UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

B.R.S. REAL ESTATE, INC.	)	
	)	
v.	)	C.A. No. 1:20-cv-20-228
	)	
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER QMF1760087, QUAKER SPECIAL RISK, and LAMARCHE ASSOCIATES, INC.	)	

MEMORANDUM OF LAW IN SUPPORT OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S RENEWED MOTION TO CONFIRM APPRAISAL AWARD, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

The District Court should affirm the Appraisal Award and dismiss the claims asserted in this lawsuit. Discovery did not reveal any facts to establish that the appraiser nominated on behalf of Underwriters was incompetent or biased. Nor did it reveal evident partiality on the part of the Umpire. It did reveal facts which show that the Plaintiff waived the grounds to challenge the Award by participating in the appraisal process with knowledge of the grounds it now asserts to invalidate the Award, but failing to timely object. There is no evidence that the appraisal process itself was tainted or influenced in any way the insurer's appraiser or the Umpire. To the contrary, each side had ample opportunity to participate and present evidence and arguments in support of their positions. By all accounts the appraisers reached an agreement on the amount of loss. Plaintiff's argument that the Award reflects both actual cash value and replacement cost is immaterial and provides no support for the relief sought in this case. In the absence of any viable claim on the contract or based on the Appraisal, the Plaintiff's "bad faith" claims fail as a matter of law.

II. STATEMENT OF FACTS

For the sake of brevity, Underwriters incorporate herein by reference the LR Cv 56(a) statement of material facts as if fully set forth herein.

III. ARGUMENT

A. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is 'genuine' if 'the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.'" *Cherkaoui v. City of Quincy*, 877 F.3d 14, 23-24 (1st Cir. 2017) (*quoting Sánchez v. Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996)). A material fact is one which has the "potential to affect the outcome of the suit under the applicable law." *Id*. at 23 (citation omitted). "A court will disregard conclusory allegations, improbable inferences, and unsupported speculation in determining whether a genuine factual dispute exists." *Id*. at 24(citations and quotations omitted).

The movant bears the initial burden of establishing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If that burden is met, the burden shifts to the non-movant who avoids summary judgment only by providing properly supported evidence of disputed material facts that require a trial. *See id*. at 324. The Court views the record in the light most favorable to the non-movant and indulges all reasonable inferences in that party's favor. *See O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993).

B. Applicable Arbitration Statutes

1. Gen.Laws 1956, §10-3-11: Order Confirming Award

At any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award, and thereupon the court must grant the order confirming the award unless the award is vacated, modified or corrected, as prescribed in §§ 10-3-12--10-3-14. Notice in writing of the application shall be served upon the adverse party or his or her attorney ten (10) days before the hearing on the application.

2. Gen.Laws 1956, §10-3-12: Grounds for Vacating Award

In any of the following cases, the court must make an order vacating the award upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud or undue means.

(2) Where there was evident partiality or corruption on the part of the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in hearing legally immaterial evidence, or refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been substantially prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

C. There is No Evidence to Establish That The Umpire Or Underwriters' Appraiser Were Incompetent, Biased, Or Showed Evidence Partiality

The Plaintiff challenges the Award because the decision makers, *i.e.*, the Umpire, William Monahan ("Monahan") and Underwriters' appraiser, James Boudreau ("Boudreau"), were allegedly incompetent or biased. However, these claims lack factual and legal merit. The only facts to support such claims are that each person works for insurance companies, including unknown syndicates at Lloyd's of London. This is not

enough to vacate the Award under Rhode Island law. Accordingly, the Court should confirm the Award.

There is no evidence to prove that Boudreau was biased and not impartial. The sole basis for this assertion is that the company he works at (Vertex) does work for insurance companies, including various underwriting syndicates affiliated with Lloyd's of London, and because the insurer's adjuster (LaMarche) had previously consulted with others from Vertex about certain mechanical and electrical issues with the claim. The plaintiff's Complaint is devoid of any factual allegations that show or explain how the original appraisal process was improper, or that Boudreau was partial and biased.

At the outset, Boudreau is clearly competent to serve as an appraiser. Since 1982, he has worked in the field of construction and been involved in the appraisal of building damages for insurance companies. [See Exhibit , Deposition of James Boudreau, pp. 9-15] He was originally retained to assist in the evaluation of the claim before being appointed as an appraiser. The plaintiff's public adjuster, Douglas Soscia, was aware of his involvement, as well as the earlier involvement of Vertex. [Ex. 5, D. Soscia dep at pp. 84-88; 91]. Boudreau attempted to schedule an inspection with the plaintiff's public adjuster, but was denied the right to inspect the property. Instead, the plaintiff's public adjuster told Boudreau that he could inspect the property during the appraisal process. At no point before the Awards did the plaintiff ever raise the issue of impartiality or bias on the part of Boudreau. That is because the process was fair. [Boudreau dep at pp. 62-63]

The Rhode Island Superior Court discussed the issue of alleged bias or partially in appraisals in *Union Mut. Union Mut. Fire Ins. Co. v. Pate*, No. PC 2013-1620, 2016 WL

4160459, at *5 (R.I.Super. Aug. 02, 2016). In this case, the insurance carrier, Union Mutual contended that the award must be vacated because the Umpire was impartial or biased to it. The court noted that it may vacate an arbitration when the challenging party establishes "a reasonable impression of partially." *Id*. (quoting *V.S. Haseotes & Sons, L.P. ex rel. Bentas v. Haseotes*, 819 A.2d 1281, 1285 (R.I. 2003). The standard requires the challenger of an arbitration to "show more than an appearance of bias but less than actual bias." *Id*.; *Haseotes*, 819 A.2d at 1285. The challenger must also show "a causal nexus between the impropriety and the arbitration award." *Id.* "[P]artiality is established when 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Id.* The Court held that Union Mutual did not met its burden of proving that the Umpire, that both parties' appraisers selected, was partial or that partiality tainted the award. *Id*. Moreover, the Court stated that Union Mutual presented no evidence or argument suggesting this resulted in the report being biased. *Id*.

Applying the standard from the *Union Mutual* here, the plaintiff has failed to establish how, with specific detail, Boudreau was biased or acted partially in the handling of the appraisal. Indeed, at Boudreau's deposition plaintiff did not establish that a single line item in appraisal estimate reflected bias. Not one. Therefore, even assuming Boudreau was not impartial - a point not established – there is certainly no evidence that his alleged bias influenced the outcome of the appraisal process.

Additional case law is instructive on the plaintiff's misguided efforts to vacate the appraisal award. In *McGinity v. Pawtucket Mut. Ins. Co.*, 899 A.2d 504 (R.I. 2006), the insured filed motion to vacate arbitration award on ground of evident partiality since insurer's arbitrator was employed as attorney. The court observed that there is a "'strong

public policy in favor of the finality of arbitration awards.'" *Pierce v. Rhode Island Hospital*, 875 A.2d 424, 426 (R.I. 2005). However, the judicial vacating of an arbitration award is appropriate in certain situations, specified by statute. In relevant part, the statute requires that a court vacate an award "[w]here there was evident partiality or corruption on the part of the arbitrators, or either of them." R.I. Gen.Laws 1956, §10-3-12(2).

As to allegations that Boudreau was biased, in *Aetna Casualty & Surety Co. v. Grabbert*, 590 A.2d 88 (R.I. 1991), the Rhode Island Supreme Court held that "it would be inappropriate to require the party-appointed arbitrator to adhere to the same standards of neutrality as a judge. That standard ignores the practical realities of arbitration panels composed of party-appointed arbitrators." Nevertheless, the Court "recognize[d] that evident partiality is an elusive concept for which no one has been able to articulate a precise legal standard." *Id*. at 96. However, "[m]ost courts that have addressed the issue have decided that a finding of evident partiality requires a showing of more than an appearance of bias but less than actual bias." *Id*. We then articulated a standard, stating that evident partiality is established where "'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Id*.

In the Declaration of Appraisers executed on November 16, 2018, both Zarlenga and Boudreau that they would "act with strict impartiality" and that they "are not interested in said property or the insurance thereon". The Umpire, Monahan, executed the same form promising also to "act with strict impartiality" and that he was "not related to any of the parties to this agreement, nor interested as a creditor or otherwise in said property or insurance." There is no evidence in this case to establish that Boudreau and or Monahan were anything other than fair and impartial. In fact, by all accounts the appraisers were

able to reach an agreement on the amount of loss. [Affidavit of William Monahan, ¶¶17-30]. Plaintiff's sole claim for challenging the partiality of Monahan is that his "website" states he has worked for insurance companies. [Ex. 5, D. Soscia at p. 125].

The *Grabbert* court recognized the strong public policy in favor of the finality of arbitration awards reflected in the narrow grounds available to parties to vacate an award. Historically, the Rhode Island courts have consistently maintained that an "award may be vacated only if it is 'irrational' or 'manifestly disregards the applicable contract provisions,' *Id*. at 92 (quoting *State v. National Ass'n. of Governmental Employees Local No. 79*, 544 A.2d 117 (R.I. 1988), or if it falls within one of the four statutorily prescribed grounds in § 10–3–12." At the same time the courts have remained cognizant of the need for public confidence and integrity in the arbitration process. *Id*. Parties voluntarily contract to use arbitration as an expeditious and informal means of private dispute resolution, thereby avoiding litigation in the courts. Absent participation in the appraisal process, the parties will remain embroiled in contentious litigation on this integral valuation issue. The appraisers, chosen by a process to ensure their impartiality, are uniquely qualified to return a decision as to the value of the property and the amount of the physical loss and damage, as they will have an opportunity to personally take a view of the subject structure and hear appropriate argument from all parties to the contract before reaching a summary, final and binding Award. Simply put, determination of the value of the property and the amount of loss by the duly constituted panel of appraisers is not only a statutorily mandated condition of the policy (R.I. Gen.Laws 1956, §27-5-3), but presents the most effective means to resolve the dispute as to the value of the property and the amount of loss while promoting judicial economy.

Any impropriety that undermines public confidence in and the integrity of the arbitration process detracts from its legitimacy as an alternative method of private dispute resolution. Ultimately, the Court in *Grabbert* felt that no matter how desirable the finality of an arbitration award may be, it is more important that an award be rendered free from any improprieties that affect the award and that could destroy public confidence in and the integrity of the arbitration process. *Id*. at 92.

Non-neutral (or party-appointed) arbitrators are expected to advocate on behalf of the party who appointed them and to do their best to present the facts to the neutral arbitrator in the light most favorable to that party. *See Local 472, International Brotherhood of Police Officers v. Town of East Greenwich*, 635 A.2d 269 (R.I. 1993). Evident partiality is an elusive concept for which no one has been able to articulate a precise legal standard. On this issue, most courts have decided that a finding of evident partiality requires a showing of more than an appearance of bias but less than actual bias. The standard emerging from these decisions is that "evident partiality" will be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." The burden of proving facts that would establish a reasonable impression of partiality rests with the party challenging an award. The Court in *Grabbert* noted that the parties who select party-appointed arbitrators also expect them to serve as non-neutrals. The reason the parties contract for the choice of their own arbitrator is to ensure that each party will have his or her "side" represented on the arbitration panel by a sympathetic member. *Id*. at 93 (quoting *Astoria Medical Group v. Health Insurance Plan of Greater New York,* 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

Here, the parties expected that their selected appraisers would provide expert guidance and knowledge to the Umpire, who may not be in a position to appreciate the finer points of the dispute and its history. This is exactly what occurred in the appraisal procedure. There is absolutely no evidence proffered by the plaintiff that Boudreau acted less than impartial or was biased in his approach, or that the Award reflects any bias.

Most importantly, the *Grabbert* court found that Aetna failed to demonstrate the required causal nexus between the party-appointed arbitrator's improper conduct and the award ultimately decided upon. The fact that the neutral arbitrator voted for the arbitration award does not disprove a causal nexus between the arbitrator's relationship to a party and the arbitration award that two of the panel members reached. Applied to this case, the plaintiff is unable to establish that that Boudreau failed to conduct the proceedings in an even-handed manner and failed to treat all parties with equality and fairness during the appraisal process. [Ex. 5, D. Soscia depo pp. 98-101].

The plaintiff requested appraisal and was fully aware and on notice of Boudreau's prior involvement in the claim, as well as his employer, Vertex. At no point, until after the appraisal award was issued did the plaintiff protest the selection of Boudreau as the insurer's selected appraiser. Unsubstantiated allegations in the Complaint that insinuate the insurer's appraiser was biased due to prior involvement in the claim and prior business connections to the defendants lacks merit. Nonetheless, whether it be through the parties' written submissions to the Court or an evidentiary hearing to be scheduled at a later date, the plaintiff cannot sustain its significant burden in demonstrating that Boudreau was somehow biased or partial toward any of the defendants, or that his involvement actually tainted the Award.

D. Plaintiff Has Failed to Raise a Genuine Issue Concerning The Alleged Partiality of James Boudreau Sufficient to Warrant Judicial Inquiry

Plaintiff contends that the "Defendants" acted improperly in nominating Boudreau to serve as the insurer's Appraiser because of his prior involvement in the claim and an alleged "business" relationship with the defendants. At the outset of the appraisal process, Boudreau (as well as Zarlenga, the insured's appraiser) signed a Declaration stating, in whole:

> We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the sound value and loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of the same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon.

Boudreau validated this statement at this deposition. [Boudreau Depo at. pp. 34-36].

A Court may vacate an arbitration when the challenging party establishes "a reasonable impression of partially." *V.S. Haseotes & Sons, L.P. ex rel. Bentas v. Haseotes*, 819 A.2d 1281, 1285 (R.I. 2003). The standard requires the challenger of an arbitration to "shown more than an appearance of bias but less than actual bias." *Haseotes*, 819 A.2d at 1285. The challenger must also show "a causal nexus between the impropriety and the arbitration award." *Id*. "[P]artiality is established when 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Id*. (*quoting Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88, 96 (R.I. 1991)); *McGinity v. Pawtucket Mut. Ins. Co.*, 899 A.2d 504, 507 (R.I. 2006).

In the present case, the plaintiff has not met its burden of proving that the Boudreau was partial or that partiality tainted the Award pursuant to the standards announced in

Grabbert. The fact Boudreau worked for Vertex is not grounds to establish evident impartiality. The Court in *Grabbert* recognized the non-neutrality of party-appointed arbitrators espoused by Justice White in his concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), wherein he stated:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. *Cf. United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 [80 S.Ct. 1347, 4 L.Ed.2d 1409] (1960). Consequently, arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." 393 U.S. at 150, 89 S.Ct. at 340, 21 L.Ed.2d at 305–06.

Grabbert, 590 A.2d at 92–93.

Here, the record does not support the plaintiff's claims of evident partiality. It is clear that the estimate prepared by Boudreau is dated June 3, 2019 – after the appraisal was underway, thereby defeating the claim that this estimate was prepared for the defendants before the appraisal began. More to the point, Boudreau clarified that he never visited the building before the appraisal process began. [Boudreau Depo. at p. 99] What the record does show is that the plaintiff knew about Boudreau's relationship with Vertex, as well as the role that he and Vertex had in the claim leading up to the appraisal. Doug Soscia had no concerns then. [Ex. 5, D. Soscia depo at p. 91]. Evidence partiality is not established simply because of an Award less than the insured's claim. Nor is established because Boudreau worked for Vertex or prepared estimates of the damage. It is abundantly clear that the appraisal took place in a manner acceptable and fair to all sides. [Boudreau depo pp. 61-71; Affidavit of William Monahan].

E. Plaintiff Cannot Demonstrate That The Appraisal Procedure Was Improperly Conducted By The Umpire

In the case at hand, the parties' selected appraisers provided the Umpire with information to assist all sides with resolving the dispute on the amount of loss. There was no impropriety or bias in the procedure, which the plaintiff fully participated in at all times. [Affidavit of William Monahan, ¶¶3-30] If anything, the plaintiff's public adjuster acted beyond the scope of the appraisal process when he presented estimates and quotes for additional repairs at the January 11, 2019, property inspection that had not already been circulated to the appraisers or Umpire. In response, the Umpire by letter dated January 16, 2019 to the plaintiff's public adjuster and Girouard with a "cc" to Zarlenga and Boudreau provided additional time for the parties to send any and all supporting documents to the appraisers and the Umpire for consideration. The Umpire also expressed a willingness to schedule a second property inspection if necessary. There was nothing improper about the Umpire's handling of the appraisal procedure. Nor is there any evidence of bias or lack of impartiality on part of the defendants' selected appraiser. The appraisal procedure was handled properly in accordance with the insurance policy and Rhode Island case law. *See Campbell v. Union Mut. Fire. Ins. Co.*, 124 A. 469 (R.I. 1924) (The evidence supports the determination of the justice that the appraisers and the Umpire were impartial and disinterested, that they considered all matters of damage and used their best judgment in making the award, and that they gave the complainant full opportunity to point out all the items of loss claimed by him).

The plaintiff also alleges in its Complaint that the Umpire improperly calculated the amended appraisal award. Plaintiff alleges that claim should have been assessed under "Replacement Cost Value" without any consideration of depreciation. This is incorrect.

The insurance policy Valuation condition (**E. Loss Conditions, 7. Valuation**) provides that in the event of a covered loss, damages will be assessed on an actual cash value basis. Replacement cost is not payable until the damaged property is repaired or replaced. Doug Soscia, the public insurance adjuster, incredibly does not know how to calculate depreciation because he has never done so. [Depo. of Ex. 5, D. Soscia, pp. 56-57].

Rhode Island Administrative Code includes insurance regulations that speak to settlement valuation in property/casualty claims. Formerly known as Insurance Regulation 73, 230 R.I. Code R. 20-40-2.9 states in pertinent part as follows:

> "B. Actual Cash Value
>
> 1. When the insurance policy provides for the adjustment and settlement of losses on an actual cash value basis on residential fire and extended coverage, the Insurer shall determine actual cash value as follows: replacement cost of property at time of loss less depreciation, if any. Upon the first party claimant's request, the insurer shall provide a copy of the claim file worksheet(s) detailing any and all deductions for depreciation."
>
> …

230 R.I. Code R. 20-40-2.9

In this case, Underwriters' appraiser submitted an estimate calculating damages on both a replace cost and actual cash value basis. After a site inspection and review of the parties' submitted documents and estimates, the Umpire entered an appraisal award calculated on an actual cash value basis that included depreciation for a net award. These calculations were made in accordance with insurance policy and Rhode Island insurance regulatory requirements. Douglas Soscia does not even know how to calculate depreciation in accordance with the law. [Depo of Douglas Soscia, at pp. 56-57].

E. Plaintiff's Request That The Court Vacate the Amended Appraisal Award Is Without Merit

The Complaint includes a request that the Court vacate the February 21, 2020 Amended Appraisal Award alleging that the appraisal outcome was improper. For the Court to vacate the appraisal award, the plaintiff needs to establish the existence of one of the elements under Gen. Laws 1956, §10-3-12. For the reasons stated above, the plaintiff cannot satisfy this burden as a matter of law. In this case, the plaintiff is simply dissatisfied with the appraisal award points generally to notions of impartiality on part of Boudreau and "other actions and omissions concerning the Claim" to support its efforts to vacate the Award. This is an insufficient basis to change the outcome of the appraisal given the lack of detailed allegations in the plaintiff's Complaint, or other evidence developed during discovery.

It is well established that courts are required to review "arbitral awards under an exceptionally deferential standard." *N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, Local 920, Am. Fed'n of Teachers,* 945 A.2d 339, 347 (R.I. 2008). Moreover, the courts have consistently recognized that judicial review of an arbitration award is "extremely limited." *Purvis Sys., Inc. v. Am. Sys. Corp.,* 788 A.2d 1112, 1114 (R.I. 2002) (quoting *Romano v. Allstate Ins. Co.,* 458 A.2d 339, 341 (R.I. 1983)). The Rhode Island Supreme Court has established that "[d]ue to the public policy favoring the finality of arbitration awards, such awards enjoy a presumption of validity." *N. Providence Sch. Comm.,* 945 A.2d at 344 (quoting *Pierce v. Rhode Island Hosp.,* 875 A.2d 424, 426 (R.I. 2005)). Our Supreme Court also held that "absent a manifest disregard of a contractual provision or a completely irrational result, the [arbitration] award will be upheld." *Desjarlais*

v. USAA Ins. Co., 818 A.2d 645, 647 (R.I. 2003) (citing *Town of N. Providence v. Local 2334 Int'l Assoc. of Fire Fighters,* AFL-CIO, 763 A.2d 604, 606 (R.I. 2000) (quoting *Providence Teachers Union v. Providence Sch. Bd.,* 725 A.2d 282, 283 (R.I. 1999)).

In sum, "[a]s long as the award 'draws its essence' from the contract and is based upon a 'passably plausible' interpretation of the contract, it is within the arbitrator's authority and our review must end." *Purvis,* 788 A.2d at 1115 (R.I. 2002) (citing *Jacinto v. Egan,* 120 R.I. 907, 391 A.2d 1173, 1176 (1978)). Moreover, an order confirming an arbitration award must be granted "unless the award is vacated, modified or corrected, as prescribed in §§ 10-3-12 and 10-3-14." G.L. 1956, §10-3-11.

In *Aponik v. Lauricella*, 844 A.2d 698, 704 (R.I. 2004), the Rhode Island Supreme Court expressly held that such a limited review of an arbitration award is necessary in order to "preserve the efficiency of the arbitration process and the policy that underlines this process, namely, judicial economy and finality of decisions." It further expressed that "[p]reserving the integrity of the arbitration process depends, therefore, upon a strong public policy in favor of the finality of arbitration awards." *Id.* It is well established that "parties who have contractually agreed to accept arbitration as binding are not allowed to circumvent an award by coming to the courts and arguing that the arbitrators misconstrued the contract or misapplied the law." *Id.,* 844 A.2d at 704 (quoting *Prudential Prop. and Cas. Ins. Co. v. Flynn,* 687 A.2d 440, 441 (R.I. 1996)).

Accordingly, the standard of review requires "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the

law." *Pawtucket Ins. Co. v. Larracuente*, No. PM-10-0029, 2011 WL 5101933, at *3 (R.I. Super. Oct. 21, 2011) (quoting *Purvis,* 788 A.2d at 1115). That is simply not present here.

G. Plaintiff Waived Any Objection To The Insurer's Appraiser Or The Parties' Umpire After It Fully Participated In Appraisal With Knowledge Of The Concerns It Argues to Vacate The Award

The District Court should reject the plaintiff's arguments that the insurer's appraiser was not impartial, or that the Umpire selected by both appraisers was incompetent. It is apparent from the record that the plaintiff acquiesced and consented to these individuals' service and roles before and during the appraisal process, and raised no objection to either until after the Award. [Exhibit 10 and Exhibit 15]. The failure to timely raise any concerns or objections should now foreclose judicial review of the Award; especially where the public adjuster was consulting with counsel on behalf of the plaintiff before the appraisal even took place. [Ex. 5, D. Soscia Depo at p. 81].

This suit seeks to vacate the Award not simply because Boudreau was impartial, as alleged, but rather because the plaintiff (and its public adjuster) did not like the outcome. [Ex. 5, D. Soscia Depo at. pp. 107-108]. The Award reflects the considered product of a process in which the plaintiff, its public insurance adjuster, and its Appraiser, participated fully. [Affidavit of William Monahan] The plaintiff knew Boudreau worked for Vertex, and that Vertex had been involved in the claim before the appraisal occurred. The fact that the plaintiff failed to timely act on its knowledge of alleged impartiality until after the Award should now foreclose it from complaining that the process was not fair. The same reasoning holds true for the belated accusation that the Umpire selected by both parties' arbitrators, Monahan, was not competent – a proposition belied by the Declaration of Appraisers signed on January 7, 2019, and the Qualification of Umpire signed on

January 16, 2019. Plaintiff, by participating in the appraisal process with knowledge of the concerns it has only raised *after* the Award may not raise those concerns to vacate the Award.

Judicial review of an appraisal award is governed by the same rules for reviewing an arbitration award. *See Grady v. Home Fire & Marine Ins. Co.*, 27 R.I. 435, 63 A. 173, 174 (1906); *Waradzin v. Aetna Cas. & Sur. Co.,* 570 A.2d 649, 650 (R.I. 1990). In considering the validity of an arbitration award, Rhode Island law plainly supports the application of waiver or equitable estoppel to situations where, as here, a party continues with the arbitration having notice of grounds to object, but fails to act. For example, the provisions of R.I.G.L. § 28-9-13. Validity of arbitration without judicial order--Grounds for attack, provides, in part:

> An award shall be valid and enforceable according to its terms and under the provisions of this chapter without previous adjudication of the existence of a submission or contract to arbitrate, subject to the provisions of this section:
>
> **(1)** **A party who has participated in any of the proceedings before the arbitrator or arbitrators may object to the confirmation of the award only on one or more of the grounds specified in this section, provided that he or she did not continue with the arbitration with notice of the facts or defects on which his or her objection is based**, because of a failure to comply with § 28-9-8 or with § 28-9-10, or because of the improper manner of the selection of the arbitrators.

[Emphasis supplied].

This is consistent with the ADR Rules of the District Court, which provide that "[a]ny party who proceeds with the case after knowledge that any provision or requirement of these procedures has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object." *See* https://www.justice.gov/sites/default/files/olp/docs/ri.pdf.

The plaintiff has waived any objection to the Award based on the alleged partiality of Boudreau or the competency of Mr. Monahan because it fully participated in the Appraisal with knowledge of the facts it now claims renders the Award invalid. In the alternative, the Court should find that the plaintiff is equitably estopped from contesting the Award based on its own inaction and failure to raise any objections.

"[W]aiver is the voluntary, intentional relinquishment of a known right. It results from action or nonaction." *Haxton's of Riverside v. Windmill Realty, Inc.*, 488 A.2d 723, 725 (R.I. 1985)). "The party claiming that there has been a waiver of a contractual provision has the burden of proof on that issue." *1800 Smith Street Associates, LP v. Gencarelli*, 888 A.2d 46, 55 n. 4 (R.I. 2005). An implied waiver may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it.

In the alternative, the District Court should find that the plaintiff is equitably estopped from challenging the Award because it failed to timely raise any objections before or during the process. "Under the doctrine of equitable estoppel, a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party." *Retirement Board of the Employees' Retirement System of Rhode Island v. DiPrete*, 845 A.2d 270, 284 (R.I. 2004). "[E]quitable estoppel is 'extraordinary' relief, which 'will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief.' " *Southex Exhibitions, Inc. v. Rhode Island Builders Association, Inc.*, 279 F.3d 94, 104 (1st Cir. 2002) (applying Rhode Island law) (*quoting Greenwich Bay*

Yacht Basin Associates v. Brown, 537 A.2d 988, 991 (R.I. 1988)). Equitable estoppel will apply when, as here, there is:

> an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and . . . , that such representation or conduct in fact did induce the other to act or fail to act to his injury.

Southex Exhibitions, Inc., 279 F.3d at 104 (*quoting Providence Teachers Union v. Providence School Board*, 689 A.2d 388, 391–92 (R.I. 1997)).

In reviewing the record before this Court, no mention is made of protestations by the insured during the period between the initial Award rendered on August 15, 2019, and the Amended Award, which followed communications with the parties on February 21, 2020. The plaintiff's failure to timely object to Boudreau's service as an appraiser both before and during the pendency of the Appraisal on grounds of partiality, or to object to the "competence" of Monahan to serve as the Umpire, constitutes a waiver of its right to now object after the Award was rendered. In the alternative, where plaintiff raised no concerns or objections beforehand, the appraisal proceeded in the ordinary course to produce an Award. Because of plaintiff's inaction during the hearings and process itself, rules of waiver and estoppel come into operation.

III. CONCLUSION

For the foregoing reasons, the defendants, Certain Underwriters of Lloyd's, London, Subscribing to Policy No. QMF1760087, respectfully request that the District Court affirm the appraisal award or, in the alternative, grant summary judgment in their favor on all or some of the claims asserted in the plaintiff's Complaint, together with such other relief as the Court deems just and proper.

Respectfully submitted,
The Defendants,
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER QMF1760087,

By Their Attorneys,

MORRISON MAHONEY LLP

/s/ *William A. Schneider*

William A. Schneider, *Pro Hac Vice*
250 Summer Street
Boston, MA 02210
Tel: (617) 439-7573
Fax: (617) 342-4951
wschneider@morrisonmahoney.com

and

/s/ Douglas L. Price

Douglas L Price, #8749
10 Weybosset Street, Suite 900
Providence, Rhode Island 02903-7141
Phone: (401) 331-4660
Fax: (401) 351-4420
dprice@morrisonmahoney.com

CERTIFICATE OF SERVICE

I, William A. Schneider, hereby certify that on January 20, 2023, I filed a copy of this document with the United States District Court ECF System, and that a copy of this document will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, of which there are presently none.

/s/ William A. Schneider