there is a clear division of responsibility between the appraisal panel and the courts. The appraisal panel determines amount of loss issues; courts resolve coverage issues. *See Licea*, 685 So. 2d at 1287. Courts cannot second-guess amount-of-loss determinations by appraisal panel members—they may not "look beyond the face of an appraisal award and consider extrinsic evidence to determine the basis for the award." *Hess*, 81 So. 3d at 486; *accord Citizens Prop. Ins. v. River Manor Condo. Ass'n*, 125 So. 3d 846, 854 (Fla. 4th DCA 2013) (declining to address duplicative items in award because such issues "raise[] an issue directly related to the 'amount of loss' … solely within the province of the appraisers").

The district court erred in granting summary judgment, as it improperly considered the adequacy of the amounts of loss determined by Keys. Despite

substantial evidence that Keys performed his duties as an appraiser—assembling experts, performing inspections, generating 155 pages of estimates (containing 8,400 line items) detailing costs to the penny for labor, materials, quantities, code upgrades, etc., participating in ten days of hearings with presentations, cross-examination, and discussions—the district court focused on out-of-context statements from the depositions of Keys and his estimator (McCallister) in the Insurers' attempt to recreate a record of what happened during the 95 hours of appraisal hearings, (Doc. 225-7, pp. 93-97, 107, 112) (Doc. 225-25, pp. 13-14) (not to mention the hours spent by the Panel outside of those hearings).

The district court erroneously concluded that Keys never computed amounts of loss because he purportedly reached no conclusions as to scope of damages, and price of repairs. (Doc. 367, p. 9).

That conclusion was based on an out-of-context statement by Keys—i.e., that simply totaling component parts of the stand-alone-pricing (totaling $233 million) was not his opinion as to the amount of the loss. That did not mean that Keys had no opinion as to the amount of the loss. Keys testified, and the other members of the Panel confirmed, that everyone knew those estimates would have to be adjusted to eliminate inherent duplication once the Umpire resolved the dispute as to the scope of damages. And Keys' testimony that the Umpire agreed to, and did, make those adjustments was unrebutted.

Even if the district court's conclusion had been correct, it would be a basis for vacatur under Section 682.13(1)(d), an arbitrator exceeding their authority—a basis not pled, and thus expressly excluded by the district court. In context, the record shows that Keys performed the task of determining the amounts of loss in precisely the form requested by the Umpire without objection from the appraisers or parties. (Doc. 230-1, pp. 41:2 – 49:13); (Doc. 225-1, pp. 338:19-341:21). The Panel understood that estimates developed before the Umpire resolved scope disagreements would need adjusting. (Doc. 298-3, p. 1). In any event, testimony that the Umpire agreed to make the required adjustments is uncontroverted, and there was no evidence that he did not do so. (Doc. 298-3); (Doc. 246-11).

By second-guessing the methodology used by the Panel to compute the amounts of loss, the district court impermissibly left its "policy defenses" lane, jumped the guardrail, and veered into the "amount of loss" lane. That lane belonged exclusively to the appraisal panel. *See Licea*, 685 So. 2d at 1287 (the appraisal panel has the *exclusive authority* to determine the amount of the loss).

The district court went where it was not allowed to go to do what it was not permitted to do. *See Hess*, 81 So. 3d at 486 (in Florida, "a trial court *may not* look beyond the face of an appraisal award and consider extrinsic evidence to determine the basis for the award") (emphasis added); *River Manor*, 125 So. 3d at 854 (acknowledging that the trial court properly declined to address the issue of

duplicative items in an appraisal award because "[a]n alleged mistake of that nature raises an issue directly related to the 'amount of loss' sustained to the particular property—an issue solely within the province of the appraisers").

IV. The District Court Erred in Vacating the Awards Under the FAC.

A. No Timely Motion to Vacate Was Filed As to Six of the Seven Awards.

It is well-settled that "[a]bsent a *timely* motion to vacate [an arbitration] … award, the trial court had *no discretion* but to confirm the award as rendered." *Broward County Paraprofessional Ass'n v. School Board of Broward County*, 406 So. 2d 1252, 1253 (Fla. 4th DCA 1981)(citations omitted) (emphasis added). A trial court's failure to confirm an award when no *sufficient* motion[17] is timely filed is an abuse of discretion mandating reversal. *Wells v. Castro*, 117 So. 3d 1233 (Fla. 3d DCA 2013). The short and strictly enforced 90-day deadline for filing is in keeping with the public policy goal of finality, speed, and avoidance of litigation that underpin favored ADR in general, and arbitration and appraisal in particular. The FAA was created to assure uniform enforcement of arbitration awards, and it was undisputed by the parties to this action that appraisal is treated the same as arbitration

[17] A complaint is not a "sufficient motion." Even when a complaint seeking vacatur is filed within 90 days, it is not deemed to be a "sufficient" motion. *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742 (11th Cir. 1988).

for purposes of vacating or confirming awards. (Doc. 351, p. 24); (Doc. 360, p. 5) (the FAC being the Insurers' sole basis for vacatur in their Renewed Motion to Vacate).

A party's motion to vacate must be stated with particularity.[18] Vacatur is available exclusively under the auspices of the FAC, and can be obtained exclusively by a timely "motion [not complaint] of a party." *Id.* The required motion must be filed within 90 days after the movant receives notice of the award pursuant to § 682.09, *unless* the movant alleges that the award was procured by corruption, fraud or other undue means, in which case the motion must be made *within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant*." Section 682.13(2). (emphasis added).

Here, the burden was on the Insurers to plead with particularity, and prove allegations of fraud, corruption or undue means by clear and convincing evidence. *Davenport v. Dimitrijevic*, 857 So. 2d 957, 961 (Fla. 4th DCA 2003). They failed to do so; thus, the sometimes-available extended deadline was not available here.

[18] Under Fed. R. Civ. P. 7(b), "an application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with *particularity* the grounds therefor, and shall set forth the relief or order sought." *Prof'l Planning Assocs.*, 857 F.2d at 745 (emphasis added).

The Insurers alleged timely filing in their *original motion* based on their theory that there was only one award, and that the 90-day deadline did not start until the last of the seven Awards was entered. [19] That motion was dismissed by the district court, and replaced with an amended motion.

The "Renewed Motion" did not allege timely filing. It attached seven separate and distinct Awards, deemed to be part of the motion, that refuted a "one-award" theory, and that show—on their face—untimely filing as to all of the Awards except the last Award (the Award to the Master Homeowners Association).

This Circuit has found that a party's failure to move to vacate an arbitral award within the three-month limitations period prescribed by the FAA bars that party from challenging the validity of the award. *Cullen v. Paine, Webber, Jackson & Curtis, Inc*., 863 F.2d 851 (11th Cir. 1989). The FAC's time limitation is virtually identical to the FAA, establishing a 90-day deadline (versus three months) for a motion to vacate. Section 682.13(2). That deadline can be extended by a showing of late-discovered fraud, corruption, or undue means, but no such showing was made in this case.

[19] "Accordingly, as the final part of the Appraisal Award was issued on July 16, 2023, this Motion is timely pursuant to the statute." (Doc. 116, p. 21).

In *Cullen*, the party seeking vacatur claimed that his engaging in settlement negotiations at the time the deadline expired "constituted due diligence in pursuit of his claim that the award was invalid as issued, and he concludes that his diligence required the district court to grant him an exception to Section 12's three-month limitations period." *Id*. at 854.

"We are unpersuaded," this Court wrote. "Cullen has alleged insufficient facts to demonstrate that he was prevented by the pendency of negotiations from filing a timely section 10 motion [motion to vacate]." *Id*. "It is clear that allowing section 12's three-month window of opportunity to slip away simply because settlement negotiations, no matter how promising, are under way falls considerably short of due diligence." *Id*.

Here, the Insurers likewise made no showing that actions by Portofino prevented them from timely filing. They certainly cannot claim that an "admission" that came after all deadlines had expired "resurrected" their already-expired right to file for vacatur. They allowed the deadlines to "slip away" before any answer was filed in a complaint, and cannot say any action by Portofino prevented them from timely filing. That is especially true when, as here, that same pleading expressly raised the argument that the filing was untimely.

Thus, the Motion to Vacate was untimely as to six of the seven Awards. As with the late-filed motion in *Cullen*, the Motion to Vacate was untimely and should have been denied as to those six Awards.

The Awards that were attached to, and became part of, the Renewed Motion to Vacate show on their face that they were issued association-by-association for separately owned properties with separate damages. Attached documents, especially when they are at the heart of a motion, are deemed to be part of the Motion. Thus, the claim that deadlines for challenging or moving to modify the first six Awards until the seventh Award was entered fails as a matter of law, based on the four corners of the Appraisal Awards.

The fact that the Panel intended separate awards was addressed in an email from the Umpire to the Panel dated March 14, 2023. In that email, the Umpire wrote:

> As the panel did agree at the outset that AN award would be submitted for "incurred," and each Tower Ones its own HOA, I believe using An Award per Tower and another Master Award is maintaining the established and agreed method to address the loss. If you suggest, as a panel, we consider issuing an Overall Comprehensive Award at final reconciliation, I would not be opposed.

(Doc. 246-11, at 10) (capitalization of "AN" and "An Award" in original). No "Overall Comprehensive Award" was requested or issued. That memo came well before the first of the deadlines had expired.

Consistent with this agreed method, the Panel issued stand-alone awards for each Tower Association and the Master Association. (Doc. 246-18). The face of all six Awards shows that each disposed of all damage claims in relation to each separate association/policyholder's claim.[20]

The Tower Association Awards were issued between March 15 and May 30, 2023. (Doc. 246-18, pp. 9-33). The last Tower Award was issued on May 30, 2023. (Doc. 246-18, p. 33). Thus, the deadline for filing a motion to vacate for even the last of those Awards was August 28, 2023. The Motion to Vacate was filed on October 13, 2023.

B. The District Court Erred in its Finding that Portofino Waived, Via an "Admission," the Untimely Filing of the Motions to Vacate.

The district court looked outside the motion to an "admission" in Portofino's Answer, (Doc. 108, ¶ 140—filed after all deadlines had expired as to six of the seven Awards), to a general allegation in the Insurers' Amended Complaint: "The appraisal panel has issued an appraisal award in seven parts …." (Doc. 104, ¶ 140).

The same pleading that the district court looked to for reviving a deadline that had already expired referenced the seven Awards in the plural, using the word

[20] That is precisely as described by the Umpire when he discussed the agreement to issue separate awards and described each as "a resolved claim." (Doc. 246-11, p. 2).

"awards" fifty-nine times. More importantly, that same pleading expressly stated that "[a]ny allegations related to vacating the appraisal awards pursuant to Florida Statutes § 682.13 fail to the extent they were not timely pursued." (Doc. 108, p. 94, ¶ 28).

There is no pleading that can revise or revive the strictly enforced deadline of § 682.13(2)—especially if, as here, the pleading is filed after the deadlines have expired. Vacatur was no longer available once those deadlines expired.

Even had the "admission" come before the deadlines expired, this Court has recognized that admissions as to legal conclusions are "of questionable importance." *Almand v. DeKalb Cnty, Ga.*, 103 F.3d 1510, 1514 (11th Cir. 1997). Here, there can be no doubt that the determination of whether the Awards are one award or separate awards is a legal conclusion that this Court can determine from the face of the Awards.

Separate insureds were issued separate Awards for separate properties separately damaged by the hurricane. It cannot be credibly argued, for example, if all Associations except Tower One were happy with their Awards, that Tower One's deadline for filing a motion to correct, modify, or vacate did not begin running until all separate Awards were entered.

The purported "admission" is of no legal relevance and cannot form the basis for waiver of Portofino's expressly raised untimeliness argument. Absent a timely

motion to vacate, the district court had no discretion but to confirm six of the Awards. *See Wells*, 117 So. 3d at 1237. The order to the contrary must be reversed.

C. The District Court Erred by Misclassifying the Alleged Failure to Provide the Amount of Loss as "Misconduct"; If Anything, this Allegation Falls Under the "Exceeded Authority" Section of the FAC.

The district court erred by vacating the Appraisal Awards under section 682.13(1)(b)(3) based on a flawed definition of "misconduct" that ignored binding interpretive principles, persuasive federal precedent under the analogous FAA, and record evidence of the appraiser's performance. Even if the Insurers properly pled and proved a failure to determine the amounts of loss—which they did not—such conduct is not "misconduct" under the FAC. Thus, the order must be reversed.

The FAC does not define "misconduct," as used in section 682.13(1)(b)(3), which authorizes vacatur for "[m]isconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding." But we know that the Florida Legislature separately listed "exceeded authority" from "misconduct." And we know that the conduct the district found to be "misconduct" is the identical conduct that the Insurers argued constituted "exceeded authority."

The Eleventh Circuit has found that arbitrators "exceed their power" if "they fail to comply with mutually agreed-upon contractual provisions in an agreement to arbitrate." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011).

"[A]n arbitrator can, in fact, exceed his powers by 'not doing enough.'" *Id.* at 844, n.14. This is exactly what the district court found—that Portofino's appraiser didn't do enough. And this fits squarely within section 682.13(1)(d), not (1)(b)(3).

Portofino's appraiser could not commit "misconduct" by exceeding his authority under Section 682.13(1)(b)(3) because "exceeding authority" is separately identified in the statute as its own reason to vacate.[21] Under the canon against surplusage, courts presume that when the legislature separately identifies conduct in different sections of a statute, it intends those provisions to have different meanings and effects. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174-79 (2012); *see also Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). Section 682.13(1)(b)(3) addresses misconduct by an arbitrator prejudicing the rights of a party, while section 682.13(1)(d) addresses an arbitrator exceeding his authority. Reading section 682.13(1)(d) as merely duplicative of section 682.13(1)(b)(3) renders it superfluous. The Florida Legislature's decision to isolate misconduct from "exceeding authority" shows its clear intent to create a distinct reason to vacate rather than to merely restate what is considered misconduct.

[21] These arguments apply equally to the FAA as the state statute closely parallels the federal act. *Cf. 9 U.S.C.A. § 10* with Fla. Stat. § 682.13(1).

The district court's conclusion that Portofino's appraiser failed to determine the amounts of loss is—any way you slice it—an "exceeded authority" issue under 682.13(1)(d) rather than a "misconduct" issue under 682.13(1)(b)(3). Thus, the district court should not have vacated the Appraisal Awards under section 682.13(1)(b)(3). And because the Insurers failed to plead the "exceeded authority" issue under 682.13(1)(d), as was found by the district court, the Awards were wrongly vacated.

D. Portofino's Appraiser Did Not Commit "Misconduct" Under the FAC.

"Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive." *RDC Golf of Fla. I, Inc. v. Apostolicas*, 925 So. 2d 1082, 1091 (Fla. 5th DCA 2006); *see also Regalado v. Cabezas*, 959 So. 2d 282, 285 (Fla. 3d DCA 2007)(holding that "[t]he language found in section 682.13(1)(a) [of the FAC] is almost identical to the language in 9 U.S.C. § 10(a)(1) (2002) [of the FAA]," "[t]hus, it is proper to look to federal law to interpret the language in section 682.13(1)(a).").

The federal courts applying the FAA have interpreted the definition of misconduct. For example, the Supreme Court has observed that the FAA's analogous provision, 9 U.S.C. section 10(a)(3), requires "error … in bad faith or so gross as to amount to affirmative misconduct." *United Paperworkers Int'l Union v.*

Misco, Inc., 484 U.S. 29, 40 (1987). District courts within this Circuit (providing persuasive authority only) require movants to "show that the arbitrator's handling of these matters was in bad faith or so gross as to amount to affirmative misconduct, effectively depriving the plaintiff of a fundamentally fair proceeding." *Pochat v. Lynch*, 2013 WL 4496548, *10 (S.D. Fla. Aug. 22, 2013) (citing *id.*).

Here, the evidence was that Keys prepared his estimates in the means and manner that the Umpire requested. When considering the extensive work that Keys and his team undertook and completed to *determine* and *present* the amount of the loss to Lewis (and then the Umpire), there is simply no basis to suggest that Keys committed bad faith or gross error. As the district court acknowledged, the extremely limited review that it was to give prohibited it from doing what the Insurers were asking it to do; i.e., making an "after-the-fact evaluation of *the estimates that were submitted by Mr. McCallister* (estimator for the Keys appraisal team) and that's *exactly the kind of review* that … that case law interpreting my scope of review is *meant to avoid*." (Doc. 346, pp. 593:21 – 594:4) (emphasis added).

The fact that the district court might have prescribed a different methodology than the one the Umpire asked Keys and Lewis to follow does not support a finding of "misconduct." Appraisers, like judges, make errors. Errors do not equate to misconduct. Not for judges. Not for appraisers.

The conduct complained of, at most, was that Keys in preparing his estimate did not follow the mandates of the appraisal provision. At most, this constitutes an "exceeding authority" basis for vacatur. Not misconduct.

E. Even if this Court Agrees That Keys Deviated From the Requirements of the Appraisal Provision, and That Such Conduct Could Be Deemed Both "Exceeded Authority" and "Misconduct," Vacatur Under Section 682.13(1)(b)(3) Requires That Prejudice Be Pled With Particularity, and Proven.

Prejudice is an essential element; mere misconduct without demonstrable harm to a party's rights does not suffice. *See Int'l Med. Ctrs., Inc. v. Sabates*, 498 So. 2d 1292, 1293-94 (Fla. 3d DCA 1986). No facts are alleged in the Insurers' Renewed Motion to Vacate that would support a finding of prejudice. The only reference to prejudice is the document production prior to the initial appraisal hearing. The district court's examination of Lewis showed that he had plenty of time to review the documents, and did review the documents, well before the Awards were issued. (Doc. 345, pp. 322:7 – 326:3). That unequivocal evidence refuted any showing of prejudice. No other basis of prejudice was alleged in a motion that had to be pled with particularity.

The district court found that Keys' alleged misconduct caused prejudice for reasons not pled in the Insurers' Motion. The district court reasoned—without the benefit of a record of the underlying appraisal proceedings (and ignoring the Umpire's written and unchallenged statements)—that such alleged misconduct

"derailed the appraisal process prescribed by the policies, triggering a domino effect that frustrated any possibility that the appointed appraisers could reach an agreement on the 'amount of loss' and effectively required the Umpire to *formulate his own estimate rather than resolve the differences between the appraisers*, as contemplated by the policy language." (Doc. 367, p. 27). That finding, in addition to going beyond the only "prejudice" alleged in the motion, is contrary to uncontroverted evidence at the two-day hearing that the Umpire *did not* "formulate his own estimate," and that he *did* resolve the differences between the appraisers.

In addition, all criticisms of Keys' appraisal were identified and presented to the Panel by Lewis, and the Panel is deemed to have given whatever weight was based on such issues, and to have considered those before issuing its seven Awards. Absent pleading and proving prejudice, even if the allegation that Keys "did not do enough" were true, vacatur fails under the "misconduct" basis for vacatur. Insurers neither pled nor proved prejudice, and thus reversal is required.

F. The District Court Erred by Improperly Considering Extrinsic Evidence Beyond the Face of the Awards.

The district court reversibly erred by exceeding the narrow scope of judicial review for awards—among the most limited known to the law—when it delved into extrinsic evidence from the "recreated" record to second-guess the Panel's

determination of the amounts of loss and to vacate the Awards. Florida law prohibits such inquiry, confining review to the face of the award.

"The proceedings had before the arbitrators are not generally to be examined by a trial Court or an appellate Court in determining how the arbitrators arrived at their award." *Weeki Wachee Orchid Gardens, Inc. v. Fla. Inland Theatres, Inc.*, 239 So. 2d 602, 603 (Fla. 2d DCA 1970). In fact, a trial court is prohibited from combing through the record of the arbitration proceeding to determine whether the arbitrator committed errors of fact or law in making the decision. *Regalado*, 959 So. 2d at 286. This is because arbitration awards cannot be set aside for mere errors of judgment by the arbitrators as to the law or facts. *Expressway Cos. v. Precision Design, Inc.*, 882 So. 2d 1016, 1018 (Fla. 3d DCA 2004).

These principles apply equally to appraisals, treated analogously under the FAC for vacatur purposes (as the parties agreed). In Florida, "a trial court *may not* look beyond the face of an appraisal award and consider extrinsic evidence to determine the basis for the award." *Hess*, 81 So. 3d at 486 (emphasis added); *see also Charlevoix Equity Partners v. AIG Prop. Cas.*, No. 16-24764-Civ-Scola, 2018 WL 3827616, *3 (S.D. Fla. Aug. 10, 2018).

As to arbitration, "[t]he panel is *the sole and final judge* of the evidence and the weight to be given it." *Sorren v. Kumble*, 578 So. 2d 836, 836 (Fla. 3d DCA 836) (emphasis added). "When the parties agreed to arbitration, they gave up some

of the safeguards which are traditionally afforded to those who go to court." *Affiliated Mktg., Inc. v. Dyco Chems. & Coatings, Inc.*, 340 So. 2d 1240, 1243 (Fla. 2d DCA 1976). "One of these safeguards is the right to have the evidence weighed in accordance with legal principles." *Id.*

This too is consistent with the law of appraisal, as the appraisal panel has the *exclusive authority* to determine the amount of the loss. *Licea*, 685 So. 2d at 1285.

Here, the district court violated these prohibitions. It relied on inadmissible extrinsic evidence beyond the face of the Awards from the "recreated" record (e.g., out-of-context statements about general conditions, scope, or repair costs) to incorrectly conclude that Keys failed to determine the amounts of loss (a matter that was never asserted in the pleadings). The district court then reframed this as "misconduct" under § 682.13(1)(b)(3). This essentially converted a dispute over the accuracy or sufficiency of Keys' determination of the amounts of loss (e.g., alleged duplicative general conditions)—issues within the exclusive province of the Panel—into "misconduct." A district court may not "comb through the record"—even when there is one—to consider errors in an appraiser's judgment on scope, costs, or methodology as a basis for vacating an award. By probing beyond the face of the Awards to redo the process, the district court reduced appraisal to a "preliminary step" that was advisory only, frustrating its purpose. *Regalado*, 959 So. 2d at 284.

The danger of attempting to "recreate" a record was illustrated in this case when Lewis was brought in by the Insurers in their efforts to create a record of what transpired. Lewis's estimator testified that Keys submitted an estimate[22] for replacement of 100% of the fixed windows and the balcony swinging doors, but that even Keys' own experts did not support such work. (Doc. 345, pp. 201:24-205:17.) That testimony was immediately objected to, with Portofino's counsel stating:

> MR. FLEMING: Your Honor, I'm going to object to this. There were over -- more than 20 experts who testified for more than two weeks before the Appraisal Panel. Those experts aren't here, and he's asking Mr. Lewis to give his opinion as to what that expert testimony showed. How is that not going behind and retrying the appraisal process?

(Doc. 345, pp. 202:14-19).

That hearsay testimony was a blatant misrepresentation of the expert findings regarding those issues, and prompted a Motion to Strike together with excerpts from expert reports, as well as sworn affidavit testimony, establishing its falsity. (Doc 347). While the trial court never expressly ruled on that Motion, the Court expressed "concerns" over the allegations made by the Insurers' witnesses. (Doc. 346, pp. 620:3-621:4). This would be the equivalent of a party that lost at a trial of which there was no record seeking to reverse a judge or jury's ruling based on post-trial

[22] The estimate the district court found did not exist.

depositions as to what transpired during the trial. This is precisely why extrinsic evidence should not have been used to vacate the Awards decided by the Panel after more than two weeks of unreported hearings.

V. The District Court Erred by Dismissing Portofino's Counterclaims.

The district court committed reversible error by dismissing Portofino's counterclaims for breach of contract. In a footnote, the district court reasoned that the counterclaims "sink or swim with the validity of the appraisal award." (Doc. 367, p. 28, n. 32). This was error because, under Florida law, appraisal is an "extra-judicial mechanism to calculate the amount of loss." *Positano Place at Naples I Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, 84 F.4th 1241, 1251 (11th Cir. 2023). Thus, although vacatur of an appraisal award may reset the calculus on damages, it does not extinguish underlying breach claims.

Here, Portofino's counterclaims assert breaches wholly untethered to the appraisal or Awards. For example, the common allegations aver that the "Insurers failed to promptly and fully determine the amount of the loss" by neglecting to "promptly and fully adjust the claim" and breached their "duty to timely pay the claim and otherwise indemnify the insureds consistent with the adjustment of the claim." (Doc. 108, p. 100, ¶¶ 12, 15; *see also* ¶¶ 2–6, 24–35). These facts form the basis for thirteen substantially similar counts of breach against the Insurers.

Portofino adequately pled all elements of breach of contract under Florida law: "(1) a valid contract; (2) a material breach; and (3) damages." *J.J. Gumberg Co. v. Janis Servs.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003). For the existence of a valid contract, Portofino alleged that the policies were "valid and binding" and covered hurricane "damages and losses." *E.g.,* (Doc. 108, ¶ 82). For material breach, it alleged failures to "promptly adjust," "complete the adjustment," "fully adjust," and "fully and timely indemnify" for the covered losses. *E.g., id*. ¶ 94. For damages, it alleged resulting harms such as unpaid insurance proceeds, interest, costs, and fees. *E.g., id.* ¶ 95. These allegations satisfied the federal pleading standard requiring only "a short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), giving "fair notice," *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), without needing "detailed factual allegations," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

None of these breach allegations hinge on the Appraisal Awards' validity. They address pre-appraisal conduct, such as untimely and insufficient adjustment, and payment issues—independent grounds for breach-of-contract actions. The district court's error is compounded by timing—the order issued two days after the statute of limitations arguably expired on Portofino's claims, foreclosing refiling or enforcement of any reappraisal. *See* (Doc. 367). This makes the district court's apparently-intended "remedy" of mandating a "re-do" of the time-consuming and expensive appraisal process illusory, and Portofino arguably has no ability to enforce

the insurance contract when its counterclaims has been dismissed, without leave to refile, after the expiration of the statute of limitations.

Equity and law demand reversal and reinstatement of the counterclaim even if the Court were to find grounds for vacatur were pled and proven by the Insurers.

CONCLUSION

For the reasons stated, the district court erred in declaring the Appraisal Awards invalid pursuant to 28 U.S.C. § § 2201, 2202. Additionally, the district court erred in vacating the Award pursuant to 682.13(1)(b)(3) and via summary judgment. Finally, the district court erred in dismissing Portofino's counterclaims on the erroneous belief that its vacatur of the Awards made those claims moot. Accordingly, this Court should reverse and remand, with instruction affirming the Appraisal Awards, with the result that the order granting entitlement to costs be rendered moot.

Dated: February 23, 2026

Respectfully submitted,

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This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 12,834 words.

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Respectfully submitted,

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I certify that on February 23, 2026, a copy of the foregoing has been electronically furnished by CM/ECF System, which will automatically send a copy to all counsel of record.

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