

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

BOOMER’S NEIGHBORHOOD GRILL & BAR, INC.,

Plaintiff,

v.

2:23-cv-1004-JES-NPM

WESTCHESTER SURPLUS LINES INSURANCE COMPANY,

Defendant.

ORDER

In this breach-of-insurance-contract case arising from property damage after Hurricane Ian, the parties jointly move to compel appraisal and stay litigation. (Doc. 26). The motion is **granted**. The clerk is directed to place a stay flag on this case pending completion of the appraisal. The following procedures and deadlines apply:

Selecting Appraisers and Umpire: The parties have selected disinterested appraisers and an umpire. By **July 24, 2024**, the parties must file a joint notice identifying the three members of the appraisal panel.¹

Discovery During Appraisal: The court’s experience in other insurance-coverage matters with appraisal issues has revealed that parties and appraisers sometimes find that the tools of formal discovery can facilitate the appraisal process.

¹ The parties must forego any ex parte communications with the panel or any of its members.

And as provided in the Federal Arbitration Act, a majority of the arbitration panel “may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” *See* 9 U.S.C. § 7.² Likewise, a party may, with the concurrence of at least two members of the appraisal panel, conduct discovery concerning the amount-of-loss issues referred to the appraisal panel for resolution.

Form of the Appraisal Award: For each covered subpart of the property (to the extent there are multiple), the appraisal panel must delineate corresponding replacement-cost values, actual-cost values, ordinance-or-law figures, and any other policy-benefit figures as appropriate. RCV awards must further delineate separate figures for each component (e.g., roof, gutters, each window, each door, the drywall for an interior room, etc.).³ To the extent the award includes any figures for replacing undamaged items to match the replacement of damaged items,⁴ any such

² *See Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 152 (2d Cir. 2019) (appraisal constitutes an arbitration for purposes of the FAA); *Martinique Properties, LLC v. Certain Underwriters at Lloyd’s London*, 567 F. Supp. 3d 1099, 1106 (D. Neb. 2021), *aff’d sub nom.*, 60 F.4th 1206 (8th Cir. 2023) (same); *Register v. Certain Underwriters At Lloyd’s*, No. 5:20-cv-52-TKW-MJF, 2020 WL 6106624, *3 (N.D. Fla. Apr. 20, 2020) (same); *Liberty Mut. Grp., Inc. v. Wright*, No. CIV.A. DKC 12-0282, 2012 WL 718857, *6 (D. Md. Mar. 5, 2012) (requests to appoint an appraisal umpire are processed as motions under the FAA); *see also Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (an agreed method to reach a binding resolution by a third-party neutral about a fact in dispute constitutes an arbitration for purposes of the FAA).

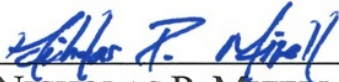
³ Commonly done using software such as Xactimate.

⁴ For example, replacing undamaged wood flooring when replacing damaged wood flooring

award must be separately set forth in the RCV award and no portion of it should be included in the ACV award. Overall, the award must be made with full consideration of the provisions, exclusions, and other terms of the insurance policy. After the appraisal panel determines what was caused by the covered peril, as opposed to excluded causes, and further determines the amounts and values of the losses attributed to the covered peril, the court will account for policy limits, deductibles, and prior payments before entering any judgment.

Completion of Appraisal: The appraisal process must be completed by **August 26, 2024**. Within **one week** after the appraisal concludes, the parties must promptly file a joint notice informing the court of the outcome of the appraisal and attach a copy of the appraisal award. The parties must also contemporaneously file a joint motion to lift the stay and advise the court about the nature of any further proceedings that may be appropriate.

ORDERED on July 11, 2024



NICHOLAS P. MIZELL
United States Magistrate Judge

because the original flooring material is no longer available or suitable. This is distinct from the replacement of an entire component, such as a roof, for any other reason (such as a regulatory standard that requires the replacement of an entire system when a certain portion of it must be repaired or replaced).