No. 25-13710-AA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WESTCHESTER SURPLUS LINES INSURANCE COMPANY, ET AL.,

Appellees/Cross-Appellants

v.

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

Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

Case No. 3:23-cv-00453-MCR-HTC

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STATEMENT REGARDING ORAL ARGUMENT

Appellees/Cross-Appellants do not request oral argument.

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INTRODUCTION

Defendants[1] ("Portofino") own five 27-story condominium towers plus other buildings in Pensacola Beach, Florida that were insured by Plaintiffs[2] when Hurricane Sally made landfall in September 2020. What followed was a property

[1] Defendants include:

1. Portofino Master Homeowners Association, Inc. d/b/a Portofino Master Homeowners at Pensacola Beach, Inc.;
2. Portofino Tower One Homeowners Association at Pensacola Beach, Inc.;
3. Portofino Tower Two Homeowners Association at Pensacola Beach, Inc.;
4. Portofino Tower Three Homeowners Association at Pensacola Beach, Inc.;
5. Portofino Tower Four Homeowners Association at Pensacola Beach, Inc.; and
6. Portofino Tower Five Homeowners Association at Pensacola Beach, Inc.

[2] When the lawsuit was filed, Plaintiffs included the following 16 carriers. As discussed further below, five settled with Portofino. The eleven Plaintiffs remaining on appeal are listed at numbers 6 through 16:

1. Westchester Surplus Lines Insurance Company ("Westchester");
2. Endurance American Specialty Insurance Company ("Endurance");
3. Everest Indemnity Insurance Company ("Everest");
4. Princeton Excess Surplus Lines Insurance Company ("Princeton");
5. Evanston Insurance Company ("Evanston");
6. Arch Specialty Insurance Company ("Arch");
7. Axis Surplus Insurance Company ("Axis");
8. Colony Insurance Company ("Colony");
9. Aspen Specialty Insurance Company ("Aspen");
10. Independent Specialty Insurance Company ("Independent");
11. Interstate Fire & Casualty Company ("Interstate");
12. Lloyd's of London ("Lloyd's");
13. James River Insurance Company ("JRI");
14. Maxum Indemnity Company ("Maxum");
15. Landmark American Insurance Company ("Landmark"); and
16. Homeland Insurance Company of New York ("Homeland").

insurance claim that skyrocketed from $13 million to $233 million via an illegitimate appraisal spearheaded by Portofino's appraiser, George Keys.

Keys failed to fulfill his obligation under the policy to estimate Portofino's loss. As he acknowledged after-the-fact, his appraisal did not reflect the cost to repair property damage caused by Hurricane Sally and, instead, contained a list of duplicative prices not meant to be aggregated. Determining the amount of loss, however, was Keys's principal job—as the district court put it, his "raison d'etre." Abdicating that responsibility constituted misconduct, violated the policy, and nullified the appraisal. The district court correctly granted summary judgment and set aside the $187-million appraisal award.

There were other fundamental deficiencies that the district court did not reach but also supported the result. For example, Portofino never demanded appraisal of the Plaintiffs remaining in this case. In fact, Portofino did not even timely notify those Plaintiffs of its loss, as required under the governing policies. As a result, they were deprived of the opportunity to properly investigate the claim and to meaningfully participate as parties to the appraisal.

The district court also expressed "grave concerns" about Keys's pecuniary interest in the outcome of the appraisal, which violated the plain policy terms requiring a disinterested appraiser. While Keys represented that he had an hourly fee arrangement with Portofino, the evidence revealed that he advanced hundreds of

thousands of dollars in costs on Portofino's behalf, did not contemporaneously bill his time, did not send periodic bills, and deferred payment of more than $2 million until months after the appraisal had concluded. During his investigation, Keys only sought witnesses who would be friendly to Portofino while ignoring others. Further, before the appraisal hearing, Keys frustrated the appraisal panel's ability to consider documentation of damages that preexisted Hurricane Sally and would have shed light on the causation of Portofino's claimed damages.

For all of these reasons—or for any of them—the award was illegitimate, and the Court should affirm.

STATEMENT OF THE CASE AND FACTS

I. The Parties

Portofino was insured by a "Tower of Insurance" that included sixteen commercial property insurance policies issued by different carriers. [DE 221-1, pp.7-10]. Westchester, Endurance, Everest, and Princeton (collectively, the "Primary Carriers") provided the primary layer of $15 million (subject to a $4.7 million deductible). [DE 222-1, p.7; DE 224-1, p.116; DE 345, p.50]. Twelve other carriers (the "Excess Carriers") provided excess insurance in tiers:

1. Arch and Axis provided the first excess layer of $10 million above the $15 million primary layer;

2. Colony, Evanston, Aspen, and Velocity[3] provided the second excess layer of $25 million;

3. Landmark, JRI, Maxum, and Velocity provided the third excess layer of $50 million; and

4. Landmark, Homeland, and Velocity provided the fourth excess layer of $100 million.

5. Landmark, Velocity, and Everest covered the fifth excess layer of $42,232,927, excess of $200 million.

[DE 222-1, pp.7-8]. This appeal is brought only by Excess Carriers; the Primary Carriers were initially part of this suit, but three (Endurance, Everest, and Princeton) paid their policy limits early during the suit [DEs 84, 85, 86], and the fourth, Westchester,[4] settled with Portofino post-judgment [DE 433].[5]

[3] Velocity Risk Underwriters is the managing general agent for Independent, Interstate, and Lloyd's. Those three insurers are collectively referred to as "Velocity." [DE 228-10, p.8-9].

[4] Westchester, as the only Primary Carrier that was a party during most of this lawsuit, filed much of the trial-court-level briefing, with which the other Plaintiffs filed joinders. [*E.g.*, DE 257 (Renewed Motion to Vacate filed by Westchester), DEs 258, 259, 264 (joinders)].

[5] One of the Excess Carriers, Evanston, also settled with Portofino post-judgment. [DE 429].

II. The Relevant Policy Provisions

Each insurer issued its own policy. [DE 222]. Subject to their terms and conditions, all policies included a Master Property Policy Form (the "Master Policy Form"). [DE 222-1, pp.9-38].

The Master Policy Form contained a "Notice" provision requiring Portofino, "[a]s soon as practicable after any loss," to notify each insurer via Portofino's broker/agent, Arthur J. Gallagher Risk Management Services, Inc. ("Gallagher"). [DE 222-1, p.34]. The Master Policy Form also contained a proof of loss provision, stating that it "shall be necessary for the Insured to render a signed and sworn proof of loss to the Insurer or its appointed representative stating: the place, time and cause of loss, interest of the Insured and of all others, the value of the property involved, and the amount of loss, damage, or expense sustained." [DE 222-1, p.34]. Finally, the Master Policy Form contained an appraisal provision, outlining the process if Portofino and each subscribing carrier "fail[ed] to agree on the amount of the loss." [DE 222-1, p.35; *see* DE 222-6, p.45; DE 222-9, p.47; DE 222-11, p.10].

Some policies had endorsements modifying provisions of the Master Policy Form. For example, the Homeland policy contained its own Loss Appraisal provision and a Duties in the Event of Loss or Damage provision, which required Portofino to "[g]ive [Homeland] prompt notice" of a loss and provide a description the property and how, when, and where the loss or damage occurred. [DE 222-11,

pp.9-10]. The JRI policy required Portofino to "immediately report" any "loss, damage or occurrence that" would, or "[wa]s likely to result in": (a) "a claim under th[e] policy"; or (b) "the exhaustion of 50% or more of the limits of the underlying insurance." [DE 222-8, p.56]. Landmark's policy required, *inter alia*, both parties to agree in writing to any appraisal. [DE 222-9, p.47].

III. The Claim, Sworn Proofs of Loss, and Appraisal Demand—of the Primary Carriers Only

Portofino reported a loss to Gallagher the day Hurricane Sally made landfall on September 16, 2020. [DE 248-1, p.2-3]. The next day, Gallagher notified the Primary Carriers, who began their investigation. [DE 248-3, pp.2-17; DE 228-15, pp.31-32]. The Primary Carriers' adjuster, Jeffrey Hellman, engaged subcontractors to inspect the property. [DE 224-1, pp.36-42, 51-59, 67, 135; DE 224-21, p.3; DE 228-4, pp.20-23; DE 345, pp.86, 264]. Portofino also began remediation for water intrusion and submitted invoices from its contractors (Phoenix Coatings, Inc. and BMS CAT) to the Primary Carriers. [DE 224-1, pp.70-71; DE 228-5, pp.39-41; DE 228-6, p.99, 101].

The Primary Carriers disputed certain invoices and requested additional documentation. [DE 224-1, pp.70-72; DE 228-4, p.23-24; *see also* DE 104 ¶¶ 53-

54 (amended complaint); DE 108 (answer)].[6] On December 11, 2020, twelve weeks after the loss and before the Primary Carriers completed their investigation, Portofino demanded appraisal. [DE 248-5]. Portofino's appraisal demand identified the name, policy number, and claim number for only the Primary Carriers without referencing or copying any Excess Carriers.[7] [DE 248-5, pp.2-3].

Between December 11, 2020 and February 19, 2021, Portofino sent three "partial" sworn proofs of loss to the Primary Carriers, all within the primary layer. The first totaled $6,479,380.60, [DE 241-5]; the second increased the total to $12,411,383.65, [DE 241-6]; and the third increased the total to $13,625.952.43, [DE 241-7], before applying the deductible. [DE 345, pp.46-47; DE 241-5, p.7; DE 241-6, p.7; DE 241-7, p.8]. The cover letter enclosing the third sworn proof of loss indicated that Portofino's "investigative work [wa]s underway, and it [wa]s anticipated that it [would] be completed in 30 to 60 days." [DE 241-7, p.4].

[6] The Primary Carriers eventually made three advance payments, totaling $6 million. [DE 224-1, pp.56, 71].

[7] Portofino later asserted the demand related only to interior damage. [DE 224-20, p.2]. The Primary Carriers responded that there was "no basis" for restricting the appraisal, but, regardless, "demand[ed] appraisal for the entire loss" to avoid any "confusion." [DE 251-19; *see also* DE 251-18 pp.3-4 (Gallagher advising Portofino that the "appraisal process does not allow you to appraise only one portion"); DE 225-1 pp.277-78 (Keys testifying that only way to appraise a loss is to appraise whole loss)].

Portofino did not submit another sworn proof of loss to the Primary Carriers and never sent any sworn proof of loss to any Excess Carrier.

IV. The Appraisal

The Master Policy Form permitted either party to invoke appraisal "[i]f the Insured and this Company fail to agree on the amount of loss." [DE 222-1, p.35]. Once appraisal was demanded, each side would appoint a "competent and disinterested" appraiser. [DE 222-1, p.35]. The appraisers would then jointly select an umpire. [DE 222-1, p.35]. Each appraiser would then "appraise the loss" by, first, determining the scope of damage caused by Hurricane Sally through inspections and testing, and, second, determining the repair costs. [DE 345, pp.218-19]. Once each appraiser prepared his estimate of the amount of loss, the two appraisers would confer. If they agreed, they would jointly issue an award. If not, they would "submit their differences to the umpire," and agreement by any two members of the panel (comprised of the two appraisers and the umpire) would constitute the award. [DE 222-1, p.35].

The Primary Carriers appointed Patrick Lewis. [DE 248-8, p.4]. Portofino initially appointed Corrine Heller but on February 8, 2021, replaced Heller with George Keys. [DE 248-5, p.3; DE 262-2, p.1]. Keys and Lewis chose Jon Doan as the umpire, and the panel agreed to exchange expert reports by May 31, 2022;

exchange estimates by July 11, 2022; and conduct a final hearing from August 15 to 25, 2022. [DE 246-17; DE 225-3, p.1].

A. The Inspections

Over several months, Keys, Lewis, and their experts inspected Portofino's property. [DE 247-1, pp.52-53, 66-67, 78-80, 133, 442-43; DE 249-6, pp.2-3]. They evaluated the damage independently but worked together with Doan to coordinate the inspections and tests. [DE 225-3, pp.26-36; *see* DE 247-1, p.80; DE 225-1, pp.31, 376-77]. At one inspection, Keys commented "this would be the largest condominium claim in the United States." [DE 345, pp.183-84].

To investigate, the teams spoke with unit owners. Keys's team sought out unit owners who were "friendly" to Portofino. [DE 225-17, p.2 ("I would like to speak to the unit owners of [specific units] if they still own their units and would be friendly to the HOA"); *Id.* (identifying owners Portofino thought would and would not be friendly)]. One owner, who insisted his unit was not damaged, requested for "someone to call him ASAP" regarding Keys's inspection of his property, but Keys never spoke with the owner "because … he [wa]s adversarial to the association." [DE 225-1, pp.145-48; DE 225-16, pp.2-3 (email stating owner "did not have any damage" and wanted "someone to call him ASAP" about Keys)].

B. The Last-Minute Document Dump

Lewis had served as an appraiser "hundreds" of times, and, as part of his regular practice, sought documents to assist with identifying whether damage was caused by or predated Hurricane Sally. [DE 247-1, pp.21, 460; DE 345, pp.156, 162-63]. Lewis first requested the documents in a meeting with Keys and Doan in July 2021, followed up in a letter to Keys on August 17, 2021, and an email on August 31, 2021. [DE 247-1, p.460; DE 257-3, pp.3-5]. He sought, *inter alia*, Condominium Association meeting notes, damage reports, and photographs. [*Id.*; DE 345, pp.56, 163-67]. But Keys refused to provide the documents, stating that it was "not [his] place" to request them, and that "[a]ll of the needed documents should have been asked for prior to going to Appraisal." [DE 257-3, p.4]. Keys "refer[red]" Lewis "to legal counsel for Portofino," stating, "perhaps you can ask him." [*Id.*].

In compliance with that referral, between September 2021 and June 2022, attorney JD Dickenson, on behalf of the Primary Carriers, sent multiple letters requesting documents from Portofino's counsel. [DE 247-1, pp.342-43, 462-63].

On September 3, 2021, Dickenson requested access to Portofino's "Master Association Web Portal." [DE 257-1, p.2-3]. He received no response.

On March 21, 2022, Dickenson followed up. [DE 257-1, p.4-7]. Portofino's counsel responded the next day, stating that he would provide "'condominium documents … and meeting minutes from the insured loss event forward," and

instructing Dickenson to "[a]sk for specific documents and they will be provided if relevant to this insurance claim." [DE 257-1, p.8-9].

About a week later, on April 1, 2022, Dickenson identified five categories of documents, which he requested "by May 1, 2022, so that the appraisal panel" could "fully evaluate [them] when completing the appraisal award." [DE 257-1, pp.10-11]. Dickenson did not receive a response so, on June 3, 2022, he sent another letter. [DE 257-1, p.14-15].

On July 18, 2022—nearly one year after Lewis's first request—Portofino's counsel sent a flash drive containing a small subset of the requested documents. [DE 257-1, p.16]. Two weeks later—with just eight business days before the appraisal hearing—Dickenson sent another letter, explaining that "[t]he appraisal process [wa]s nearing a conclusion and the Insurers' appraisal team ha[d] been unable to consider critical information contained in the requested documents while conducting the appraisal." [DE 257-1, p.17-25]. Over the next week, between August 5 and 12, 2022, Portofino's counsel provided tens of thousands of pages of additional documents. [DE 257-1, pp.26-34]. In all, Plaintiffs (and Lewis) received approximately 5800 documents, totaling in excess of 80,000 pages—the majority of

which were produced between August 10 and 12. [DE 345, p.173-74; *see* DE 257-1, pp.16-34].[8]

On August 11, 2022, Lewis expressed concern about the voluminous Document Dump and requested a one-week continuance of the appraisal hearing because the "very large repository of documents" could have a "significant impact" on his damage analysis. [DE 225-5, pp.4-5]. Despite his prior deferral to Portofino's counsel, Keys objected, stating that "[w]hat has been exchanged by the Attorneys is outside of this process." [DE 225-5, p.3].

Keys, Lewis, and Doan corresponded regarding the continuance. Lewis explained that the documents would "directly affect [his] ability to determine" the "loss and damage values…." [DE 225-5, p.3 ("we are not fulfilling our responsibilities as Appraisers"); DE 249-16, p.2 (proceeding as scheduled would "result in inaccurate assumptions and decisions of loss and damage values")]. He asked whether Keys received the documents. [DE 225-5, pp.3-4]. Keys replied that he had "no idea" what documents Lewis received but did not need to see them. [DE 225-5, p.2]. Doan ultimately refused the continuance, writing that "experts ha[d]

[8] Lewis never received some documents, like those related to roofing maintenance or scratches on the windows. [DE 345, pp.167-72, 337; DE 247-1, p.231-32]. He also never received "Capital Reserve Studies"—i.e., periodic analyses, required by law, that detail anticipated repairs. [DE 345, pp.167-68; DE 346, pp.486-87].

long ago made" "travel, lodging, and other commitments." [DE 225-5, pp.1-2; DE 249-16, p.1].

C. The Estimates

Meanwhile, Lewis and Keys exchanged their estimates. [DE 226-18; DE 345, pp.181-82, 187-88].

Lewis estimated the loss at approximately $18 million.[9] [DE 247-1, p.467; DE 345, p.269]. While costing expert Kevin Bryant assisted Lewis in determining repair costs, Lewis "proofed and changed and created the final estimate [himself]." [DE 247-1, pp.67, 132].

Keys's first estimate was approximately $212 million. [DE 251-27, pp.6-10]. About a week later, he increased it to $233,030,601.80 because of a "price inputting mistake." [DE 251-29, p.2-6; DE 257-18; DE 345, pp.149, 150-51, 189]. Unlike Lewis, who personally created his final estimate, Keys adopted the numbers of his costing expert, Larry McCallister, wholesale.[10] [DE 225-1, p.95; DE 251-29, pp.2-6 (listing "Repairs as Per LJB Restoration Estimate")]. Keys's revised estimate was

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[9] Lewis's initial estimate was $10,379,796.06, but he increased it based upon Portofino's incurred costs, some of which were supported by documentation provided for the first time at the appraisal hearing. [DE 251-27, p.5; DE 345, pp.266, 274, 309].

[10] McCallister estimated $217 million for repairs. [DE 230-1, p.43]. The rest of Keys's $233-million estimate encompassed Portofino's incurred costs. [DE 251-29, pp.2-6].

more than seventeen times Portofino's $13.6-million third (and most recent) sworn proof of loss. It amounted to approximately 96% of the total insured value, for a group of buildings that then-remained standing and were marketed to the public as "meticulously maintained" and "luxurious." [DE 257-8].

Keys's estimate was replete with duplicative costs, did not consider "general conditions"[11] that could be shared amongst multiple "trades,"[12] and did not account for economies of scale. [DE 230-1, pp.47-49, 121-24]. For example, it called for the assembly and reassembly of a 600-ton crane fifty times (ten times per Tower). [DE 230-1, p.58-60]. It included the cost of temporary toilets for 410 months—two temporary toilets per Tower for seventeen years—even though all repairs were expected to be completed within four years. [DE 230-1, p.64-67; DE 247-1, pp.444-45]. It also included costs for 11,520 hours of on-site supervision per Tower, totaling 57,600 hours—i.e., forty hours per week for 27.7 years. [DE 230-1, pp.39-42]. Keys represented the amount as an "estimate of damages for all towers." [DE 251-27, p.3; *see* DE 251-26 ("estimates for the above referenced appraisal"); DE 257-18, p.2

[11] "General conditions" are "support costs" that are not "embedded" in a construction bid, like cranes, jobsite trailers, temporary toilets, and general contractor supervision. [DE 345, pp.196-98, 272, 367].

[12] A "trade" is a specialty, like roofing or fenestrations (windows and doors). [DE 346, pp.395-96].

("statement of loss")]. When Lewis received the estimate, he was "very shocked." [DE 345, p.183].

D. The Hearing

The appraisal hearing occurred from August 15 to 25, 2022. [DE 247-1, pp.61-62, 300]. It consisted of presentations from each appraiser and their scope/causation experts. [DE 247-1, pp.52-53, 64].

Lewis's experts, who had completed reports months earlier, had no time to review the Document Dump. Neither did Lewis. This "put [him] at a severe disadvantage…." [DE 247-1, pp.207-11, 235-36; *see* DE 345, pp.325-29].

McCallister and Bryant did not testify at the appraisal hearing (which ended early, in part because Keys's father died). [DE 247-1, p.61-62; DE 345, p.236]. Therefore, the panel agreed for Doan to "meet independently" with them to review the cost estimates. [DE 225-1, pp.47-48; DE 345, pp.236-37].

At the "costing meeting" on October 5, 2022, Bryant pointed out Keys's duplicative and hyper-inflated costs, and McCallister "acknowledged" the redundancies "completely." [DE 345, pp.371-72]. Bryant prepared a memorandum the next day, reflecting that McCallister agreed to revise the estimates. [DE 228-3, pp.39-40; DE 257-23, p.3; DE 345, pp.372-73].[13] But McCallister never did so. [DE 228-3, p.87; DE 230-1, pp.57; DE 345, pp.209-10].

[13] McCallister denied agreeing to revise his estimates. [DE 230-1, p.77-78].

Keys and Lewis presented final closing arguments on November 29, 2022. [DE 247-1, p.230]. By then, Lewis identified relevant documents from the Document Dump "to the best of [his] ability." [DE 247-1, p.231]. Among them were meeting minutes detailing maintenance to windows and sliding glass doors, balcony damage, and water intrusion. [*See* DE 257-4, pp.4, 7-9, 11, 14, 16-17]. While Lewis presented arguments regarding the documents, Doan did not allow amended expert reports or "accept any other positions, documents, or experts." [DE 345, pp.325; *see* DE 247-1, pp.240].

V. The Excess Carriers

Portofino never demanded appraisal of any Excess Carrier or submitted any sworn proofs of loss implicating the excess layers. [DE 251-8, p.97]. Portofino notified some Excess Carriers of the claim only after the appraisal was underway. [*See* DE 248-2, pp.96-97; DE 241-1, p.5; DE 251-23, p.61; DE 251-24, p.109].

The first Excess Carriers, Arch and Axis, were notified on December 10, 2020—approximately three months after the loss (and the notification to the Primary Carriers). [DE 248-4]. Between March 8 and 10, 2021, Gallagher notified Aspen, Colony, Evanston, and Velocity. [DE 224-7, p.3; DEs 248-10, 248-11]. By then, Portofino and the Primary Carriers had already appointed their appraisers. Portofino never properly notified the other Plaintiffs, but Dickenson alerted JRI, Maxum, and

Landmark in March 2022.[14] [DE 248-13]. Homeland did not learn of the claim until July 2022.[15] [DE 245-1, pp.399-400; DE 248-14, pp.150-52, 237-38; DE 228-14, p.38-40].

Although Portofino never demanded appraisal of them, several Excess Carriers contributed to appraisal expenses to access information and monitor the progress. [DE 251-24, pp.69-71, 75, 85; DE 251-25, pp.64-67; DE 251-22, pp.86, 100-02; DE 251-23, pp.98, 193-95, 226; DE 228-13, p.96; DE 283-1, pp.2-4, 7]. As the corporate representative of one Excess Carrier, Colony, explained, "participation is different from meaningful participation"; while Colony was "keeping informed about the process," it was "not notified promptly," and "didn't have an opportunity to choose an appraiser … or object" to Portofino's appraiser. [DE 344-3, pp.8-9, 12, 14]. Corporate representatives for other Excess Carriers testified similarly.[16]

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[14] Dickenson alerted them because Lewis reported that Keys's estimate might be between $50 and $150 million. [DE 248-13; *see* DE 248-12].

[15] Portofino sent a June 24 letter to Homeland requesting certified insurance policies, with a subject line that stated "Portofino – Hurricane Sally Property Damage Claim," which Homeland received on July 6, 2022. [DE 245-1, pp.150-51, 399-400]. The letter did not contain any information identifying the damaged property or describing the scope and nature of any damage. [DE 245-1, p.399]. Homeland did not learn the claim was in appraisal until August 15, 2022, the day the final appraisal hearing began. [DE 245-9, pp.43-44].

[16] [DE 228-10, pp.121, 173 (Velocity); DE 228-11, p.76 (JRI); DE 228-14, p.50, 86, 95 (Homeland); DE 251-24, pp.69-71, 75, 157-58 (Aspen); DE 251-25, p.65, 84 (Axis); DE 251-23, pp.36-39, 98 (Evanston)].

Portofino was also repeatedly notified that Landmark was not participating in the appraisal because appraisal was never invoked in accordance with Landmark's specific policy provisions, including agreement by both sides in writing. On June 14, 2022, Landmark wrote by certified letter:

> Landmark has not agreed to appraisal and will not be bound by the current appraisal proceedings. It is our understanding that the ongoing appraisal process is proceeding in potential violation of some or all of the[]limitations or conditions [in the Landmark policy] …

[DE 241-1, p.5; DE 241-11, p.4; DE 241-12, p.2]. That Landmark was "not participating" was also reiterated to Portofino in letters from Dickenson dated August 3 and 16, 2022, [DE 241-13, p.10; DE 241-14, p.10]; in a letter from Landmark's counsel on August 17, 2022, [DE 241-15, p.3]; and in Landmark's response to Portofino's civil remedy notice filed with the Department of Financial Services. [DE 241-8, p.9].

VI. Plaintiffs Initiate this Lawsuit

On January 12, 2023, before the Award issued, Plaintiffs sued for declaratory relief. [DE 1]. Plaintiffs also filed an emergency motion to stay the appraisal, asserting that the process was "corrupted and misused beyond what [wa]s contemplated in the Policies." [DE 5, p.47]. The district court denied the stay, finding Plaintiffs would "retain all available rights to assert coverage issues." [DE 78, p.4].

VII. The Award

The appraisal award was issued in seven parts between February and July 2023 (collectively, the "Award"). [DE 257-24]. The first part, which included Portofino's incurred costs for interior damages, totaled $14,180,798.64 and was signed by Lewis, Keys, and Doan. [DE 257-24; DE 247-1, p.245; DE 345, pp.225-26, 265-66]. The remaining six parts were signed by only Keys and Doan. [DE 257-24, pp.4-36]. The Award totaled $186,896,043.57.

VIII. The Amended Complaint, Motion to Vacate, and Discovery

After the Award issued, Plaintiffs filed an amended ten-count complaint, seeking declaratory relief and to vacate the Award under Florida Statute § 682.13. [DE 104]. Portofino filed an answer and counterclaim, alleging breach of contract against each Plaintiff. [DE 108]. Plaintiffs filed answers and affirmative defenses. [DEs 123, 124, 125, 126, 127, 129, 129, 130, 131, 132, 133].

On October 13, 2023, Plaintiffs filed a Motion to Vacate the Award under § 682.13. [DEs 116, 117, 118, 119]. Portofino moved to stay adjudication of the Motion to Vacate pending discovery. [DE 136]. Both parties agreed that Plaintiffs would "have the right to amend the Motion [to Vacate] after further discovery." [DE 136, p.2]. Therefore, the district court denied the Motion to Vacate "with leave to file an amended motion following the close of discovery." [DE 141].

Over the following year, the parties deposed eighteen witnesses, including McCallister and Keys. [*See* DEs 224-1, 225, 228, 236-6]. During his deposition, McCallister revealed that the redundancies in his (and Keys's) $233-million estimate were by design, and that the estimate reflected an "à la carte" menu of options, rather than the cost of repairing damage caused by Hurricane Sally. [DE 230-1, pp.41-42, 48-52, 126, 190-91 ("just to be clear, we produced zero scope")]. McCallister compared the estimate to a restaurant menu: "If I give you a menu for an entire restaurant, I would say most people wouldn't eat all the food on it." [DE 230-1, pp.122, 125 ("if you go to Subway and you look at all their sandwiches, you're not going to order all their sandwiches"). He admitted it did not reflect a price anyone would pay and described it as a "methodology" that would not "be selected by a thinking person":

> Q. … [Y]ou testified that the 11,520 hours of supervision that are reflected in this Tower 1 estimate is not the true number of what it would take in terms of on-site construction supervision. Did I understand you correctly?
>
> A. My testimony was that we were tasked with putting these numbers together a la carte, if you would, and that it would have redundancies. Those were clearly stated in the appraisal, and we addressed those openly.
>
> I believe there was no hiding of the ball that if you did these a la carte, it was not the methodology that would be selected by a thinking person….

[DE 230-1, pp.43, 47-48]. Keys confirmed that, although presented as his estimate, he did not appraise the loss, and the figures were intended only as a "starting point" for Doan:

> Q. But isn't it true that you submitted those numbers … as the amount of money required to repair the damages associated with Hurricane Sally?
>
> …
>
> A. Not true.

[DE 225-1, p.341-42].

> Q. [D]idn't you submit those estimates as the cost of repairs to put the property back in its pre-Sally condition?
>
> A. No, sir.

[DE 225-1, p.340-41 ("they never were intended to be submitted in a cumulative basis")].

Lewis and Bryant testified that the first time they learned about the "à la carte" description of Keys's estimate was during this lawsuit. [DE 228-3, pp.89-90; DE 346, pp.422-23, 436, 440, 452]. Although Lewis believed Keys's estimate was inflated, Lewis testified, "I didn't know the extent of it because I was presented with those as being the Hurricane Sally damages." [DE 345, pp.213-14, 235, 283-84; *see* DE 346, pp.440-41].

IX. Keys's Retainer Agreement and Billing Practices

When Portofino initially appointed Keys in February 2021, at least four courts had previously disqualified him from serving as an appraiser because of his apparent interest in the outcome of those appraisals. [DE 225-1, pp.23-24; *see* DE 262-3, pp.2-3]. At the time, most of his work was performed on a contingency basis. [DE 225-1, pp.69, 176-77, 245-46, 249].

Knowing Keys's history, the Primary Carriers (the only Plaintiffs who had received the appraisal demand) requested Keys's retainer agreement and asked whether he had an interest in the appraisal. [DE 262-3, p.2-3]. Portofino's counsel objected, but the agreement was eventually produced about eighteen months later in the Document Dump. [DE 247-6, p.52; *see* DE 249-30, p.19].

The agreement, executed in counterparts between March 3 and 8, 2021, provided that Keys would charge hourly but "defer payment" of his fees until after the appraisal. [DE 226-12; DE 346, pp.539-40]. It also provided that Keys would be reimbursed for any expert costs he advanced. [DE 226-12]. Over nearly two and a half years, without issuing any invoices to Portofino, Keys advanced more than $600,000. [DE 225-1, pp.256-57; DE 226-10].

The retainer agreement also provided that Portofino was "responsible" for the umpire's fees, which would be paid "directly to the umpire." [DE 226-12]. When Keys's office emailed Portofino about Doan's fee, Portofino's counsel responded,

the "Board was told that Key Claims would be advancing payment with reimbursement to be made from claims proceeds. Approved by board based [o]n that representation." [DE 226-27, p.2].

Keys did not issue a "final" bill[17] with "documentation" until February 2024—about seven months after the final part of the Award issued. [DE 346, pp.533]. This was not standard practice for either Portofino or Keys; Keys billed at least some other clients on a monthly or periodic basis, and Portofino's other hourly professionals provided interim billings. [DE 225-1, p.253-58; DE 346, pp.553-54].

Keys's bill was accompanied by an "Activity Log" with time entries, but Keys did not contemporaneously track his time; instead, "clerks" in his office made "educated estimate[s]." [DE 225-1, pp.70, 72-73]. When asked how a clerk would have known to bill .25 for sending an email, Keys explained, "they go through the email. I guess they look at the actual entry and say, okay, he did an e-mail here, he spent 15 minutes on the file, or whatever it may be." [DE 225-1, p.70].

Keys's fees for the appraisal totaled $1,519,553.75, plus an additional $20,525 for post-appraisal work. [DE 225-1, pp.239, 266-68; DE 226-10]. Although Keys's fee agreement deferred payment until the end of the appraisal, in March 2024 (eight

[17] Keys's files reflected earlier invoices from December 2022, and August 2023. [DE 226-9; DE 225-26, pp.1-3]. Lamar received the August 2023 bill without "backup documentation." [DE 346, p.532-33].

months after the Award), Keys sent a letter acknowledging that Portofino was "awaiting payment from the Insurers" and asking Portofino to "place our previously forwarded interim billing in line for payment as soon as possible." [DE 226-11; DE 225-1, pp.22-23; DE 346, p.533]. At the time, Portofino owed Keys more than $2 million (including the advanced costs). Five months later—over one year after the Award—Keys still had not been paid. Portofino's corporate representative was deposed on August 9, 2024, and questioned about Portofino's financial arrangement with Keys; shortly thereafter, Portofino enacted a special assessment to pay him. [DE 225-1, p.74; DE 346, pp.527-34].

X. The Renewed Motion to Vacate, Motions for Summary Judgment, and Evidentiary Hearing

Following discovery, Plaintiffs renewed their Motion to Vacate. [DEs 257, 258, 259, 265]. They sought vacatur under several subsections of Fla. Stat. § 682.13(1)—subsections (c) (refusal to postpone the hearing); (b)(2) (arbitrator corruption); and (b)(3) (arbitrator misconduct).

Plaintiffs also filed six motions for partial summary judgment, arguing, *inter alia*, that (1) Portofino failed to properly notify the Excess Carriers[18] of the loss, so coverage under their policies was barred [DEs 241, 245, 248]; (2) the appraisal did

[18] Axis and Arch, though Excess Carriers, did not argue failure to notify or late notice; all other Excess Carriers did.

not comply with the Master Policy Form because Portofino failed to submit a sworn proof of loss, Portofino failed to demand appraisal, and Keys never stated the amount of loss, so appraisal was premature and Plaintiffs were not bound by the Award [DE 251]; and (3) Keys was not competent and disinterested, so Plaintiffs were not bound by the Award [DE 266]. Portofino filed responses and its own motions for partial summary judgment.[19] The district court conducted a two-day evidentiary hearing on

[19] The docket entries for the relevant motions, responses, and replies are:

Title/Subject	Motion	Response	Reply
Renewed Motion to Vacate Appraisal Award, and Joinders	257, 258, 259, 264	298	323
Landmark's Motion for Summary Judgment (Noncompliance with Notice and Appraisal Provisions)	241	295	304
Homeland's Motion for Summary Judgment (Noncompliance with Notice and Appraisal Provisions)	245	292	309
Several Plaintiffs' Motion for Summary Judgment on Late Notice	248	291	303
Several Plaintiffs' Motion for Summary Judgment (Appraisal Process), and Joinders	251, 260, 263	301	305
Plaintiffs' Motion for Summary Judgment (Keys Not Competent or Disinterested)	266	300	317
Portofino's Motion for Summary Judgment (Applicability of and Non-Compliance with Cooperation Provision)	250	278	318
Portofino's Motion for Partial Summary Judgment (Claims and Defenses relating to Notice)	255	277, 287	312, 313
Portofino's Motion for Summary Judgment (Claims and Defenses related to Plaintiffs' Non-Participation in Appraisal)	261	283, 284, 286	311, 314, 315

the Renewed Motion to Vacate. The court heard live testimony from five[20] witnesses [Lewis, Bryant, Westchester's Corporate Representative (Ashley Argyle), Portofino's Director of Maintenance (Dmitri Krivosheyev), and Portofino's Director of Associations (Kimberley Lamar)], received deposition designations of eight witnesses, [DE 344], and received thousands of pages of exhibits. Although Portofino designated Keys as a witness [DE 326, p.2], Plaintiffs learned two business days before the hearing that he was unavailable and would not be attending because he was in the Bahamas. [DE 345, pp.378-79].

After the close of evidence, the district court instructed the parties to prepare written closing arguments and made "a couple of notes or observations." [DE 346, pp.615-23]. The court cited testimony that Plaintiffs were "denied the benefit of [their] bargain" based upon "the way" Keys and McCallister "conducted their work," noted that was also the subject of a motion for summary judgment, and observed, "I think you have a strong argument on that." [DE 346, p.622, 628-29 (questioning the appropriate relief if Keys violated policy by not stating the value of the loss)]. In a post-hearing order, the district court instructed the parties to brief the following: "if

Portofino's Motion for Summary Judgment (Keys Competent and Disinterested)	262	288	307
Portofino's Motion for Summary Judgment (Various Affirmative Defenses)	265	290	310

[20] The court also heard direct examination from Plaintiffs' expert, William Klein, but struck the testimony as irrelevant to the motion to vacate.

the Court were to deny [the] Renewed Motion to Vacate, but grant one of Plaintiffs' numerous pending motions for summary judgment, what happens?" [DE 336, p.2].

Each side filed a written closing argument and a supplemental brief. [DEs 351, 352, 359, 360]. Portofino asserted for the first time in its written closing argument that the Motion to Vacate was untimely as to six portions of the Award and that Fla. Stat. § 682.13 was the exclusive way the district court could find the appraisal award unenforceable. The district court requested a reply brief from Plaintiffs addressing those two issues, which was filed on August 25, 2025. [DEs 361, 362].

XI. The Order

On September 22, 2025, the district court granted Plaintiffs' motion for summary judgment regarding the appraisal process and, alternatively, Plaintiffs' Renewed Motion to Vacate. [DE 367]. The court found the Award could not stand "because it is undisputed that Portofino's appointed appraiser, George Keys, did not fulfill his raison d'etre: he never stated the 'amount of loss' to Portofino's property caused by Hurricane Sally…." [DE 367, pp.2-3]. The court found that Keys's failure constituted both misconduct under § 682(1)(b)(3), and a violation of "the most basic—and fundamental—aspect of the process set forth in the" Master Policy Form. [DE 367, p.18]. In either event, the Award was "produced by a process that neither the Insurers nor Portofino bargained for or agreed to." [DE 367, p.28].

Because the court "resolved" the matter on "narrow[]" grounds, it did not reach Plaintiffs' other pending motions. [DE 367, p.27]. Nonetheless, it expressed "grave concerns with Keys's actions," observing that "[t]he facts here are eerily similar to and coincide with the other cases, of which there are several, where Keys was found to have an improper interest in the outcome of an appraisal." [DE 347, p.27]. The district court considered and rejected Portofino's counter-arguments and ordered the parties "to conduct a new appraisal before a new panel." [DE 367, pp.20-28].

STANDARD OF REVIEW

This Court reviews the entry of summary judgment *de novo*. But the district court's decision on Plaintiffs' motion to vacate is—contrary to Portofino's contention—a mixed question of law and fact. This Court reviews the legal conclusions *de novo* but the findings of fact "for clear error." *Biscayne Beach Club Condo. Ass'n, Inc. v. Westchester Surplus Lines Ins. Co.*, 111 F.4th 1182, 1185 (11th Cir. 2024).

SUMMARY OF ARGUMENT

The district court correctly declared the Award invalid and vacated it. There are a multitude of bases in the record that support this finding—any one of which requires affirmance.

First, Portofino is incorrect that § 682.13, Florida Statutes, provides the exclusive mechanism for vacating an appraisal award. On the contrary, Florida courts recognize fundamental differences between arbitrations, which are intended to resolve the entire dispute between parties, and appraisals, which are intended to resolve only the "amount of loss." Parties to an appraisal routinely litigate coverage and contractual issues after a panel's determination of the loss. Portofino's contention that Plaintiffs were precluded from challenging the process as invalid under the plain language of their policies is meritless.

Second, the district court correctly granted summary judgment based upon Keys's failure to state the amount of loss, which rendered the rest of the process invalid. Portofino never objected to that argument as unpled, so it waived any such objection. Regardless, Plaintiffs requested declaratory relief based upon Keys's failure to comply with the appraisal provision, so the issue *was* pled. Moreover, Keys admitted that he never stated the "amount of loss" as that phrase is defined by Florida law because he never computed the repair costs attributed to Hurricane Sally. Any other purported issues of fact, like the extent of his investigation, were immaterial.

Third, the district court correctly vacated the award under § 682.13(1)(b)(3), finding that Keys's failure to state the amount of loss constituted "misconduct." The motion to vacate was timely—and Portofino waived any argument otherwise by

failing to object until years later, *after* the evidentiary hearing, and by admitting in its answer that the singular Award was issued in seven parts, the last of which was issued 89 days before Plaintiffs filed their motion. Moreover, Keys's failure to comply with his obligations is classic "misconduct," regardless of whether it also "exceeded his authority."

Fourth, the district court could have granted summary judgment based upon Keys's partiality, which also violated the policies. Keys unmistakably had an interest in the appraisal's outcome: the more Portofino recovered, the more likely Keys would receive payment on his multi-million-dollar invoice (including reimbursement for hundreds of thousands of dollars in advanced costs).

Fifth, the district court could have vacated the award based upon the appraisal panel's unreasonable failure to continue the hearing following the Document Dump. Lewis was prejudiced by the late-disclosed information. His experts could not consider it, and he was unable to pursue "investigative trails" that he would have otherwise. The last-minute disclosures severely prejudiced Plaintiffs by depriving the Panel of complete information at the hearing.

Finally, the district court correctly dismissed Portofino's counterclaims. The Excess Carriers were belatedly (or never properly) notified about Portofino's claim, and none received a sworn proof of loss—much less one implicating their attachment

points. Thus, none breached their policies, and Portofino's counterclaims against each fail as a matter of law.

For all of these reasons—or, for *any* of them—this Court should affirm.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECLARED THE APPRAISAL AWARD INVALID.

"Appraisals are creatures of contract." *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. Dist. Ct. App. 2014); *see NCI, LLC v. Progressive Select Ins. Co.*, 350 So. 3d 801, 806 (Fla. Dist. Ct. App. 2022). Thus, it is well settled that, once "the appraisal provisions of" an insurance contract "have been properly invoked, further proceedings should be conducted *in accord with those provisions* …." *Allstate Co. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002) (emphasis added); *see Certain Underwriters at Lloyd's v. Lago Grande 5-D Condo. Ass'n, Inc.*, 337 So. 3d 1277, 1280 (Fla. Dist. Ct. App. 2022) ("In matters of appraisal, the contract language controls."); *NCI, LLC*, 350 So. 3d at 807-08 (once appraisal is "properly invoke[d]," "the parties should conduct those proceedings in accord with the agreed-on policy provisions").

The appraisal provision required each party to appoint an appraiser, and each appraiser to "stat[e] separately the value at the time of loss and the amount of loss." Keys never did that. Thus, the district court correctly concluded the appraisal process was invalid—it did not comply with the policies, so the resulting Award was,

likewise, invalid. *Cf. Gratkowski v. ASI Preferred Ins. Corp.*, 351 So. 3d 1216, 1222 (Fla. Dist. Ct. App. 2022) (holding appraisal award was invalid because appraisal proceedings were invalid).

Portofino contends that Florida's *Arbitration* code provides the only mechanism to vacate an *appraisal* award, so the district court erred by declaring the Award invalid. But Portofino misapprehends the case law and the distinction between appraisals and arbitrations. Florida courts are clear that "appraisal is—by its nature—a different process than arbitration." *NCI, LLC*, 350 So. 3d at 807; *Liberty Mut. Fire Ins. Co. v. Hernandez*, 735 So. 2d 587, 588 (Fla. Dist. Ct. App. 1999) (appraisals and arbitrations "are not identical"). Its purpose is not to resolve the entire controversy between two parties (like an arbitration), but to resolve "the specific issues of actual cash value and 'amount of loss.'" *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n*, 117 So. 3d 1226, 1229 (Fla. Dist. Ct. App. 2013); *cf. Merrick Pres. Condo. Ass'n, Inc. v. Cypress Prop. & Cas. Ins. Co.*, 315 So. 3d 45, 49 (Fla. Dist. Ct. App. 2021) ("The appraisers determine the amount of the loss, which includes calculating the cost of repair or replacement of property damaged, and ascertaining how much of the damage was caused by a covered peril….").

As in the district court, Portofino relies substantially on *Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115 (Fla. 2014), to support its argument that the only mechanism for vacating an appraisal award is § 682.13. But

Visiting Nurse is inapposite, as it involved neither an appraisal provision nor an insurance contract. Indeed, the word "appraisal" never appears in the opinion.

Notably, while several courts have applied § 682.13 to motions to confirm or set aside appraisal awards, they do not do so uniformly,[21] and no Florida court has held that the Arbitration Code provides the *only* means by which to vacate an appraisal award. *Cf. Gratkowski*, 351 So. 3d at 1218 (finding appraisal award invalid without referencing § 682.13); *Mango Hill*, 117 So. 3d at 1230 ("Proper procedure required that Citizens' defenses be addressed, not by a motion to confirm appraisal award under the Florida Arbitration Code, but rather *by motion for summary judgment* or trial" (emphasis added)).

Case law demonstrates the opposite. The Florida Supreme Court has recognized that an appraisal provision is not an agreement to submit to formal arbitration proceedings under the Florida Arbitration Code. *Suarez*, 833 So. 2d at 765; *see Jossfolk v. United Prop. & Cas. Ins. Co.*, 110 So. 3d 110, 112-13 (Fla. Dist. Ct. App. 2013) (rejecting contention that the only way to challenge an appraisal award is through section 682.13(1)).

[21] Courts have doubted whether Florida's Arbitration Code applies, and at the evidentiary hearing, Portofino challenged its application, [DE 345, p.22]. *E.g.*, *Baptist College of Fla., Inc. v. Church Mut. Ins. Co.*, 656 F.Supp.3d 1290, 1295 (N.D. Fla. 2023) ("Florida's Arbitration Code is not applicable to the parties' appraisal proceedings…."). But Portofino abandoned that position and now contends that it provides the *only* mechanism for vacatur.

Thus, Portofino's contention that the appraisal was equivalent to an "arbitration" is contradicted by case law; and by the fact that, unlike arbitrations, enforcement of appraisal awards routinely involves both the appraisal to determine the amount of the loss, *and* court proceedings to determine other coverage and contractual issues. *Cf. NCI, LLC*, 350 So. 3d at 807 (appraisal "allows parties to settle a damage amount while still preserving the ability to raise defenses and other matters through litigation"). It is well settled that "issues of coverage and liability under an insurance policy are for the court or jury," not the appraisal panel. *State Farm Fla. Ins. Co. v. Hernandez*, 172 So. 3d 473, 476 (Fla. Dist. Ct. App. 2015); *see Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n, Inc.*, 125 So. 3d 846, 855 (Fla. Dist. Ct. App. 2013) (court "obligated to adjudicate" insurer's defense, even though not "in the nature of a 'coverage' issue," because it was "a legal defense not directed at the amount of the loss").

Stated simply, Plaintiffs were entitled to assert policy—i.e., contractual—defenses against enforcement of the Award. *Cf. Parrish v. State Farm Fla. Ins. Co.*, 356 So. 3d 771, 777 (Fla. 2023) ("[P]arties to a contract choose their words on purpose, and we respect those choices when we can discern them."). Otherwise, the policy language establishing an appraisal procedure would be meaningless.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT AND DECLARED THE AWARD INVALID.

A. The District Court granted summary judgment on a properly pled claim.

1. Portofino waived any argument that the issue was unpled.

Portofino argues that Keys' failure to comply with the appraisal provision in the Master Policy Form was unpled. While this argument fails on the merits, as discussed below, it was also waived.

In their motion for summary judgment, Plaintiffs argued that Keys did not comply with the appraisal provisions because he admitted he never stated the amount of loss. [DE 251, pp.33-39; DEs 260, 263]. Portofino filed a forty-one-page response, challenging the merits of Plaintiffs' motion. [DE 301]. Portofino also filed a supplemental brief regarding the interplay between the motions for summary judgment and the motion for vacatur, arguing that Plaintiffs' motion for summary judgment regarding the appraisal process "should be DENIED as a matter of law based on established facts." [DE 359, pp.3-4]. Despite dozens of pages of briefing, Portofino never argued that Plaintiffs' summary judgment motion was based upon an unpled claim or defense. Thus, it has waived that challenge because this Court generally "will not consider an issue raised for the first time on appeal." *Finnegan v. Comm'r of Internal Revenue*, 926 F.3d 1261, 1271 (11th Cir. 2019).

Citing *Flintlock Constr. Servs. v. Well-Come Holdings, LLC*, 710 F.3d 1221 (11th Cir. 2013), Portofino claims that an "objection below" was not required. [IB.33]. But *Flintlock* does not stand for the proposition that a party may challenge a claim as unpled for the first time on appeal.[22] Nor does it alter the well-settled waiver doctrine or the requirement that, to raise an issue on appeal as a basis for reversal, the argument must have been made in the lower court. In fact, this Court has held otherwise. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991) ("[Appellant's] failure, in the district court, to raise the argument that federal pre-emption is an affirmative defense prevents us from sanctioning CSX for its failure to include this affirmative defense in its answer. As a 'general principle of appellate review, an appellate court will not consider issues not presented to the trial court.'").

Thus, Portofino waived the argument, and this Court should not consider it.

2. Plaintiffs sought declaratory relief and vacatur.

Portofino's argument also fails on the merits. Plaintiffs pled and presented both declaratory relief and vacatur based upon Keys's misconduct, which the district court granted.

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[22] In *Flintlock*, this Court *affirmed* summary judgment and held that the district court correctly denied the appellant's cross-motion for summary judgment. The Court did *not* do what Portofino requests here: reverse based upon a ground never raised below. So *Flintlock* is inapposite.

"At the pleading stage, all a plaintiff must do is provide a short and plain statement of the claim showing that the pleader is entitled to relief." *Caterpillar Fin. Servs. Corp. v. Venequip Machinery Sales Corp.*, 147 F.4th 1341, 1348 (11th Cir. 2025) (quotations and citations omitted); Fed. R. Civ. P. 8(a)(2)). The Court does "not require heightened fact pleading of specifics"—"only enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Moreover, "[p]leadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). Portofino's argument that the amended complaint did not satisfy this liberal standard is unsupported by the record and the law.

Contrary to Portofino's argument, the operative complaint alleged that Keys engaged in misconduct in a multitude of ways, and it specifically identified numerous issues with Keys's estimate—including that the estimate was inflated and duplicative because it was not intended to reflect actual pricing. Plaintiffs asserted, for example (in their Statement of Facts incorporated into all counts), that Keys's estimate "contain[ed] numerous items with dollar values that [we]re severely inflated and not based on actual costs"; that Keys and his experts "submitted written documents that contain[ed] misleading information" and "estimates and invoices with unsupported pricing"; and that they "submitted duplicate and overlapping items for the same or similar repairs and repair processes in their estimates, which could not all be performed by the contractors." [DE 104, pp.24-25, 34].

Relatedly, the amended complaint pled that Keys "did not intend to evaluate the 'amount of loss'"; "intended to maximize [Portofino's] recovery in the appraisal without any consideration of whether the estimates he submitted during the appraisal accurately reflect[ed] the damages that resulted from Hurricane Sally," and was not competent, qualified, or disinterested. [DE 104, pp.46, 67 ("Keys engaged in corruption and/or misconduct by … artificially inflating and duplicating costs in his estimates, refusing to consider evidence of prior damage and repairs, and other acts and omissions to be revealed in discovery")].

Plaintiffs sought a declaration that they "do not have any obligation to pay the Appraisal Award because [Portofino] failed to comply with the Appraisal Provision … of the Policies."[23] [DE 104, p.40]. They also sought declarations that Keys was precluded from serving as Portofino's appraiser, and that the award should be vacated. [DE 104, pp.48, 66-68; *see* DE 104, p.69 (Prayer for Relief requesting the Court "adjudicate and decree … [t]hat Defendants are not entitled to any recovery under the Policies by their failure to comply with the Appraisal Provisions of the Policies"); *see also* DE 104 p.65 (requesting declaration that "Pursuant to paragraph 50 of the [Master Policy Form], the appraisers were obligated to appraise the amount

[23] Plaintiffs requested the relief that was granted. But the district court was permitted to grant relief "even if" not "demanded" in the pleadings. Fed. R. Civ. P. 54(c); *cf. Carter v. Diamondback Golf Club, Inc.*, 222 F. App'x 929, 931 (11th Cir. 2007)).

of the loss at the time of the hurricane.")]. These allegations gave Portofino *ample* notice of the claims and satisfied Plaintiffs' liberal burden.

Portofino next argues that Plaintiffs "suggested" "in their pleadings" that Keys *did* determine the amount of loss. [IB.45]. Again, Portofino's argument is belied by the record. Notably, though it claims that *all* Plaintiffs admitted that fact, Portofino cites only (a part of) one paragraph of *Westchester's* answer. Portofino omits that all other Plaintiffs—i.e., all Excess Carriers, and the only parties remaining on appeal—flatly *denied* that paragraph. [DE 123, p.10 (Landmark); DE 124, p.6 (JRI); DE 125, p.5 (Maxum); DE 126, p.5 (Evanston); DE 127, p.6 (Aspen); DE 128, p.128 (Axis); DE 129 p.6 (Arch); DE 131, p.15 (Homeland); DE 132, p.9 (Velocity); DE 133, p.4 (Colony)]. Thus, Portofino's contention that the summary judgment "was inconsistent with" Plaintiffs' admissions is inaccurate and fails as a matter of law.

Finally, Portofino argues that Plaintiffs "did not allege that an appraiser exceeded his authority." [IB.33]. The amended complaint *did* cite section 682.13(1)(d) relating to an arbitrator "exceed[ing]" his "powers." [DE 104, p.47]. Regardless, neither Plaintiffs' motion for summary judgment nor the district court's order was based upon that theory, so whether it was pled is irrelevant.

B. Keys admitted that he never "state[d]" the "amount of loss." Any other facts were immaterial.

In a perfunctory, two-paragraph argument without a single record citation, Portofino asserts that 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," and that those (uncited) facts create a genuine dispute of material fact. Notwithstanding the lack of record support, Keys admitted he never determined the "amount of loss." So, the length of time he spent attending the appraisal hearings, and whether (or the extent to which) he inspected Portofino's property, consulted with experts, or collected estimates of the cost to repair various components in a vacuum are immaterial and did not preclude summary judgment. Likewise, whether the umpire made adjustments to Keys's $233-million estimate, or whether the panel members knew that Keys's estimate was not an accurate statement of loss, is irrelevant.

Keys's role required that he "state" the "amount of loss"—which, by Portofino's own telling, included both the "scope of damages" *and* the repair or replacement cost. [IB.24 (citing *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140 (Fla. Dist. Ct. App. 2014) and *State Farm Fire v. Licea*, 685 So. 2d 1285 (Fla. 1996))]; *see First Acceptance Co., Inc. v. At Home Auto Glass, LLC*, 365 So. 3d 1278, 1280 (Fla. Dist. Ct. App. 2023) ("[A] determination of the amount of loss for appraisal purposes 'necessarily includes determining both the extent of the covered damage and the monetary amount necessary to repair or replace the damaged property.'").

Keys testified that he never did so. [DE 225-1, p.341]. This concession, as the district court found, was "the death knell[] to Portofino's cause" because it established that Portofino's appraiser "did not comply with the most basic—and fundamental—aspect of the process set forth in the appraisal provisions." [DE 367, p.18]. Thus, there were no issues of *material* fact, and the district court correctly granted summary judgment.

C. The District Court did not review the adequacy and accuracy of the amount of loss.

Portofino argues that although Keys unequivocally testified that the $233 million estimate "was not his opinion as to the amount of the loss," "[t]hat did not mean that Keys had no opinion as to the amount of loss." [IB.36]. But Portofino cites no evidence that Keys *did* have such an opinion—or, more importantly, that he "stated" it, as required by the policies. There is no such evidence because Keys failed to perform this contractual obligation.

The district court did not "consider the adequacy of the amounts of loss determined by Keys," "second-guess[]" the panel's "methodology," or look *behind* the Award, as Portofino argues. Instead, it cited Keys's (and McCallister's) admissions that they never determined or stated the amount of loss in violation of the Master Policy Form. [DE 367, pp.6-7, 13-15, 19 (rejecting as "beside the point" Portofino's argument that the "'amount of loss' is a question exclusively for the appraisal panel" because "[e]ven by Portofino's telling, the Court's role is limited to

determining whether the appointed appraisers 'did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it,'" and finding Keys "did not accomplish the task" he was appointed to do (quoting Portofino's response to motion to vacate, DE 298, p.11)].

As discussed further below, courts are permitted to review evidence outside the four corners of the Award to determine policy compliance, whether misconduct occurred, and whether the appraiser was disinterested. *Infra,* Part III.E. Therefore, there was no error.

III. THE DISTRICT COURT CORRECTLY VACATED THE AWARD BECAUSE KEYS'S FAILURE TO STATE THE AMOUNT OF LOSS WAS MISCONDUCT UNDER § 682.13.

A. Portofino waived any objection to timeliness.

Under Florida law, a motion to vacate based upon arbitrator misconduct "must be filed within 90 days after the movant receives notice of the award …." Fla. Stat. § 682.13(2). Plaintiffs filed their initial motion to vacate 89 days after the panel issued the seventh and final part of the Award. So the motion was timely. *See infra,* Part III.B.

Regardless, Portofino's argument that it was untimely—raised for the first time in its closing arguments after the two-day evidentiary hearing, years of litigation, and hundreds of pages of briefing—was itself untimely and, thus, waived. The 90-day deadline is procedural, rather than jurisdictional, so (like a statute of

limitations defense) it may be waived. *See NuVasive, Inc. v. Absolute Medical, LLC*, 71 F.4th 861, 873-75 (11th Cir. 2023) (Federal Arbitration Act's ("FAA") time limit for filing a motion to vacate is procedural, not jurisdictional); *Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986) ("We have found no case holding that the filing requirement [under the FAA] is jurisdictional in nature…. We view this bar as one in the nature of a statute of limitations, which is subject to waiver." (citations omitted)).

As the District Court correctly noted, "Portofino previously agreed to stay consideration of the original motion to vacate, filed nearly two years ago, without so much as a peep about its timeliness (or lack thereof)." [DE 367, p.25]. Indeed, Plaintiffs filed their initial motion to vacate the appraisal award on October 13, 2023 [DEs 117, 118, 119] to protect the 90-day deadline and, rather than challenging its timeliness, Portofino moved to stay its adjudication and proceeded to conduct extensive discovery—including more than eighteen depositions. Thus, the Court should reject Portofino's belated argument that the motion to vacate was untimely.

Portofino's admissions also preclude its assertion. Plaintiffs' operative complaint alleged: "The appraisal panel has issued an award in seven parts." [DE 104 ¶ 140]. Portofino "[a]dmitted" that allegation. [DE 108 ¶ 140; *see also* DE 104 (¶¶ 141, 144, 145, 147, 148, 149 (alleging each tower award was a "partial award"); DE 108 (answer admitting same)]. Therefore, Portofino is foreclosed from the

contrary position it now takes—i.e., that the singular Award was actually seven separate ones.[24] *Cf. Best Canvas Prods. & Supplies, Inc. v. Ploof Tr. Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) ("a party is bound by the admissions in his pleadings"); *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1178 (11th Cir. 2009) ("Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them."); *Rogers v. U.S.*, 569 F.App'x 819, 821 (11th Cir. 2021) (statement that the defendant filed a timely motion to vacate his sentence was "an intelligent waiver of the statute of limitations defense" that precluded later untimeliness argument).

Portofino references "an affirmative defense of untimeliness," [IB.21, 44], which does not save the day for Portofino, either. The defense states 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*." [DE 108, p.94 (emphasis added)]. But it does not allege that the Motion to Vacate *was* untimely filed, notify Plaintiffs that Portofino was challenging the timeliness of the motion (or the basis

[24] Portofino argues that its admission was a legal conclusion that could not "revise or revive" the 90-day filing deadline. [IB.57]. But Portofino's admission is not *why* the motion to vacate was timely; as discussed below, it was timely because it was filed within 90 days. Portofino's failure to raise the issue earlier—and its admissions—simply prevent it from arguing otherwise now.

for such a challenge), or—most importantly—nullify Portofino's admission that there was a single Award.[25]

For all of these reasons, Portofino forfeited any untimeliness challenge, so this Court need not reach the issue.

B. The Motion to Vacate was timely.

The appraisal provision contemplates "an award"—singular—to determine a singular "amount of loss."[26] When Portofino invoked appraisal, it demanded one "appraisal" to determine one "loss." Portofino named one appraiser (Keys) and jointly entered into one contract with him. Keys's retainer agreement referenced "a" singular loss. [DE 226-12, p.1]. The appraisal process included comprehensive inspections of the interior and exterior of all Towers together and culminated in a single (multi-day) appraisal hearing at which evidence regarding all Towers was presented. Neither the parties nor the appraisers treated the process as establishing distinct appraisals for each Tower; nor could they under the plain language of the Master Policy Form.

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[25] Notably, Portofino's answer and affirmative defenses were filed September 15, 2023—two months *before* Portofino moved to stay adjudication pending merits discovery without objecting to the timeliness. [DE 108; DE 136].

[26] In fact, issuing multiple awards in a single appraisal was not contemplated by the Master Policy Form. If Portofino had taken the position earlier that the panel issued multiple separate awards, this would have been an additional basis for Plaintiffs to challenge the appraisal process.

Portofino nonetheless asserts that the Renewed Motion was deficient because it did not "allege timely filing," it attached each of the partial awards, and it used the word "Awards" in the plural, thus purportedly demonstrating that the motion was untimely. But Portofino cites no authority that magic words alleging timeliness were required in the Renewed Motion (especially after Plaintiffs asserted it in their initial motion,[27] and Portofino never challenged it, *supra*). Moreover—contrary to Portofino's assertion—the Renewed Motion clearly provided that the "Appraisal Panel issued *an appraisal award in seven parts* over a period of five months." [DE 257, p.29 (emphasis added)]. Thus, on its face, the Renewed Motion established its timeliness.[28]

Portofino's reliance on *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851 (11th Cir. 1989) falls flat. There, unlike here, the appellee filed a motion to confirm an arbitration award. The appellant did *not* file a motion to vacate the award, and, instead, belatedly raised as an affirmative defense that the award should

[27] The Renewed Motion relates back to the original Motion to Vacate. *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1382 (11th Cir. 1988). Portofino does not argue otherwise.

[28] Portofino also argues that the "burden" was on Plaintiffs "to plead with particularity and prove allegations of fraud, corruption, or undue means" to file the motion outside the 90-day timeframe. [IB.39]. Plaintiffs presented both detailed facts with record citations and supporting law, [DE 257, pp.1-30, 37-39], but the argument is irrelevant since Plaintiffs filed their motion within the 90-day timeframe.

be vacated. This Court held that "the failure of a party to move to vacate an arbitral award within the three-month limitations period … bars him from raising the alleged invalidity of the award as a defense in opposition to a motion … to confirm the award." *Id.* at 854. The Court further held that it would not carve out a "due diligence" exception for the appellant's untimely filing because the facts did not demonstrate due diligence. *Id.* Here, Plaintiffs timely filed their motion and are not seeking a "due diligence" exception because none is required. *Cullen* is inapposite.

Finally, Portofino argues that an email from the Umpire to the Panel referencing, in capital letters, "AN award … 'for incurred'" and "An Award per Tower" establishes that the panel "intended separate awards." [IB.42]. That email does not, however, establish that each partial award triggered a separate deadline for vacatur (or that the Umpire had the authority to partition the single appraisal award into multiple). The parties contemplated one appraisal, the appraisal provision(s) contemplated "an award," and Portofino admitted the seven subparts constituted "an award," so there is no legal or factual basis to conclude that the subparts were anything except one Award. *Cf. River Manor Condo. Ass'n*, 125 So. 3d at 847 (where appraisers separately stated loss for several buildings and common elements, characterizing appraisal process as resulting in "an award").

C. Keys committed misconduct that prejudiced Plaintiffs.[29]

Under Fla. Stat. § 682.13(1)(b)(3), the court "shall" vacate an arbitration award if "there was … misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding."

Florida's Arbitration Code does not define "misconduct." So under Florida law, it "should be given its plain and ordinary meaning." *Abramov v. NextGear Cap., Inc.*, 399 So. 3d 1138, 1139 (Fla. Dist. Ct. App. 2024); *see Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) ("The words of a statute are to be taken in their natural and ordinary signification and import."). Florida courts "typically look to dictionaries for the best evidence of that ordinary meaning." *Conage v. U.S.*, 346 So. 3d 594, 599 (Fla. 2022).

Black's Law Dictionary defines misconduct as "[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." Merriam-Webster defines "misconduct" as "mismanagement especially of governmental or military responsibilities," "intentional wrongdoing," or "improper behavior." Keys's failure to determine the amount of loss fits squarely within those definitions—it was a dereliction of his duties, improper, and intentional.

[29] Parts IV.C and IV.D of Portofino's Brief are addressed together since they involve overlapping issues.

Portofino asserts that Keys's actions would constitute "exceeded authority" (under Fla. Stat. § 682.13(d)), rather than "misconduct" under subsection (1)(b)(3). But the sole case that Portofino cites regarding an arbitrator exceeding his powers, *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011), does not involve an allegation of misconduct, much less analyze the overlap, if any, between an action that might "exceed" an arbitrator's powers and one that constitutes "misconduct." The *Cat Charter* Court's expression of its "belie[f]" that an arbitrator can "exceed his powers by 'not doing enough'" says nothing about whether an appraiser's wholesale failure to act, as here, may constitute misconduct.[30] In contrast to the situation described in *Cat Charter*, where the arbitrator failed to include "findings of fact and conclusions of law" in the arbitration award, the problem here is not that Keys did not do "enough"; it is that he did not serve as an appraiser *at all* because he never appraised the loss.

Moreover, Florida's Third District has held that "an arbitrator exceeds his or her power only when he or she goes *beyond* the authority granted by the parties," which is consistent with the plain meaning of the word "exceeds" and undermines

[30] Respectfully, the Court's observation is contrary to the plain meaning of the word "exceed." *See* Merriam-Webster (defining exceed as "to be greater than or superior to"; "to go beyond a limit set by"; or "to extend outside of"). Courts in other jurisdictions have disagreed that an arbitrator's "not doing enough" constitutes "exceeding" his powers. *See, e.g.*, *In re Romanzi*, 31 F.4th 367, 375 (6th Cir. 2022); *Thomas Builders, Inc. v. CKF Excavating, LLC*, No. M2021-00843, 2023 WL 3792712, at *4 (Tenn. Ct. App. June 2, 2023).

Portofino's argument that Keys's shortfall could be construed as exceeding his authority. *Metalonis v. Boies Schiller Flexner LLP*, 350 So. 3d 458, 462-63 (Fla. Dist. Ct. App. 2022) (emphasis added).

The Second District's decision in *Quesada v. City of Tampa*, 96 So. 3d 924, 927 (Fla. Dist. Ct. App. 2012), also demonstrates that the contours of the parties' agreement may inform whether an arbitrator (or appraiser) committed misconduct. In *Quesada*, the court held that an arbitrator's independent research was misconduct that warranted vacatur. In so holding, the Fourth District noted that the parties' agreement "did not provide that the arbitrator was free to conduct independent research." *Id.* Here, the Master Policy Form did not allow Keys to relinquish (or delegate to Doan) his duty to state the amount of the loss; it required Keys to fulfill this task. Keys's repudiation of his role by presenting an inflated "menu" of prices is classic "misconduct," as the district court correctly determined.

Portofino also asserts that federal courts interpreting "the FAA's analogous provision" to subsection (1)(B)(3)—9 U.S.C. section 10(a)(3)—require "error in bad faith or so gross as to amount to affirmative misconduct," and that, because Doan "requested" estimates to be prepared in the "means and manner" submitted by Keys, Keys's misconduct did not rise to that level.[31] However, there is no evidence

[31] The "analogous" provision of the FAA refers to "misbehavior," rather than "misconduct." 28 U.S.C. § 10(a)(3).

suggesting that Keys—who had more than forty years' experience in appraisals—believed that he (or anyone on the Panel) could unilaterally amend the terms of the Master Policy Form to which he was not party. The evidence showed the opposite: Keys testified that he usually reviews the controlling appraisal provision, and he acknowledged that appraisers cannot be "advocate[s]" for a party. [DE 225-1, pp.25-26, 356-57; *see* p.278 ("Q. If this appraisal agreement -- only listed the Portofino Master Homeowners Association and Portofino Tower One Homeowners Association, would you be able to appraise the Hurricane Sally losses of Tower Four? A. No, I don't think so. They had to empower me to do that.")]. Therefore, the manner in which Doan requested the estimate does not excuse Keys's misconduct.

D. Plaintiffs pled and proved that Keys's misconduct prejudiced their rights.

In the Renewed Motion, Plaintiffs asserted that Keys "advocated for duplicative and unnecessary repairs and replacements" and "inflated costs without any factual support," resulting in an adversarial appraisal and the $180 million award. [DE 257, p.37-38]. At the evidentiary hearing, Plaintiffs presented evidence that Keys's failure to state the amount of loss derailed the appraisal. Lewis testified, for example, that since Keys submitted only an à la carte menu, there was no way for Lewis to "determine" the "differences" between his estimate and Keys's. [DE 345, p.213]. Bryant testified that he believed he was supposed to compare Keys's

submissions to Lewis's, but "the first thing" Bryant encountered was "confusion," because they were presented "in a manner and form that [he had] never seen before" and contained a "significant amount of redundancies." [DE 345, pp.366-70].

Consistent with that evidence, in Plaintiffs' written closing, they argued prejudice because "the appraisers were deprived of the ability to come to an agreement on any issues before turning the matter over to the Umpire as a result of Keys' failure to comply with the rules governing the appraisal." [DE 351, p.41]. The district court agreed, finding that Keys's misconduct "almost immediately 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." [DE 367, p.27].

Portofino's assertion on appeal that Plaintiffs did not plead prejudice with sufficient particularity fails as a matter of law. Portofino responded in opposition to the Renewed Motion without arguing that it was insufficiently pled and did not object to the evidence and argument during the two-day evidentiary hearing. [*See* DE 298]. Thus, the issue was waived.

But Portofino is also incorrect that there was no prejudice. It relies upon *Int'l Med. Ctrs., Inc. v. Sabates*, 498 So. 2d 1292 (Fla. Dist. Ct. App. 1986), where an arbitrator called an outside source to confirm evidence that was presented during the

arbitration hearing. *Id.* at 1293-94. Although the court noted that "arbitration panels should not, in the course of their deliberations, go outside the evidence presented to them," it held that the challenged conduct merely confirmed information that "was already in the record" and caused no prejudice.

In stark contrast, Keys's misconduct resulted in the *absence* of information in the record—i.e., his statement of loss—that was *required* under the plain policy terms. It hindered the rest of the appraisal and, unlike the misconduct in *Sabates*, caused severe prejudice. As the district court described, it "torched any chance of an agreement with the Insurers' appraiser, as contemplated by the policy language." [DE 367, p.21].

Portofino also asserts that Lewis presented "criticisms" of Keys's appraisal to "the Panel," and that "the Panel is deemed to have given whatever weight was based on such issues." [IB.63]. But that did not cure the prejudice; to the contrary, it underscores it. Under the Master Policy Form, the Umpire was not supposed to participate in the discussions unless and until the two appointed appraisers disagreed concerning the amount of loss. Keys's misconduct required the Panel to bypass that whole process. "It was, in many ways, the original sin." [DE 367, p.27]. Thus, the district court correctly vacated the award.

E. The District Court did not improperly consider extrinsic evidence.

Finally, Portofino argues that the district court improperly "delved into extrinsic evidence" and a "recreated" record of the appraisal. [IB.51-52]. But the district court did not re-examine the evidence presented *at* the appraisal hearing or the factual bases for the Award. It looked only to Keys's and McCallister's own admissions about what they *did not* do—namely, comply with the Master Policy Form's plain terms.

Florida courts routinely look beyond the four corners of the appraisal award, not to reconsider the amount of the award but to determine whether the policy was appropriately followed or whether other coverage issues bar enforcement of the award. In *Parrish*, for example, the Florida Supreme Court examined Keys's fee agreement in holding that he was not disinterested. 356 So. 3d at 778. In *Sabates*, 498 So. 2d at 1293, which Portofino cites, the trial court held an evidentiary hearing to determine whether misconduct occurred.

Portofino's argument that courts can never look beyond the award would nullify the established bases for vacating awards, like fraud and misconduct, which necessarily require additional, extrinsic evidence. Its position is untenable.

IV. THE COURT SHOULD ALSO AFFIRM BASED UPON OTHER BASES IN THE RECORD ESTABLISHING THE AWARD IS INVALID AND UNENFORCEABLE.

This Court can "affirm for any reason supported by the record, even if not relied upon by the district court." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1177 (11th Cir. 2020) (quotations omitted). The Court should also (or alternatively) affirm because Keys was not competent and disinterested, because the Panel refused to continue the appraisal hearing after the Document Dump, severely prejudicing Lewis and Plaintiffs, and because (as discussed in Part V, below, and on Cross Appeal), Portofino failed to satisfy its post-loss obligations and never demanded appraisal of the Excess Carriers.

A. Keys was not disinterested because he had a financial interest in the appraisal.

"Parties to a contract are free to contract for the qualifications of the decision makers in their preferred form of alternative dispute resolution." *Branco*, 148 So. 3d at 495. Here, all policies required a disinterested appraiser. [DE 222-1, p.35].

The Florida Supreme Court has explained that "disinterested" in an insurance policy is given its plain and ordinary meaning: "[f]ree from bias, prejudice, or partiality and therefore able to judge the situation fairly"; "not having a pecuniary interest in the matter at hand"; lacking interest; "not influenced by regard to personal advantage"; and "free from selfish motive." *Parrish*, 356 So. 3d at 776. Applying those definitions in *Parrish*, the Florida Supreme Court disqualified Keys from

serving as an appraiser, finding his fee arrangement gave him a pecuniary interest in the appraisal. Courts in other jurisdictions have held similarly. *E.g., Auto-Owners Ins. Co. v. Summit Park Park Townhome Ass'n*, 886 F.3d 852 (10th Cir. 2018); *Creekside Crossing Condo. Ass'n v. Empire Indem. Ins. Co.*, Case No.: 2-20-cv-136-JLB-MRM, 2022 WL 962743 (M.D. Fla. Jan. 31, 2022); *Copper Oaks Master Home Owners Ass'n v. Am. Family Mut. Ins. Co.*, Case No.: 15-cv-01828-MSK-MJW, 2018 WL 3536324 (Dist. Colo. July 23, 2018).

Keys's arrangement with Portofino is more of the same. Keys advanced more than $600,000 in costs; did not contemporaneously record his time; did not generate periodic billing; and did not pursue payment (of his $1.5 million fees or $600,000 reimbursable costs) for more than one year after the Award issued, instead acknowledging that Portofino was still "awaiting payment from the Insurers" when he asked that his invoice be placed "in line for payment as soon as possible." [DE 226-11].

While (purportedly) not a contingency fee agreement, Keys's fee agreement was, at a minimum, akin to a "letter of protection," which courts routinely recognize as vesting an individual with an interest in the outcome of a case. *See Carnival Corp. v. Jimenez*, 112 So. 3d 513, 516 n.3 (Fla. Dist. Ct. App. 2013) (when a client needs medical care but lacks insurance, an attorney may send a "letter of protection" on client's behalf requesting the provider to "treat the client in exchange for deferred

payment … from the proceeds of a settlement or award"—but even "if the client does not obtain a favorable recovery, the client is still liable" for the bills); *Bellezza v. Menendez*, 273 So. 3d 11, 15 (Fla. Dist. Ct. App. 2019) (a physician's "bias can be established by admitting letters of protection, which can demonstrate that the physician has an interest in the litigation's outcome" (citing *Worley v. Central Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 23-24 (Fla. 2017)).

Thus, Keys's arrangement with Portofino undisputedly "align[ed]" their economic interests, making it so that the more Portofino received from Plaintiffs, the more likely Keys would get paid. *Cf. Parrish*, 356 So. 3d at 778 (holding Keys not disinterested because "the more Mr. Parrish recovers, the more KCC [Keys's company] collects; and the more KCC collects, the likelier it is that Mr. Keys will himself be in a position to be paid, or that his interest in KCC will be valuable"). Because Keys had a pecuniary interest in the Award, he was not qualified to serve as an appraiser.

B. The Award was invalid because the arbitrators failed to continue the hearing upon a sufficient showing.

Pursuant to Fla. Stat. § 682.13(1)(c), "the court shall vacate an arbitration award if … [a]n arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement…." The Document Dump was sufficient cause, but Keys and Doan unreasonably refused to continue the hearing. This, too, supports vacatur and summary judgment.

The evidence showed that Lewis asked for documents reflecting prior repairs at the property in August 2021—more than a year before the appraisal hearing. And the Primary Carriers continued to request the documents for months thereafter. But neither received any documents until July 18, 2022, and the vast majority of them weeks later—just days before the August 15 hearing.

Lewis explained how the untimely production substantially prejudiced him. [DE 345, pp.171-81]. There were "investigative trails" he could not pursue concerning causation of damages. [DE 345, pp.337-44]. He and his experts were unable to meaningfully review the documents before the hearing, and his experts were precluded from supplementing or amending their reports after the hearing. [DE 345, pp.176, 320-29, 337-55]. Lewis was clear, both during the appraisal and this lawsuit, that the documents impacted his determination of the amount of loss.

Thus, the panel's refusal to continue the hearing to allow sufficient time for his review was unreasonable and provides an additional (or alternative) basis for affirmance.

V. THE COUNTERCLAIMS FAIL AS A MATTER OF LAW.

Finally, Portofino asserts that the district court erred by dismissing its counterclaims because they asserted "breaches wholly untethered to the appraisal," like each carrier's alleged "failure to promptly and fully determine the amount of the loss." [IB.54]. But Portofino did not timely notify the Excess Carriers or provide a

sworn proof of loss reaching their layers, so they never had an opportunity to investigate, and their obligations under their policies were never triggered. As a matter of law, the Excess Carriers—the only Plaintiffs remaining—did not breach their respective policies. The Court should affirm dismissal of the counterclaims.

Notice and proof-of-loss provisions "enable the insurer to evaluate its rights and liabilities," "afford it an opportunity to make a timely investigation," and "prevent fraud and imposition upon it." *Laster v. U.S. Fid. & Guar. Co.*, 293 So. 2d 83, 86 (Fla. Dist. Ct. App. 1974) (quotations omitted). Under Florida law, an insured's failure to comply with its post-loss obligations "creates a presumption that the insurer was prejudiced" and is a basis to deny recovery. *1500 Coral Towers Condo. Ass'n v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541, 544 (Fla. Dist. Ct. App. 2013); *Nat'l Gypsum Co. v. Travelers Indem. Co.*, 417 So. 2d 254, 256 (Fla. 1982). An insured's belief that "the damage was not severe enough to justify filing a claim" does not excuse belated notice. *Sec. First Ins. Co. v. Visca*, 387 So. 3d 313, 318 (Fla. Dist. Ct. App. 2024).

Portofino was required to report the loss "with full particulars" to Gallagher "as soon as practicable" to ensure "transmission to the designated loss adjuster" and to each "Company" (i.e., carrier).[32] However, it failed to comply with that provision

[32] Under JRI's policy, Portofino was required to provide immediate written notice if the loss would likely result in either a claim under the JRI policy or the exhaustion

and only immediately notified to the Primary Carriers. Arch and Axis received notice after two months; Aspen, Evanston, Colony, and Velocity after six months; and Homeland, JRI, Maxum, and Landmark were *never* properly notified by Portofino. *Cf. PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.*, 566 F.App'x 845, 849 (11th Cir. 2014) (citing *Morton v. Indem. Ins. Co. of N. Am.*, 137 So. 2d 618, 320 (Fla. Dist. Ct. App. 1962) (six and one-half months not prompt notice); *Deese v. Hartford Acc. & Indem. Co.*, 205 So. 2d 328, 329 (Fla. Dist. Ct. App. 1962) (four weeks)). Portofino also never provided a sworn proof of loss to the Excess Carriers, much less one that implicated their excess layers.

Notably, Portofino's notice and proofs of loss to the Primary Carriers did not satisfy its obligation with respect to the Excess Carriers. On the contrary, the Master Policy Form's Participation Page identified each carrier as a separate "Insurer" or company, so notice to one "Company" did not satisfy the requirement as to any other. [DE 221-1, p.7]; *see Ins. Co. of N. Am. v. Bd. of Com'rs of Port of New Orleans*, 524 F.App'x 103, 107 (5th Cir. 2013) (where plaintiffs were co-insurers, holding "[a]ll of the subscribing insurers … must receive notice for the duty of coverage to be triggered for all three underwriters," and where one insurer did not receive notice, its "duty of coverage under the policy was not triggered").

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of 50% or more of the underlying limits to the JRI policy. [DE 222-8, p.56]. Under Homeland's policy, Portofino was required to notify Homeland directly. [DE 222-11, p.9-10].

Portofino also cannot overcome the presumption that the Excess Carriers were prejudiced by its failures. On the contrary, Portofino deprived the Excess Carriers of an opportunity to inspect the property at the time of the loss, select experts, consider proofs of loss, or meaningfully participate in any aspect of appraisal. [*See supra*, p.21 (identifying testimony regarding Excess Carriers' lack of meaningful participation)]; *see PDQ Coolidge*, 566 F.App'x at 847-48 ("Under Florida law, the purpose of policy provisions requiring prompt notice is to enable the insurer to evaluate its rights and liabilities, to afford an opportunity to make a timely investigation, and to prevent fraud and imposition upon it.").

Thus, Portofino's counterclaims fail as a matter of law. The Excess Carriers did not breach the Master Policy Form when Portofino was not entitled to coverage based upon its own failures. [33]

[33] Portofino's failure to notify JRI is not excused by the JRI provision stating that "[f]ailure to give notice of any such loss which, at the time of occurrence, did not appear to involve this policy but which, at a later date, would appear to give rise to a claim hereunder, shall not invalidate such claim." [DE 303, p.10]. That provision contemplates later notice of "a claim hereunder," which never happened. [DE 303, pp.10-14]. Moreover, once Portofino notified the $25-$50 million layer, there was an independent basis to notify JRI. [DE 303, pp.10-14].

CROSS APPEAL

STATEMENT OF THE ISSUE

Whether the trial court erred by ordering the parties to a new appraisal when Portofino failed to comply with its post-loss obligations under applicable insurance policies.

STANDARD OF REVIEW

"The interpretation of provisions in an insurance contract is a question of law reviewed *de novo*." *James River Ins. Co. v. Ground Down Engineering, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008).

SUMMARY OF ARGUMENT

Regardless of the main appeal, the district court erred by ordering the Excess Carriers to a new appraisal. As discussed above, Portofino never properly notified the Excess Carriers of the loss, never submitted a sworn proof of loss implicating their layers, and never demanded appraisal of the Excess Carriers. *Supra*, part V. Landmark's policy also required both parties to agree to appraisal in writing, which never occurred. The district court's order requiring all parties to "conduct a new appraisal before a new panel" overlooks these procedural deficiencies, allows

Portofino to bypass its obligations under the policies, and should be reversed on this limited issue.

As the Excess Carriers argued in their motions for summary judgment, Portofino's failures preclude its recovery under the policies, and the Excess Carriers are entitled to judgment in their favor. [DEs 245 (Homeland); 248 (Colony, Evanston, Aspen, Velocity, JRI, Maxum, Landmark)]. At a minimum, appraisal was premature because Portofino never demanded appraisal of the Excess Carriers pursuant to the policies. [DE 251].

ARGUMENT

I. THE DISTRICT COURT ERRED BY ORDERING THE EXCESS CARRIERS TO A NEW APPRAISAL.

A. Portofino's failure to promptly notify or demand appraisal of the Excess Carriers precludes its recovery as a matter of law.

As discussed in Part V of the Answer Brief, *supra*, Portofino did not notify the Excess Carriers of the loss before demanding appraisal of the Primary Carriers. Thus, Portofino never invoked appraisal to any Excess Carrier. Further, the sworn proofs of loss that were provided only to the Primary Carriers did not implicate the excess layers. Portofino cannot rebut the presumption of prejudice and show that no prejudice resulted from its failure to promptly notify the Excess Carriers. *See PDQ Coolidge*, 566 F.App'x at 849.

Portofino's failure to comply with its post-loss obligations supports affirming the district court's rejection of Portofino's counterclaim and reversing on cross-appeal. Notice is a condition precedent to coverage, and an insured's failure "to give timely notice of loss in contravention of a policy provision is a legal basis for the denial of recovery under the policy." *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. Dist. Ct. App. 1981).

The district court erred by ordering a new appraisal. This Court should reverse on this limited issue, and direct judgment for the Excess Carriers.

B. At a minimum, appraisal is premature.

It is well settled that an appraisal demand is not ripe until "post-loss conditions are met, and the insurer has had a reasonable opportunity to investigate and adjust the claim and there is a disagreement regarding the value of the property or the amount of loss." *Lago Grande*, 337 So. 3d at 1277 (italics and quotations omitted); *see Gratkowski*, 351 So. 3d at 1220 ("Appraisal could not be invoked unless the parties failed to agree on the amount of the loss."). Absent a "meaningful exchange of information sufficient to substantiate the existence of a genuine disagreement," appraisal is premature. *Id.* (quoting *Redlhammer v. ASI Preferred Ins. Corp.*, 337 So. 3d 421, 423 (Fla. Dist. Ct. App. 2021)).

The Master Policy Form allowed either party to invoke appraisal "[i]f the insured and this Company fail to agree on the amount of loss."[34] [DE 221-1, p.7]. Portofino never demanded appraisal of any Excess Carrier. Instead, Portofino's appraisal demand identified the name, policy number, and claim number of only the Primary Carriers. [DE 248-5, pp.2-3]. As discussed *supra*, notice to—or an appraisal demand of—one "Company" did not satisfy the requirement as to any other.

[34] Homeland's Loss Appraisal is materially the same in this regard. [DE 222-11, p.10].

Even if Portofino had properly demanded appraisal of the Excess Carriers, it would have been premature because there was no "fail[ure] to agree on the amount of loss" between Portofino and any Excess Carrier; in fact, there was never even an *opportunity* for such disagreement. *See Branco*, 148 So. 3d at 494 ("Until the insurer has a reasonable opportunity to investigate and adjust the claim, there is no 'disagreement' (for purposes of appraisal) regarding the value of the property or the amount of loss to be appraised."); *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So. 3d 188, 191 (Fla. Dist. Ct. App. 2010) ("Only when there is a real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer, is an appraisal warranted." (quotations omitted)); *see supra*, Parts I and V (citing Florida cases holding that the plain language of an insurance policy controls).

The district court's order improperly allows Portofino to bypass its obligations. *Cf. NCI, LLC*, 350 So. 3d at 808 (refusing to construe appraisal provision in a manner that "would effectively" "eliminat[e]" it from the policy).

II. THE DISTRICT COURT ERRED BY ORDERING LANDMARK TO A NEW APPRAISAL BECAUSE IT DID NOT AGREE IN WRITING TO APPRAISAL.

Ordering a new appraisal as to Landmark was also improper because none of the specific requirements of Landmark's appraisal provision—which replaces the clause in the Master Policy Form—were satisfied. Landmark's policy plainly and

unambiguously provides that, on written request by either party ("[i]f we and you disagree on the value of the property or the amount of loss"), "[a]n appraisal may then take place *only if the other party agrees in writing to participate in the appraisal process* pursuant to terms of a written agreement between the parties." [DE 1-1, p.716 (emphasis added)]. The provision further warns that "[i]f the parties cannot agree on a written agreement specifying the protocol, an appraisal will not take place." [*Id.*] Neither Portofino nor Landmark requested appraisal of the other, Landmark never agreed to participate in the appraisal demanded of only the Primary Carriers, and there was no written agreement between Portofino and Landmark specifying an appraisal protocol. In fact, Landmark consistently maintained that it was neither a party to, nor participating in, the Primary Carriers' appraisal. [DE 241-1, p.5; DE 241-11, p.4; DE 241-12, p.2; DE 241-13, p.10; DE 241-15, p.3; DE 241-8, p.9].

Under the plain and unambiguous terms of Landmark's policy, Landmark was neither a party to nor participating in the appraisal, so it cannot be compelled to participate in another appraisal without its express agreement. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975-76 (Fla. 2017) ("Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written."); *cf. Green v. Cincinnati Ins. Co.*, No. 2:25-cv-431-JES-NPM, 2025 WL 2443698 (M.D.

Fla. Aug. 25, 2025) (recognizing enforceability of an appraisal provision requiring the mutual agreement of both parties).

CONCLUSION

For these reasons, Plaintiffs respectfully request the Court to affirm the district court's order declaring the Award unenforceable and vacating it, but reverse that portion of the order requiring a new appraisal. The Court should direct the entry of judgment in favor of the Excess Carriers and hold that Portofino is precluded from recovery. Alternatively, the Court should reverse the district court's order requiring a new appraisal as premature.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)

I certify that this brief complies with the type-volume limitation in FRAP 28.1(e). This brief contains 15,298 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Principal and Response Brief was filed with the Clerk of Court using the CM/ECF system this 26th day of May 2026, which will serve a copy on all counsel of record.

/s/ Jack R. Reiter