No. 19-12716

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROCKHILL INSURANCE COMPANY,
Defendant/Appellant/Cross-Appellee,

v.

ST. LOUIS CONDOMINIUM ASSOCIATION, INC.,
Plaintiff/Appellee/Cross-Appellant.

On Appeal from the United States District Court
Southern District of Florida, Case No. 1:18-cv-21365-WILLIAMS/Torres

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CROSS-APPELLANT/APPELLEE'S CORRECTED PRINCIPAL BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Rockhill Ins. Co. v. St. Louis Condo. Assoc., Inc., Appeal No. 19-12716

I. Corporate Disclosure Statement:

St. Louis Condominium Association, Inc., is a non-government corporation. There is no parent corporation or publicly traded corporation that owns more than 10% of St. Louis' stock.

II. Certificate of Interested Persons:

1. GlobalPro Recovery, Inc.
2. Craig M. Greene, Esq.
3. Shawn R. Horwick, Esq.
4. Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A.
5. Lauren Levy, Esq.
6. Levy Law Group, P.A.
7. Michael Metta, Esq.
8. Mark J. Mintz, Esq.
9. Mintz Truppman, P.A.

10. Susan C. Odess, Esq.

11. Gray R. Proctor, Esq.

12. Rockhill Holding Company

13. Rockhill Insurance Company

14. Siegfried Rivera

15. Stuart Sobel, Esq.

16. State Auto Insurance Group

17. State Automobile Mutual Insurance Company

18. St. Louis Condominium Association, Inc.

19. Hon. Kathleen M. Williams

STATEMENT REGARDING ORAL ARGUMENT

This is an appeal of a five-day jury trial on a $16 million insurance claim, with extensive pretrial litigation. The Court would benefit from oral argument to clarify any questions that arise.

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[1] Hereinafter referred to as "the Association" or "St. Louis."

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The federal courts have diversity jurisdiction over this dispute pursuant to 28 U.S.C. § 1332. Appellate jurisdiction over the district court's final judgment exists pursuant to 28 U.S.C. § 1291.

INTRODUCTION AND STATEMENT OF THE ISSUES ON CROSS-APPEAL

This state law first-party property insurance case arises upon the policy Appellant/Cross-Appellee Rockhill Insurance Company sold to Appellee/Cross-Appellant St. Louis Condominium Association, Inc. The Association made an insurance claim for damages sustained to the St. Louis Condominium building, a 32-story luxury high-rise on downtown Miami's Brickell Key, when Hurricane Irma struck Florida in September 2017. Rockhill maintained that the building sustained no damages during Hurricane Irma; or, if it had, they were below the 3% deductible.

The jury awarded $3,313,725.67, for covered damages from Hurricane Irma, but also found $359,578.00 in pre-existing damages, by which amount the district court reduced the jury verdict. The district court further reduced the award by $945,342, ostensibly the deductible amount of 3% of the insured value of the building.

Cross-Appellant St. Louis Condominium Association, Inc. raises the following issues in the cross-appeal:

1. Whether legally sufficient evidence supported the jury's finding that no coverage existed for $359,578.00 in excluded pre-existing damages?

2. Whether the 3% policy limit hurricane deductible is legally enforceable in the amount of $945,342, where it was not reviewed by the Florida Office of Insurance Regulation?

STATEMENT OF THE CASE AND FACTS

This case is about the claim the St. Louis Condominium Association, Inc. ("the Association") made to Rockhill Insurance Company ("Rockhill") after Hurricane Irma struck in September 2017. The Association's building is a 32-story luxury condominium located on downtown Miami's Brickell Key. The building is worth approximately $32,000,000. (Tr. 84,[2] Ex. 55, at 4 (replacement cost $32,050,700)). When the loss here occurred, the St. Louis Condominium building ("the building") was insured for a total of $31,511,400, with a 3% hurricane deductible endorsement included in Rockhill's $20,000,000 policy. (Ex. 1, at 3, 11). The remainder of the coverage, not relevant to this appeal, was provided by Certain Underwriters at Lloyd's, London. (Id.).

[2] The transcript is cited herein as "Tr. XX," according to the page numbering of the PDF file submitted by Rockhill, as though the entire transcript were Bates stamped. "Ex. XX" refers to the trial exhibits, as submitted in docket entry 267.

I. Introduction: The St. Louis Condominium Association, Inc. made a $16 million insurance claim after Hurricane Irma struck Florida, culminating in this breach of contract lawsuit.

Through a public adjuster, GlobalPro Recovery, Inc. ("GlobalPro"), the Association immediately notified Rockhill that a loss occurred after Hurricane Irma struck in September 2017. (D.E. 117, at 3). Stephen Pesak, Rockhill's initial adjuster, saw fresh cracks in the "patios outside the units" (i.e., the balconies) that he considered to be "hurricane damage." (Tr. 190-91 (deposition read at trial)). After completing its own investigations, the Association asked Rockhill to restore the building to pre-loss conditions by replacing all sliding glass doors and windows, at a cost of approximately $16 million. (D.E. 228, at 1-2; *see* Ex. 2, at 1 (sworn proof of loss claiming for $16,113,648.88 in damages)). Four months later, Rockhill took Pesak off the project, replacing him with Adjuster Phillip Ambrose. (Tr. 372, 375). Mr. Ambrose would testify that "the only damage that I saw was wet sheetrock," and he had no reason to believe Hurricane Irma was not the cause. (Tr. 381).

Three more months passed, and Rockhill had neither paid nor denied the Association's claim. Accordingly, the Association filed suit in March 2018. (D.E. 7, at 1). Rockhill removed the case to federal court. (D.E. 1).

A coverage decision did not come until December 2018. Rockhill issued a denial letter contending that "the exterior of the Insured Property did not sustain substantial direct physical loss as a result of windstorm." (D.E. 117, at 12).

According to Rockhill taking pre-existing damages into account, the damages were "significantly less than the $945,342.00" deductible. (D.E. 117, at 12).[3]

Rockhill's position hardened at trial. In opening argument, Rockhill promised to show the jury that "there was no damage directly caused by Hurricane Irma." (Tr. 17). All the damages observed were pre-existing, and therefore excluded from coverage. (Tr. 19-10).

Ultimately, Rockhill (surprisingly)[4] failed to produce any estimate of damages, pre-existing or otherwise. Nevertheless, after the jury found for the Association on liability, it calculated $359,578 as the amount of pre-existing damages. This number corresponds exactly to a line item for waterproofing in the Association's estimate from Hector Torres, the only expert to offer a dollar amount value for damages. Mr. Torres included this line item because the replacement windows would need waterproofing, not due to any existing problem (Tr. 229 (explaining waterproofing is "in connection with the replacement of the doors and

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[3] Rockhill's other policy defenses form the basis of Ground 1 in the Appellant's Brief, and are addressed therein. The Association does not seek to add to Rockhill's statement of facts with respect to any of the grounds raised in Appellant's Brief.

[4] Rockhill's expert, Paul Millard (who was listed on Rockhill's pretrial stipulation) estimated above-deductible repair costs of $975,610.90, and was expected to testify for Rockhill at trial. (D.E. 116-2, at 110 (expert report); D.E. 233, at 4 (witness list)).

windows")). The Torres estimate is reproduced at pages 15-16 of this Cross-Appellant's Brief.

Cross-Appellant's Ground 1 turns on whether Rockhill presented sufficient evidence for the jury to reach its conclusion on the dollar amount of pre-existing damages. The statement of the case is adapted to that inquiry.

Ground 2, regarding whether the hurricane deductible can apply without prior approval by Florida's Office of Insurance Regulation, particularly where the deductible is ambiguous, is an issue of law not nearly as fact-dependent as Ground 1. The hurricane deductible is reproduced at page 24 of this Cross-Appellant's Brief.

II. Rockhill Insurance Company disputed whether Hurricane Irma caused any damages to the condominium building.

To prove causation, the Association presented evidence of the Building's pre- and post-Irma condition from the residents and Association board members. Many of the residents made incident reports with building management. Property Manager Nellie Nickerson's testimony described an inspection two months before Hurricane Irma that determined the building to be in good condition, without door or window damage. (Tr. 80-81). Additionally, GlobalPro founder Daniel Odess testified on the prior condition of the building based on his prior service as public adjuster for the Association.

The Association's experts, forensic engineer William Pyznar and glass and glazing expert Paul Beers, testified that Hurricane Irma caused wind damage to the windows and sliding glass doors. Rockhill's experts Bert Davis and Janine Pardee, however, testified that Hurricane Irma did not cause a covered loss.

A. Witnesses with firsthand knowledge testified to damage caused by Hurricane Irma.

Property manager Nellie Nickerson testified that she "never had complaints about windows or any water intrusion" before Hurricane Irma." (Tr. 83). Before Hurricane Irma, the building was "in optimal condition." (Tr. 83). A July 12, 2017 quality assurance inspection from FirstService, the management company that employed Ms. Nickerson, noted no problems with the windows and no visible cracking in the building's exterior. (Tr. 80-81, 85, 117; Ex. 56, at 22). The exterior did need cleaning, however. (Id.).

Maria Del Castillo, president of the Association's board of directors, testified that the board members walked the building once a week to ensure it remained in "the best utmost condition at all times." (Tr. 120). When she returned to the property after Hurricane Irma passed, Ms. Del Castillo saw "ten blown windows" and "debris everywhere." (Tr. 122; *see also* Ex. 146, video F (capturing boarded-over windows on drone camera during October 23, 2017 overflight by Falcon Engineering)). There was water damage from leaking windows in common areas such as the gym and the

children's room. (Tr. 122). In her own unit, the water intrusion had warped her flooring. (Id.). Her shutters were broken during the storm, and her windows would no longer open. (Tr. 122-23).

After Hurricane Irma struck, Ms. Nickerson received at least 45 incident reports documenting water and wind damage in individual units. (Tr. 87-88, Exs. 8-53). The residents were advised to make a claim on their individual homeowner's policies for the damages. (Exs. 8-53).

Public Adjuster Daniel Odess had firsthand knowledge of the building from previous work "going back to approximately 2012," and testified that the building was "very well maintained." (Tr. 146). He was not aware of any pre-existing water intrusion issues. (Id.).

Finally, the Association's forensic engineering expert William Pyznar, who testified as to causation, had the unique opportunity to personally observe because he did not evacuate for Hurricane Irma, and he lived "directly across from Brickell Key . . . in the corner unit with a clear shot of St. Louis Condominium from my 22nd floor apartment." (Tr. 217).

B. The parties' experts disagreed on whether Hurricane Irma damaged the condominium building.

The Association's causation experts relied on reports from the firsthand observers to establish the condition of the building before Hurricane Irma struck.

(Tr. 40-41, 75, 79-80 (Paul Beers); Tr. 194-95 (William Pyznar)). Paul Beers testified that maintaining the windows and doors of the individual units was the responsibility of the owners, so he was not surprised that the Association could not produce any relevant maintenance records in response to his request. (Tr. 73). The absence of records for Mr. Beers to review was in accord with Nellie Nickerson's testimony that there were no pre-existing issues with the window and door systems. (Tr. 83).

Rockhill's experts purported not to find any damages from Hurricane Irma, based on their inspections.

1. Plaintiff's forensic engineer: William Pyznar.

William Pyznar, a partner at Falcon Engineering, testified as a forensic engineering expert on building envelope failures. (Tr. 194). He concluded that the building had suffered extensive damage from Hurricane Irma to the windows and sliding glass doors. (Tr. 208-09).

He conducted interior inspections of nine units, on different floors and representing each of five different floor plans. (Tr. 196). He used a scaffold to visually inspect sixteen windows from the exterior. (Tr. 216-17). He observed the exterior through binoculars, and also viewed detailed video footage from an October 23, 2017 drone overflight. (Tr. 197; Ex. 88, at 6).

Reviewing the drone video footage with the jury, he described "racking" of the windows – i.e., "where the window assembly has distorted." (Tr. 200). When windows are racked, they "will not function properly and there will be openings" because the window is no longer flush with the frame. (Id.). The gaskets would no longer seal, allowing water to enter. (Tr. 207).

He testified that at a wind speed of 123 mph, the building might move a foot or so. (Tr. 205). Such a wind would inflict 2,000 pounds of force on a 6' by 9' window. (Id.). In addition to the gusts, the building would suffer fatigue during Hurricane Irma from the sixty hours of sustained wind over thirty miles per hour. (Tr. 206). He indicated that every window and door "should be replaced as the existing units have failed and no longer function correctly or provide the necessary weather protection." (Ex. 88, at 27).

2. Plaintiff's glass and glazing expert: Paul Beers.

Glass and glazing expert Paul Beers took several thousand photographs and created diagrams showing the location of the damage on each window. (Tr. 43 (describing Ex. 67); Tr. 56). He or one of his employees went into almost every unit. (Tr. 28, 57 ("all but nine")). One of his team went up the height of the building on a swing stage. (Tr. 26, 57-58). Based on his review of the documentation of his team's investigation, 88% of the windows and sliding glass doors suffered damage from

Irma. (Tr. 52; *see* Tr. 62 ("I looked at every single one of the thousands of pictures. . . .")). The damages were spread throughout the building. (Tr. 52).

Mr. Beers also conducted a pressure chamber test with water spray in five units, to simulate a summer rainstorm with forty mile-per-hour winds. (Tr. 32; 37-39). The windows leaked during the tests. The coloration of the leaking water indicated that the leaks were "relatively new" and due to something that had "just recently occurred." (Tr. 34). This was consistent with reports that there was no water leakage before Hurricane Irma struck. (Tr. 41).

In addition to leakage, many windows exhibited sign of window frame movement and cracking; window frame joint damage; and, glass stop damage. (Tr. 49-50). "None of these things would be related to the age of the building. It is clearly because of – a force caused them to move." (Tr. 50). He ruled out damage secondary to settling of the foundation, explaining that settling would "basically crush the window frames together," and would not account for the cracks he observed "up and down the entire side of the windows and doors." (Tr. 79).

3. Defendant's engineering expert: Bert Davis.

Bert Davis served as one of Rockhill's engineering experts. (Tr. 287). He inspected windows and sliding glass doors from the interior of forty different units, less than a third of the individual units. (Tr. 288, 293).

He testified that he "did not observe any wind damage from the storm to the door systems." (Tr. 294). Similarly, he "did not see wind damage to any of the window units in this building." (Tr. 298). He denied that any racking had occurred at the building. (Tr. 317). According to Mr. Davis, all of the issues he observed were caused by defects in balancers, springs, or plastic guides. (Tr. 300-02; *see* Tr. 291-93, 295-97 (explaining window and door assemblies)). Over objection,[5] Mr. Davis testified that these could be replaced; "windowbalancer.com" had the necessary balances. (Tr. 302). Rockhill did not, however, introduce evidence of the price of a balancer, nor of any other replacement component.

Ultimately, Mr. Davis attributed every window and door problem at the building to wear and tear rather than Hurricane Irma. (Tr. 309).

4. Defendant's structural engineer: Janine Pardee

Structural engineer Janine Pardee testified as an expert in "civil and structural engineering and hurricane damages assessment." (Tr. 347). Rockhill hired her to "perform the structural part of the survey and to look at the exterior stucco; mainly the main structure, stucco and some other surfaces." (Id.). She estimated sustained wind speeds of sixty miles per hour at the building, half of the speed the building

[5] The Association objected when Rockhill asked Mr. Davis "How, if at all may the racked windows be repaired?" because the topic was "outside the scope of his expertise and his report." (Tr. 302).

was designed to withstand. (Tr. 349). She testified that there were no signs that the building had moved. (Tr. 351). According to her, there was evidence of older stucco cracking on the lower levels, caused by settling of the foundation. (Tr. 353). The cracking and related paint damage was not due to wind, but instead caused by a "balcony drainage and water intrusion issue," compounded by "lack of proper jointing of the stucco." (Tr. 357).

She would have expected to see cracking in the stucco over the concrete block infill panels if the building sustained serious wind damage. (Tr. 350, 354). Instead, she found only structural cracks near the entrance that she ascribed to "settlement of the wing wall foundation," which rested in soil rather than bedrock. (Tr. 352). These cracks were older, with black mildew and weathering. (Tr. 353).

Ms. Pardee's testimony was in a sense rebuttal of Rockhill's adjuster Stephen Pesak, whose deposition indicated Hurricane Irma caused damage to stucco on the exterior balconies. (Tr. 190-91).

III. The St. Louis Condominium Association presented an estimate of the precise amount of damages, which Rockhill argued was all pre-existing.

The following summary focuses on covered damages and pre-existing damages. In connection with Cross-Appellant's Ground 1, it is intended to demonstrate the lack of evidence tying the line item for waterproofing to any pre-existing damages.

A. The Association presented only repair estimate, for $16 million, from expert general contractor Hector Torres.

Hector Torres, principal at DLT Building Advisors, testified as an expert in building cost. (Tr. 218, 222). He produced an estimate of $16,036,942, which included replacement of all the windows and sliding glass doors. (Tr. 235, 246; Ex. 59, at 2).

By far, the largest line item in the estimate was the $7,705,236, for windows, glass, and glazing. (Ex. 59, at 1). The 102,736 square feet of material bid was necessary to replace "every single window and every single sliding glass door" in the building. (Tr. 246). The fourth largest item was $359,578 for "waterproofing," i.e. "general caulking – windows/doors" for all 102,736 square feet of glass and glazing. (Id.). This number corresponds exactly to the jury's deduction for pre-existing damages in the final verdict. (D.E. 263, at 3).

Hector Torres testified that he buys window assemblies by the foot, not by the window. (Tr. 243). His estimate included a line item for $7,705,236 to replace 102,736 square feet of "glazing w/frame – Package." (Ex. 59, at 1). That $7.7 million figure represents every single window and sliding glass door. (Tr. 246).

But that figure, without more, would not accomplish window replacement. "Sliding glass doors and windows are part of an assembly. They don't stand alone." (Tr. 227). To budget for the entire project, he had to "look at the equipment and

supplies and logic to install it, the sequence to install it and the schedule to install it." (Tr. 227-28). Here, part of that installation sequence would be to waterproof the newly replaced glazing system. (Tr. 228). Accordingly, the estimate included a $359,578 line item for "Waterproofing: General caulking – windows/doors." Like the glazing, the waterproofing requirement was calculated based on replacing all 102,736 square feet of glass in the windows and doors. (Id.; Ex. 59, at 1).

Mr. Torres's summary of total costs of $16,036,942 and detailed estimate of direct costs of $11,460,559 are found in Trial Exhibit 59, reproduced in full below:

DLT BUILDING ADVISORS 3470 North Miami Avenue Upper Suite Miami, Florida 33127	State of Florida CGC 058081	ST LOUIS BRICKELL KEY CONDO ASSOC 800 Claughton Island Drive Miami, Florida 33131

BUILDING RESTORATION ESTIMATE - *SUMMARY*

Property Inspected:	800 Claughton Island Drive	Total GSF	ELEVATION			
Location:	Miami, Florida 33131	128420.60	NORTH	SOUTH	EAST	WEST
Owner:	St Louis Brickell Key Condo Association	Stucco/Concrete	3157.66	3157.66	9684.4	9,684
Stories	31					
Total Units	130	Window/Glass	12630.64	12630.64	38737.6	38,738
Claim Category:	Hurricane Irma - **WIND**					
Estimate Date:	October 27, 2017	Total GSF	15788.3	15788.3	48,422	48,422
Prepared By:	Hector Torres CGC 058081 -C:754.581.2475					

Item	Description	Mobilization	Materials	Supplies	Equipment	Total Cost
1000	General Requirements	$78,000		$65,000	$138,000	$281,000
1100	Equipment				$289,800	$289,800
2100	Demolition					$226,250
2200	Surveying					$34,680
3200	Site Safety					$69,000
7100	Waterproofing					$359,578
8100	Doors and Hardware					$931,000
8500	Window, Glass and Glazing					$7,705,236
9260	Framing and Drywall					$466,050
9280	Stucco and Plastering					$924,628
9900	Painting					$150,252
14000	Pools & Spas					$23,085
	Subtotal Direct Cost			$65,200	$427,800	$11,460,559
	General Conditions - Project Supervision	$630,000				$630,000
	Subtotal	$630,000	$0	$65,200	$427,800	$12,090,559
	Contractor's Contingency - 3%					$362,717
	Subtotal					$12,453,276
Major Loss Item	Construction Management Fee - 5%					$604,528
	Subtotal					$13,057,804
	General Liability Insurance - 1.5%					$195,867
	Subtotal					$13,253,671
	Overhead - 10%					$1,325,367
	Profit - 10%					$1,457,904
	Bond					NIC
	Total Restoration Estimate					**$16,036,942**

DLT BUILDING ADVISORS		ST LOUIS BRICKELL KEY CONDO ASSOC
3470 North Miami Avenue	State of Florida CGC	800 Claughton Island Drive
Upper Suite	058081	Miami, Florida 33131
Miami, Florida 33127		

BUILDING RESTORATION ESTIMATE - *DETAIL*

Property Inspecte	800 Claughton Island Drive
Location:	Miami, Florida 33131
Owner:	St Louis Brickell Key Condo Association
Stories	31
Total Units	130
Claim Category:	Hurricane Irma - **WIND**
Estimate Date:	October 27, 2017
Prepared By:	Hector Torres CGC 058081 -C:754.581.2475

Total GSF	ELEVATION			
128420.60	NORTH	SOUTH	EAST	WEST
Stucco Concrete	3157.66	3157.66	9684.40	9684.40
Window Glass	12630.64	12630.64	38737.60	38737.60
TOTAL	15788.30	15788.30	48422.00	48422.00

CSI	Trade	UNIT	Qty	Unit Cost		Subtotal
1100	**Equipment**					
1	Heavy Equipment Rental - Swing Stage	6	MTHS	$36,000		$216,000
2	Heavy Equipment Operators	6	MTHS	$12,300		$73,800
			Equipment	**Subtotal:**		**$289,800**
2100	**Demolition**					
3	General, ongoing, Preparation of site	6	MTHS	$15,000.00		**$90,000**
4	Debris Removal	25	EA	$1,200.00		**$30,000**
5	Hauling of Debris	25	EA	$650.00		**$16,250**
6	Site Safety - Overhead Protection	6	MTHS	$15,000.00		**$90,000**
				Demolition Subtotal		**$226,250**
2200	**Surveying, Staging & Permitting**					
7	Architectural & plans	1	LS	$22,460.00		$22,460
8	Environmental Consultant - DERM	1	LS	$2,650.00		$2,650
9	Building and Site Control	1	LS	$2,500		$2,500
10	Site Boundary Analysis	1	LS	$1,500		$1,500
11	Benchmarks	1	LS	$850		$850
12	Existing Conditions Report	1	LS	$2,500		$2,500
13	Miami Dade County Monitoring - DERM	1	LS	$2,220		$2,220
				Subtotal:		**$34,680**
3200	**Site Safety**					
14	Site Safety - OSHA COMPLIANCE HIGH RISE	6	MTHS	$11,500.00		$69,000
				Subtotal:		**$69,000**
7100	**Waterproofing**					
15	General Caulking - Windows/Doors	102,736	SF	$3.50		$359,578
				Subtotal:		**$359,578**
8100	**Doors and Hardware**					
16	Door & Hardware Package - SGD	266	EA	$3,500		$931,000
				Subtotal:		**$931,000**
8500	**Window, Glass and Glazing**					
17	Glazing w/frame - Package	102,736	SF	$75.00		$7,705,236
				Subtotal:		**$7,705,236**
9260	**Framing and Drywall**					
18	Drywall Package- Inside Units	130	EA	$3,585.00		$466,050
				Subtotal:		**$466,050**
9280	**Stucco and Plastering**					
19	Exterior Stucco Repair -	25,684	SF	$36.00		$924,628
				Subtotal:		**$924,628**
9900	**Painting**					
20	Painting - Stucco exterior 2 coats	25,684	SF	$5.85		$150,252
				Subtotal:		**$150,252**
14000	**Pools and Spas**					
21	Empty, Acid Wash, Gunite	1	EA	$15,500		$15,500
22	Power wash & repair pool deck	1	EA	$7,585		$7,585
				Subtotal:		**$23,085**

B. Rockhill argued that certain water-related damages were caused by pre-existing conditions excluded from coverage.

The Association's policy included an endorsement excluding any pre-existing damages from coverage. (Ex. 1, at 67). The endorsement provides that "this policy shall exclude any loss or damage directly or indirectly caused by, resulting from or contributed to by any pre-existing damage to any covered property, at the time of the loss." (Id.). According to Rockhill, the building "had old windows. They had old doors," but the Association's experts had naively taken the Association's word that there were no prior leaks, without reviewing maintenance records. (Tr. 20-21). Thus, Rockhill argued that the jury should deduct from its award "any pre-existing damage that was there, which our experts will be telling you about, contributed to – whether indirectly or directly – contributed to any damage that plaintiff is now asserting here in this case." (Tr. 18).

Specifically, Rockhill linked water intrusion during Hurricane Irma to poor balcony waterproofing, which Rockhill contended the Association had recognized when it commissioned a "Railing and Paint Project" to beautify the balconies in 2015. Rockhill accused the Association of using Hurricane Irma as an excuse to pay for repairs within the scope of the project.

1. Rockhill argued that poor waterproofing of the balcony concrete caused water intrusion.

Rockhill's experts testified at length about poor waterproofing on the balconies. Janine Pardee testified that water penetrated into the balcony concrete to the underside. She testified that "most of the balconies appear not to have any type of water-proofing over the concrete deck, so every time it rains there is an opportunity for moisture to enter the concrete." (Tr. 356). According to Ms. Pardee, water caused the balcony concrete to swell and contract repeatedly, causing delamination and spalling. (Tr. 358). "Water puddles on these balconies and it travels through the concrete and it has some pressure and deteriorating effect on the stucco and the paint below." (Tr. 360). Thus, the "delaminating stucco and the peeling paint on the undersides of the balcony [was] due to the lack of water-proofing on the balcony concrete." (Id.).

Ultimately, she blamed the water penetration issues on the balcony waterproofing as well:

> I formed the opinion that the lack of water-proofing on the balcony concrete not only caused the damages we've looked at here but probably also allowed a lot of water intrusion that occurred during Hurricane Irma.
>
> The water when it puddles on the balcony surface – when it is raining hard it puddles deeper so the water is able to penetrate into the building envelope at the juncture with the building opening under the sliding glass doors.

> So the water can go under the sliding glass doors and into the ceilings and walls of the unit below.

(Tr. 365). But she expressed unawareness that "the repairs to the balconies the water-proofing of the balconies . . . is not a part of the claim that brings us here." (Tr. 370).

Additionally, Bert Davis testified that the concrete balconies "did not have a good water-proofing system." (Tr. 304). According to him, water intrusion occurred under the sill of the sliding glass doors, when "water from the upper balconies that were leaking to the living room ceiling of the unit below." (Id.).

2. Rockhill argued that the balcony water intrusion was caused by repairs within the scope of work for the "Railing and Paint" balcony beautification project the Association commissioned in 2015.

Rockhill also emphasized the fact that, in 2015, the Association commissioned a "Railing and Paint Project" to beautify the building's exterior. (Ex. 91). Rockhill would argue that the project "was not a beautification project. This is St. Louis Condominium Building's pre-existing damage project being claimed in this case and now we want Rockhill to pay for it." (Tr. 515). Rockhill argued that the "same damages pointed out by this engineer in 2016 are being passed off now as hurricane. This is not a beautification." (Tr. 530). Rockhill linked its insinuations to its affirmative defense that the Association had violated its duty of cooperation. (Tr. 530; *see* Appellant's Br., at 29-40 (describing defense)). Rockhill even suggested

the Association had falsely sworn to damages that "did not take into account they had pre-existing damage that may have contributed" to the figure. (Tr. 514).

Ms. Del Castillo testified that "in order to beautify [the exterior of] our building, we decided to change the concrete balconies to make them look nicer with glass . . . we decided to do the balconies the interior hallways and the elevators and the paint to go along with it." (Tr. 130). At a May 5, 2015 meeting, the Association's board of directors considered four proposals and agreed to contract Erdozain Consulting Engineers, Inc. to "prepare the scope of work for the Building painting, stucco repairs, water proofing and balconies demolition." (Tr. 133; Ex. 128).

Engineer Jack Erdozain would issue the Railing and Paint Project Manual ("the project manual") in June 2016. (Tr. 95-96, 115-16; Ex. 91). The enclosed bid form for the "St. Louis Condominium Paint Project" described a project including "Railing replacement, balcony waterproofing, office and Meeting Room window to door and planter modification, painting and caulking of the St. Louis Condominium." (Ex. 91, at 6). It includes a line item amount for "painting and caulking" and one for "balcony waterproofing." (Ex. 91, at 9). It also requests bidders to specify the unit pricing to replace stucco, prepare and repaint sliding glass doors and windows." (Id.).

The project manual also requests bidders report specific pricing for "balcony, deck water proofing per square foot." (Tr. 97-98). One section of the manual

describes "cold fluid-applied waterproofing" to be applied to the balcony concrete. (Ex. 91, at 38-40).

To further link the balcony repairs with its pre-existing damage argument, Rockhill introduced minutes of the Association's board meetings that describe, for example, "consideration of new projects: painting water proofing and balconies." (Tr. 129-32, 135; Exs. 126-27; *see generally* Exs. 123-136).

Rockhill tried to tie Ms. Pardee's testimony about the balconies directly to the beautification project described in the project manual. (Tr. 363-64). She did not disclose any opinion on the project manual before trial, however, leading the district court to sustain the Association's objection to that line of questioning. (Tr. 364 ("we are not going to discuss her review of a report that she did not include in her regular report and she did not have any opportunity to be deposed on so it is new information")).

During closing argument, Rockhill accused the Association of using Hurricane Irma as an excuse to complete the Railing and Paint project on Rockhill's dime. (Tr. 514-15). It predicted that the jury would find that the Association "turned this beautification project into a pre-existing damage – now being claimed as hurricane damage." (Tr. 515). Rockhill pointed out that the Railing and Paint project included "painting interior and exterior stucco and balcony water-proofing," and argued the Association was now "calling what was work to be done in a

beautification project Hurricane Irma damage." (Tr. 531). Indeed, according to Rockhill, the Association's design was evident because it used the same contractor for temporary repairs that it used for the Railing and Paint project. (Id. ("This is the same work these people were going to do back then but now waited for Hurricane Irma to pass through and pass them on as Hurricane Irma damages.")). According to Rockhill, "[c]ommon sense" should have told the jury that the "building, painting, stucco repairs and water-proofing" discussed at the 2015 Association board meetings corresponded to pre-existing damages. (Tr. 532-33).

Rockhill's closing argument was long on insinuation but short on figures. Rockhill failed to put on a single witness, or offer any other evidence, of a precise amount of pre-existing damages. As the jury would be instructed, proof of the dollar amount was an element of Rockhill's pre-existing damages defense. (Tr. 482).

IV. The Association won a $3,673,303.67 damage award, and challenged subsequent reductions for pre-existing damages and for the 3% deductible.

The jury found that Rockhill had breached the policy by failing to pay covered damages, and that the Association had complied with all of its pre-suit duties. (D.E. 263, at 1). It awarded $3,673,303.67 in damages. (Id., at 2). On appeal, the Association argues that two reductions to this amount were applied in error.

A. The jury found $359,578 of pre-existing damage. The district court further reduced the award by Rockhill's claimed deductible amount of 3% of the total insured value, $945,342.

For the pre-existing damages exclusion, the jury was instructed that Rockhill had to prove two elements: first, that "the damages which St. Louis claims already existed at the time of loss such that the damage was not caused by Hurricane Irma;" and, second, the dollar amount of the pre-existing damages. (Tr 482). The jury found that some of the damages "were directly or indirectly caused by, resulted from or contributed to by any pre-existing damages to any covered property." (D.E. 263, at 2). It found that "the amount of such pre-existing damages claimed by St. Louis not caused by Hurricane Irma" was $359,578.00. (Id., at 3).

In addition to the deduction for pre-existing damages, the district court applied a deductible of 3% of the building's value: $945,342. (D.E. 269, at 1). The hurricane deductible endorsement, (Ex. 1, at 11), is reproduced in full on the following page:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

HURRICANE OR HAIL DEDUCTIBLE

Hurricane Deductible Amount: 3% of Total Insured Values per building, per Calendar Year, subject to a minimum $25,000 per occurrence.

All Other Windstorm/Hail Deductible Amount: $25,000 per occurrence.
or N/A% of Total Insured Values N/A, subject to a minimum $N/A per occurrence.

The **Hurricane** Deductible, as shown above, applies to direct physical damage or loss to covered property by a Hurricane, regardless of any other cause or event that contributes concurrently or in any consequence to the damage or loss.

The All Other Windstorm/Hail Deductible, as shown above, applies to direct physical damage or loss to covered property by non-hurricane windstorm or hail, regardless of any other cause or event that contributes concurrently or in any consequence to the damage or loss.

Deductible Clause:

A deductible amount is calculated and applied based on the amount or percentage as shown above

A. If the deductible is on a per building basis, the deductible is applied to the sum of building, personal property and business income value of that building.

B. If the deductible is on a per location basis, the deductible is applied to all insured buildings, personal contents and business incomes at the location affected by loss or damage.

C. If the deductible is on a TIV basis, the deductible is applied to the Total Insured Values, as contained in the Statement of Values on file with the Company.

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss, and will pay the resulting amount or the Limit of Insurance, whichever is less.

"**Hurricane**: A storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service (hereafter referred to as NHC). The Hurricane occurrence begins at the time a hurricane watch or hurricane warning is issued by the NHC, and ends 72 hours after the termination of the last hurricane watch or hurricane warning issued for by the NHC."

All other terms and conditions of this policy remain unchanged.

B. The Association filed post-trial motions challenging the reductions for pre-existing damages and deductible.

The Association filed both a Rule 50 motion for judgment as a matter of law (D.E. 270) and a Rule 59(e) motion to alter or amend the final judgment. (D.E. 272). These motions were directed, *inter alia*, to the sufficiency of the evidence on pre-existing damages and the legality of the deductible. Rockhill filed separate responses. (D.E. 273, 274). The Association filed a consolidated reply. (D.E. 275).

1. No evidence supported the jury's finding on the dollar amount of pre-existing damages, despite the district court's jury instructions that Rockhill was specifically required to prove that element.

Before the jury began deliberating, the district court granted some of the Association's *ore tenus* motions for judgment as a matter of law on Rockhill's affirmative defenses. The court denied the motion directed to pre-existing damages, however. (Tr. 447-48; *see* Tr. 452-43 (describing evidence as "not very detailed testimony but it's there")).

In the written post-trial motions, the Association explained that "Rockhill had the burden of proving both elements" of the pre-existing damages defense: "the fact of pre-existing damage and the dollar amount. By their failure to offer any evidence as to the second element, Rockhill failed in its burden." (D.E. 270, at 3; D.E. 272, at 7). There was "no basis in the evidence to support the jury's finding that damage in the amount of $359,578 represented the dollar amount of damage that was not caused

by Hurricane Irma." (D.E. 270, at 2; D.E. 272, at 6). Therefore, the jury's pre-existing damages calculation was a legally insufficient basis for the court to reduce the covered damages award. (D.E. 270, at 4; D.E. 272, at 7).

In response, Rockhill argued that the pre-existing damages finding should stand because it had "challenged the basis for the estimate," notwithstanding its failure to "call an expert to testify as to an amount of Plaintiff's damages." (D.E. 273, at 2; D.E. 274, at 6). Rockhill looked to the $359,578 line item in the Torres estimate for waterproofing and general caulking of windows and doors, which "exactly coincide[d] with the amount that the jury found was preexisting." (Id.). According to Rockhill, "[s]ubstantial, competent evidence support[ed] the jury's finding that this item was categorically excluded from coverage." (Id.).

For support, Rockhill relied on who it called its "most significant witness" on the matter, Janine Pardee, who "testified that the extensive delamination of stucco finish and paint on the undersides of the balconies was caused by long term moisture damage." (D.E. 273, at 2; D.E. 274, at 6-7). Rockhill described her testimony as "confirm[ing] that a substantial amount of the water intrusion at the Insured Property was due to the preexisting condition of the balconies." (D.E. 273, at 2; D.E. 274, at 7). Rockhill argued that Erdozain Consulting's 2016 beautification project manual (Ex. 91) corroborated her testimony because it "specifically itemized a plan to fix

the exterior stucco and balconies and included items which Ms. Pardee explained were pre-existing." (Id.).

Additionally, Rockhill directed the district court to minutes of the Association's 2015 board meetings, which discussed painting and waterproofing the balconies, and stucco repairs, (D.E. 273, at 3; D.E. 274, at 7; Ex. 126-28), as well as weekly management reports discussing the corroded rebar in the balconies and the need to apply new stucco to prevent water intrusion. (D.E. 273, at 3; D.E. 274, at 7; Ex. 120-21).

In its reply, the Association explained that "the line item pertains to the work necessitated by the replacement of the windows and sliding glass doors ("SGD"). It would not be required otherwise – and therefore, is not a cost to repair pre-existing damage." (D.E. 275, at 2). The Association pointed out that "the square footage of caulking is equal to the square footage of window and SGDs being replaced: 102,736 for both windows and SGDs." (Id.). "The jury's use of this exact amount in their award for pre-existing damages is without any basis in the evidence" because there was "no testimony linking general caulking to pre-existing damage." (Id.).

As for delamination of paint and stucco on the undersides of balconies, the Association had never asked Rockhill to pay for those damages, which were not part of the Torres estimate. (Id., at 3). No deduction from the total award could be

supported for damages to the stucco on the balcony undersides, because the Association never asked Rockhill to pay for them in the first place.

2. Rockhill's ambiguous 3% deductible was unenforceable without approval from Florida's Office of Insurance Regulation.

The Association also argued that Section 627.701(2)(b), Florida Statutes, rendered the 3% deductible unenforceable. (D.E. 270, at 4; D.E. 272, at 4-5). Section 627.701(2)(b) provides that "Unless the [Office of Insurance Regulation] determines that the deductible provision is clear and unambiguous, a property insurer may not issue an insurance policy . . . which . . . states the deductible as a percentage rather than as a specific amount of money." "Because the deductible set forth by Rockhill in its policy is stated as a percentage rather than a specific amount of money, it violates Section 627.701 and should not be applied." (D.E. 270, at 5; D.E. 272, at 5).

In response, Rockhill relied on Florida law governing commercial lines policies, which explicitly authorizes a deductible of up to 10 %, so long as the insurer also offered a 3% deductible policy. (D.E. 273, at 3-5; D.E. 274, at 4-6). Rockhill argued that "the Policy's Hurricane or Hail Deductible of 3% complies with Fla. Stat. § 627.701(8) because the Policy is a commercial lines policy." (D.E. 273, at 5; D.E. 274, at 8). Rockhill also argued that "it is undisputed that Rockhill Insurance Company is a surplus lines insurer" not subject to Section 627.701 in the first place. (D.E. 273, at 3; D.E. 274, at 4 (citing § 626.913(4), Fla. Stat.)).

In reply, the Association pointed out that, not only had Rockhill never claimed surplus lines insurer status in litigation, its policy did not include the mandatory surplus lines disclosure. (D.E. 275, at 3-4 (citing § 626.924, Fla. Stat.)). "Indeed, the policy never even references the term surplus lines or claims to be such." (D.E. 275, at 4). As for commercial lines status, Rockhill's argument mistakenly addressed "the amount of a deductible rather than the statutory requirement" of OIR approval. (D.E. 275, at 6). Thus, "Rockhill's failure to adhere to statutory requirements voids the deductible." (Id.).

C. The district court denied the Association's post-trial motions on damages.

The district court denied the Association's motions. (D.E. 291, 292). The court explained that setting the dollar amount of pre-existing damages "is a function of the jury, not the Court," and rejected the challenge to the evidentiary sufficiency of the jury's finding. (D.E. 291, at 3). As for the deductible, the court found that the language was unambiguous, without considering whether Rockhill had fulfilled its statutory obligation to obtain OIR review, or the consequences of such failure. (Id., at 3-4). The court thus applied two reductions to the jury's covered damages finding: one for the jury's pre-existing damages finding, and another for the deductible.

The district court also awarded prejudgment interest. It rejected Rockhill's argument – i.e., that interest was not available for judgments against surplus lines

insurers like Rockhill – because Rockhill failed to raise the issue in its affirmative defenses. (D.E. 291, at 4-5 (observing that Rockhill's answer (D.E. 8) argued only that "the extent of Plaintiff's recovery of benefits under the Policy, prejudgment interest and/or attorney's fees, if any, should be reduced by Plaintiff's inequitable conduct and the doctrine of unclean hands.")). Rockhill does not appeal this finding.

The Association filed this cross-appeal.

SUMMARY OF THE ARGUMENT

The district court erred in denying the Association's post-trial motions. The evidence did not support the jury's finding that the Torres estimate's $359,578 line item for "Waterproofing" and "General Caulking – Windows/Doors" corresponded to pre-existing damages. Additionally, the district court erred in finding that the deductible here was unambiguous. The correct question is whether Florida's Office of Insurance Regulation ("OIR") approved it. Without OIR approval, the deductible is not enforceable, period. Here, the ambiguity and surplusage in Rockhill's particular deductible further illustrates the important role OIR review plays in protecting Florida's policyholders.

As for the grounds raised by Rockhill in the Appellant's Brief:

1) Ground 1, error in denying Rockhill's motion for summary judgment on the Association's failure to comply with its duties, is not cognizable on appeal.

Moreover, summary judgment clearly would have been inappropriate. The Court should affirm as to Rockhill's Ground 1.

2) Ground 2, error in denying Rockhill's motion for judgment as a matter of law, is not adequately briefed and additionally lacks merit. The Court does not sit as a second jury. It cannot reweigh evidence on appeal from an order denying a Rule 50(b) motion. Rockhill's *Daubert* argument – that "the opinions of the Plaintiff's expert's where [sic] based on inadequate independent data, insufficient data, and on their acceptance of the reprsentations [sic] of the Plaintiff's representatives" – is a textbook example of an argument that pertains to the weight of expert testimony rather than its admissibility. The Court should affirm as to Rockhill's Ground 2.

3) Ground 3, abuse of discretion in striking Rockhill's expert Brian Warner, also lacks merit. The district court was well within its broad discretion to strike Mr. Warner because he was never available for deposition before the discovery cutoff. The Court should affirm as to Rockhill's Ground 3.

CROSS-APPELLANT'S ARGUMENT

As cross-appellant, the Association presents claims raised in post-trial motions pursuant to Rule 50(b) and Rule 59(e). The Court's review of an order denying a motion for judgment as a matter of law is "de novo, applying the same standards as the district court." *Lamonica v. Safe Hurricane Shutters, Inc*., 711 F.3d 1299, 1312 (11th Cir. 2013). A motion for judgment as a matter of law cannot be granted merely because reasonable and fair-minded people might reach a different conclusion from the evidence at trial. *Walls v. Button Gwinnett Bancorp, Inc.,* 1 F.3d 1198, 1200 (11th Cir. 1993). The question is the legal sufficiency of the evidence, not its persuasiveness. When reviewing the sufficiency of the evidence, "[a]ll reasonable inferences are drawn in favor of the nonmoving party, no credibility determinations may be made, the evidence may not be weighed, and evidence that the jury need not have believed is to be disregarded." *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 948 (11th Cir. 2018) (citation omitted).

A decision on a motion to alter or amend is reviewed for abuse of discretion unless the ruling turns on a question of law, in which case the standard of review is also de novo. *United States Equal Employment Opportunity Comm'n v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1343 (11th Cir. 2016).

I. The district court erred by denying the Association's motions to not reduce the jury's damages reduction for pre-existing damages.

In trying to square the jury's $359,578 pre-existing damages calculation with the evidence at trial, Rockhill relied on Janine Pardee's testimony and the 2016 Railing and Paint project manual. In its response to the post-trial motions, Rockhill suggests that Janine Pardee's testimony connects the "extensive delamination of stucco finish and paint on the undersides of the balconies" to the Torres estimate's line item for "Waterproofing: Caulking Windows/Doors." (D.E. 273, at 2). Rockhill is wrong. In fact, there is no evidence linking this amount to pre-existing damage.

It is true that Ms. Pardee testified about poor waterproofing on the balconies. But she described a process by which water was absorbed and travelled through concrete, causing leakage, and cracking and separation of the stucco. (*See* Tr. 360 (explaining "lack of water-proofing on the balcony concrete" permitted rainwater to "travel[] through the concrete")). She testified that the balconies lacked "any type of water-proofing over the concrete deck, so every time it rains there is an opportunity for moisture to enter the concrete." (Tr. 356). According to her "about 25 percent" of the balcony undersides exhibited delamination of stucco or paint. (Tr. 359). She testified that "the lack of water-proofing on the balcony concrete" caused stucco damage because it permitted water to "travel[] through the concrete." Water penetrated "the building envelope at the juncture with the building opening." (Tr.

365). The water thereby penetrated through the sill "under the sliding glass doors and into the ceilings and walls of the unit below." (Id. (emphasis added)). She described a structural problem exacerbated by standing water, not leaky doors. She cannot be the link between waterproofing all of the exterior glass and the preexisting condition of the building.

Unlike the waterproofing line item in the Torres estimate, which accounted for the entire 102,736 square feet of exterior glass (Ex. 59, at 1, *see* p. 16, *supra*), Ms. Pardee did not describe waterproofing of the entire sliding glass door frames, much less the windows. Indeed, she did not even observe any windows on the two sides of the buildings without balconies. (Tr. 366-67). Her testimony does not support a pre-existing damage deduction equal to the full value of the waterproofing line item in the Torres estimate.

Bert Davis similarly testified that "water from upper balconies [was] leaking to the living room ceiling of the unit below." (Tr. 304). He noted that the balconies were concrete, and "did not have a good water-proofing system." (Id.). He described only "minimal" problems with the sliding glass doors, (Tr. 318) and like Ms. Pardee did not describe waterproofing the entire door frames as though replacement glass had been installed.

Mr. Davis's testimony regarding the windows presents another insurmountable hurdle to justifying the jury's finding on pre-existing damages. He

purported to look at the "condition of caulking" when he inspected the building. (Tr. 288). He only testified, however, as to water intrusion caused by wear and tear on gaskets and other window components. (Tr. 297, 303, 307-08). When asked directly about water intrusion damage from Hurricane Irma, he did not attribute any window leakage to poor caulking. (Tr. 304). The water intrusion "through the window and door systems" was due to "either the glazing ceiling joints or through worn gaskets."[6] (Id.). He attributed the problems to "window balances," not waterproofing. (Tr. 326).

Thus, Rockhill's argument ignores the missing links. The jury instruction specifically required that Rockhill prove pre-existing damage and the dollar amount thereof. (Tr. 482). The waterproofing amount on Hector Torres' estimate was not dependent on any pre-existing problem. Instead, it was caulking to be done after brand new windows were put in, as part of the brand-new window installation project. (Tr. 227-28). Similarly, there was no testimony, expert or otherwise, of a dollar amount of beautification from the project manual that was improperly claimed as Hurricane Irma damages.

[6] The jury does not appear to have heard any definition of a "glazing ceiling joint."

A jury may not "pull figures out of a hat;" there must be "a rational basis [] for the calculation" of damages. *United States v. Sullivan,* 1 F.3d 1191, 1196 (11th Cir.1993) (affirming jury award in civil trespass action). Unlike *Sullivan*, here the defendant Rockhill did not put on any evidence of a dollar amount of damages, pre-existing or otherwise. This is not a case of selecting a number from a permissible range. *See id.* (explaining that, while the United States had not "introduced evidence itemizing the cost of reforestation," its experts had provided a figure of $614,000, and the verdict of $219,000 was "well within the range of damages that the evidence would support.").

The jury's pre-existing damages calculation suffers from another infirmity as well. The dollar value of the waterproofing line item was tied directly to replacing every piece of exterior glass. Here, the jury's total award was less than half of the $7,705,236 line item to replace the glass in the windows and doors, much less the other line items and associated administrative costs. Because the jury did not award damages sufficient to replace all 102,736 square feet of glass, there was no evidentiary basis to make a $359,578 deduction for the full cost of 102,736 square feet of waterproofing material. The facts of this case required a proportional reduction in the waterproofing line item.

There is no path that leads from the evidence at trial to the full value of the waterproofing line item in the Torres estimate. *See Jamison Co., Inc. v. Westvaco*

Corp., 526 F.2d 922, 932 (5th Cir. 1976) (remanding where Court "encounter[ed] only insurmountable roadblocks and unending detours" in justifying jury's award with respect to the evidence). "Whether the error resulted from disregarding the evidence, a mathematical mistake, confusion, or some other reason, it is still error." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1267–68 (11th Cir. 2008) (reversing where the jury's damage award was based on calculations "well outside the boundaries of the evidence"). The Court should remand with instructions to strike the jury's finding on pre-existing damages, which is not supported by legally sufficient evidence.

II. The district court erred by enforcing the ambiguous 3% policy deductible where Rockhill failed to obtain approval from Florida's Office of Insurance Regulation pursuant to Section 627.701(2), Florida Statutes.

The district court erred by applying the 3% deductible and reducing the jury award by a further $945,342. The deductible, expressed in the policy as a percentage rather than an amount certain, is unenforceable because Rockhill did not obtain approval from Florida's Office of Insurance Regulation.

Section 627.701(2) provides that:

> (2) Unless the office determines that the deductible provision is clear and unambiguous, a property insurer may not issue an insurance policy or contract covering real property in this state which contains a deductible provision that:

> (a) Applies solely to hurricane losses.
>
> (b) States the deductible as a percentage rather than as a specific amount of money.

§ 627.701, Fla. Stat. Ann. Rockhill never submitted the deductible for OIR review, rendering the hurricane deductible endorsement unenforceable.

The policy that Rockhill sold the Association contains a 3% hurricane deductible. There is an endorsement titled "Hurricane or Hail Deductible" of "3% of Total Insured Values per building, per Calendar Year, subject to a minimum $25,000 per occurrence"). (Ex. 1, at 11; *see* p. 24, *supra* (full deductible endorsement reproduced in this brief)). There appears to be no dispute that Florida's Office of Insurance Regulation ("OIR") never determined that Rockhill's endorsement was "clear and unambiguous." (D.E. 273, at 3-4 (Rockhill's response, omitting any such argument)).

The more difficult question is what consequences should follow Rockhill's failure to obtain OIR approval for its deductible provision. The district court skipped this question, moving ahead to decide whether the deductible provision was ambiguous. The Association disagrees with the court's conclusion. More fundamentally, though, the Association disagrees with the district court's approach to the issue. The correct approach, discernible through legislative intent at the time

Subsection (2) was added to Section 627.701, is that the deductible provision is not enforceable because Rockhill bypassed the OIR approval process.

To understand why Florida's legislature intended the Association to have an enforceable remedy for Rockhill's violation of Section 627.701(2), it is necessary to review the history of the statute and the case law interpreting it. Section 627.701 contains requirements for coinsurance and hurricane deductible clauses. Violating certain subsections renders the offending clause unenforceable; violating others does not. Subsection (2) presents an issue of first impression.

A violation of Section 627.701(1)'s disclosure requirements renders a coinsurance clause null and void. *U.S. Fire Ins. Co. v. Roberts*, 541 So. 2d 1297 (Fla. 1st DCA 1989). Violating the language and typeface requirements of Section 627.701(4), on the other hand, does not render the offending hurricane deductible void. *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012). In the remedy context, Subsection (2) is more like Subsection (1) and less like Subsection (4).

Section 627.701(1) provides that a property insurer "may issue an insurance policy . . . which contains provisions requiring the insured to be liable as a coinsurer

. . . only if" the coinsurance clause includes a precise phrase.[7] In 1983, the statute was amended, removing a provision that "any such clause or provision shall be null and void, and of no effect" without the required disclosure. Nevertheless, the legislature signaled that the change was a clarifying amendment intended to "make it more readable," not a substantive change. *Roberts*, 541 So. 2d at 1298–300.

Thus, to this day, a violation of Section 627.701(1) still renders an offending coinsurance clause unenforceable, despite the absence of explicit language to that effect. *Id.*; *see also Chalfonte*, 94 So. 3d at 553-54 (relying on *Roberts* to interpret subsequently-enacted § 627.701(4)(a), Fla. Stat.).

In 1993, after *Roberts*, Florida added Section 627.701(2), the deductible provision Rockhill violated here. Chapter 93-410, C.S.H.B. Nos. 33-C & 43-C, 1993 Fla. Sess. Law Serv. Ch. 93-410 (C.S.H.B. 33-C & 43-C) (Fla. 1993). Like Subsection (1), which provides that a policy "may issue . . . only if" the required disclosures are present, Subsection (2) provides that a policy "may not issue" unless the OIR makes the required determination. Against the background of *Roberts*, which the legislature declined to overrule, the Court should presume that Florida's legislature intended similar language to have a similar effect.

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[7] "Coinsurance contract: the rate charged in this policy is based upon the use of the coinsurance clause attached to this policy, with the consent of the insured."

Moreover, Florida law generally "requires the filing and approval of certain forms by the Office of Insurance Regulation before the forms can be used in insurance policies in Florida. . . .If a form is not filed with the Office, the form is void." *CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co.*, 291 Fed. App'x 220, 225 (11th Cir. 2008) (citing § 627.410(1), Fla. Stat.; *Am. Mut. Fire Ins. Co. v. Illingworth,* 213 So. 2d 747, 749 (Fla. 2d DCA 1968)). On the date of the 1993 amendment creating Section 627.701(2), Florida cases established that insurer-favoring endorsements not approved by the OIR (or pre-OIR equivalent) were unenforceable. *Illingworth*, 213 So. 2d at 750 (cited in 30B Fla. Jur. 2d Insurance § 1518 (June 2020)). When it added Section 627.701(2), the legislature naturally would have expected an unreviewed deductible form to be unenforceable.

Another indicator of legislative intent is found in the 1995 amendment adding Subsection (3). Chapter 95-276, C.S.H.B. No. 2619; 1995 Fla. Sess. Law Serv. Ch. 95-276 (Fla. 1995). Subsection (3)(b) specifically provided that "The failure to provide such notice [of available alternative deductible amounts] constitutes a violation of this code, but does not affect the coverage provided under this policy." If the legislature understood a violation of Subsection (2) to leave the hurricane deductible intact, it would hardly be necessary to add such a note to Subsection (3)(b). Contrariwise, if the legislature intended Section 627.701(2) to be a toothless provision with no accompanying remedy, one would expect the legislature to add a

similar provision that a violation "does not affect the coverage provided" to Subsection (2) along the way.

Voiding a deductible that does not comply with Section 627.701(2) is consistent with *Chalfonte*, which held that violating Subsection (4) does not void the offending hurricane deductible. 94 So. 3d at 556. Without overruling or even questioning the First District's holding in *Roberts*, the Florida Supreme Court in *Chalfonte* held that "failure to comply with the language and type-size requirements established in section 627.701(4)(a) does not render a noncompliant hurricane deductible provision . . . void and unenforceable." *Id.* at 554. The legislative history of Section 627.701(2) however, makes this case more like *Roberts* than *Chalfonte*.

Finally, a private remedy is especially appropriate for a violation of Subsection (2), which deprives the OIR of the opportunity to exercise its "comprehensive power" to "regulate each person who sells insurance, including surplus insurance, in Florida." *Lemy v. Direct Gen. Fin. Co.*, 885 F. Supp. 2d 1265, 1273 (M.D. Fla. 2012). Where the OIR's authority is bypassed, the law should recognize a remedy directly enforceable by those the statute exists to protect. Otherwise, the regulatory scheme is not effective.

Florida law recognizes the role insurance consumers play as private attorneys general in another closely related context, as well. Florida law does not merely regulate policies; Florida statutes supplement the policies by incorporation.

Foundation Health v. Westside EKG Assocs., 944 So. 2d 188, 195 (Fla. 2006) ("Florida courts have long recognized that the statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights."); *Citizens Ins. Co. v. Barnes*, 124 So. 722, 723 (Fla. 1929). Requirements embodied in Florida's insurance statutes can "form the basis for a breach of contract action by an insured if properly pled and supported by the evidence." *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 887 (Fla. 4th DCA 2007). This result obtains "even though the statutory scheme does not appear to support a private right of action merely to enforce compliance with some or all of them." *Id.* Like disallowing an unapproved deductible, recognizing a private right of action for breach of contract creates appropriate consequences for those who would treat Florida's regulatory scheme as a set of suggestions rather than binding law. *Cf. Barnes*, 124 So. 2d at 723 (explaining that statutes "should govern and control in the adjustment and settlement of such loss).

The district court's "no harm,[8] no foul" approach is not without intuitive appeal, but it misses the point. When a hurricane deductible is expressed as a

[8] The Association does not concede that there is no "harm" – i.e., ambiguity – in the instant deductible.

percentage instead of an amount certain, the OIR must review the endorsement to determine whether it is ambiguous or otherwise violates Florida law. If Rockhill finds the OIR review process unduly cumbersome, it can do the math itself and specify a deductible amount of $945,342. This, it did not do.

OIR approval is no mere formality. The OIR review process in Section 627.701(2) is important because percentage deductibles are prone to misinterpretation. Where more than one reasonable interpretation exists, there is ambiguity.

Consider that here, even Rockhill's own adjuster, Stephen Pesak, got it wrong! Mr. Pesak came up with $600,000 after he applied the 3% to the amount of coverage Rockhill extended, $20 million instead of the total insured value of $32 million. (Ex. 86, at 1; Ex. 1, at 3 ("Total Insured Value: $31,511,400"); *see* Tr. 103 (discussing exclusion of evidence at trial)). This illustrates the opportunities for misinterpretation that arise when a deductible is expressed as a percentage, rather than an amount certain.

Another problem: If the deductible is 3% of a fixed amount, why not just write that number into the policy? Using a percentage strongly implies that the ultimate deductible is a variable, perhaps based on the amount of loss. This reading is not inconsistent with certain language in the deductible. (*See* Ex. 1, at 11 (Providing that

the hurricane deductible "applies to direct physical damage or loss to covered property by a hurricane")).

Rockhill compounds this inherent ambiguity by littering the policy with surplusage. The deductible here purports to be "subject to a $25,000 minimum." (Ex. 1, at 11; *see* p. 24, *infra*). But Rockhill interprets the deductible to be a static and unchanging $945,342. Under Rockhill's interpretation, the policy is not and never can be subject to any other minimum.

To create an alternative $25,000 minimum that will never apply is not merely confusing, it injects surplusage into the policy in violation of Florida law. *See, e.g., Klotz v. Anthem Life Ins. Co.*, 601 So. 2d 593, 594 (Fla. 3d DCA 1992) (remarking on "familiar rules" of policy interpretation, "especially that every expression must be given meaning"). 3% of the building limit of $31,511,400 will always exceed $25,000, rendering the stated minimum a nullity. Florida law does not countenance Rockhill's interpretation of its own policy, which "relies on negation of some of the contractual provisions" in violation of the rule against surplusage. *Paladyne Corp. v. Weindruch*, 867 So.2d 630, 631, 633 (5th DCA 2004) (emphasis added). This ambiguity and negation of the stated minimum is particularly objectionable in the context of a deductible provision which, like an exclusion, is strictly construed against the insurer in Florida. *Eckols v. 21st Century Cent. Ins. Co.*, 260 So. 3d 1123, 1125 (Fla. 5th DCA 2018) (explaining that, because "insurers have the

responsibility to clearly set forth what damages are excluded from coverage under the policy," exclusionary clauses are construed "even more strictly against the insurer than coverage clauses") (citation omitted); *see also Brown v. Gulf Life Ins. Co*., 343 So. 2d 91, 93 (Fla. 3d DCA 1977) (observing that exclusion at issue was functional equivalent of a deductible).

Moreover, Rockhill failed to include any clarification on the declarations page, which merely notes generically that the coverage amount "is excess of deductibles(s) [sic]." (Ex. 1, at 3; *see Pizzullo v. N.J. Mfrs. Ins. Co.*, 952 A.2d 1077, 1090 (N.J. 2008) (explaining that "the failure to identify a relevant exclusion on the declarations page may contribute to the creation of an ambiguity" even in an "otherwise clear" policy)).[9] Other confusing generic language in the deductible includes the needless reference to "per building" applicability, where there is only one building insured. (Ex. 1, at 11; *see* p. 24, *supra*).

The OIR exists to protect Floridians from ambiguous and misleading policy language like this. § 624.4412, Fla. Stat. (directing office to disapprove forms that contain "any inconsistent, ambiguous, or misleading clauses). It is by no means a

[9] Florida law expresses a clear preference for declarations pages that "compute and prominently display the actual dollar value of the hurricane deductible." § 627.701(4)(b), Fla. Stat.

given that Rockhill's deductible would have passed OIR muster. The legislative intent behind Section 627.701(2) should prevent Rockhill from enforcing it here.

Accordingly, Cross-Appellant St. Louis Condominium Association, Inc. respectfully requests the Court reverse and remand with instructions to enter a new final award that reflects the unenforceability of the 3% hurricane deductible endorsement.

APPELLEE'S ARGUMENT

The Court should reject the grounds for reversal that Rockhill presents in the Appellant's Brief. The Court need not consider the merits of Ground 1, which is not cognizable on appeal, or of Ground 2, which is not adequately briefed. Nevertheless, all three grounds for appeal in the Appellant's Brief lack merit. The Court should affirm the jury's verdict with respect to liability, and remand with instructions to enter an award that omits any reduction for the pre-existing damages exclusion or the deductible.

I. Regarding Appellant's Ground 1: The Court cannot reverse an order denying summary judgment after an adverse jury verdict; moreover, no error occurred.

As Rockhill points out, this Court reviews the denial of a motion for summary judgment *de novo*. (Appellant's Br., at 35). However, because this ground is not cognizable on appeal, there is nothing for the Court to review.

In Ground 1, Rockhill argues the district court should have granted its motion for summary judgment. According to Rockhill, "the Association's violation of the Policy's 'Duties of the Named Insured in the Event of Loss or Damage' and 'Legal Action against Us' conditions prejudiced Rockhill's investigation as a matter of law and were in breach of the Policy's requirements." (Appellant's Br., at 40). The jury, on the other hand, disagreed with Rockhill's basic premise, answering "Yes" to the question, "Do you find by the greater weight of the evidence that St. Louis or its

agents complied with its duties under the policy before filing this lawsuit?" (D.E. 263, at 1).

The Court need not address the merits of Rockhill's arguments, because the jury's verdict precludes any further review of the order denying summary judgment. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344 n.3 (11th Cir. 2000) (explaining that the denial of a motion for summary judgment "is unreviewable on appeal" after a trial on the merits has occurred). "Summary judgment was not intended to be a bomb planted within the litigation at early stages and exploded on appeal; instead, it was intended as a device to diminish the effort, time, and costs associated with unnecessary trials." *Holley v. Northrop Worldwide Aircraft Servs.*, 835 F.2d 1375, 1377-78 (11th Cir. 1988). If a trial occurs, unnecessary or not, the propriety of summary judgment becomes moot. Therefore, "this Court will not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits." *Lind v. UPS*, 254 F.3d 1281, 1286 (11th Cir. 2001).

Cognizability aside, the district court did not err in denying Rockhill's motion for summary judgment. Summary judgment is inappropriate if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rockhill's conclusory jury-type arguments are lifted directly from its objections to the Report and Recommendation on the motion for summary judgment. (*Compare* Appellant's Br., at 38-39, *with* D.E

188, at 445-46). There, as here, Rockhill failed to meaningfully engage with the magistrate judge's conclusion that "there are issues of fact" that would impermissibly "involve the weighing of evidence in the record" because:

> Plaintiff has shown that Defendant had four opportunities to inspect the property between September 2017 and March 2018 but failed to make a coverage determination and refused to provide an estimate of Plaintiff's losses. Plaintiff has also shown that it voluntarily provided reports, estimates, and a proof of loss form for the damages suffered but that Defendant stonewalled its considerations of Plaintiff's insurance claim.

(D.E. 185, at 7).

Rockhill cannot carry its burden on appeal by simply recounting the facts and insisting that "there was no evidence of pre-suit 'stonewalling' by Rockhill." (Appellant's Br., at 39). The Association deserved the benefit of reasonable inferences based on the evidence. *Allen v. Bd. of Pub. Educ. for Bibb County*, 495 F.3d 1306, 1315 (11th Cir. 2007). The inference that the Association was blameless was more than merely reasonable – it was correct, according to the jury. The Court should affirm as to Ground 1.

II. Regarding Appellant's Ground 2: Rockhill fails to identify any error in denying its motion for directed verdict.

Rockhill argues that the evidence was legally insufficient to support a verdict for the Association because "the opinions of the Plaintiff's expert's where [sic] based on inadequate independent data, insufficient data, and on their acceptance of the

reprsentations [sic] of the Plaintiff's representatives." (Appellant's Br., at iii, 1, & 40). The Court's review of Ground 2 is "de novo, applying the same standards as the district court." *Lamonica v. Safe Hurricane Shutters, Inc*., 711 F.3d 1299, 1312 (11th Cir. 2013). Judgment as a matter of law for a defendant is appropriate when "no jury reasonably could have reached a verdict for the plaintiff on that claim." *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1121 (11th Cir. 2016). Only when the plaintiff's evidence is insufficient as a matter of law should courts take a case from the jury. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1242 (11th Cir. 2010).

Rockhill's argument, however, is premised in part on the alleged inadmissibility of the Association's experts under *Daubert*. This Court reviews *Daubert* rulings for abuse of discretion. *United States v. Barton*, 909 F.3d 1323, 1330 (11th Cir. 2018).

Rockhill cannot prevail on Ground 2 because it does not present a complete appellate argument suitable for evaluation on the merits. By the time a reader reaches the end of the argument on Ground 2, we have only Rockhill's say-so to show that "the opinions of these experts were based on inadequate data, insufficient data, and, overwhelmingly on the unquestioned acceptance of the representations of Plaintiff's representatives." (Appellant's Br., at 44). Rockhill's jury arguments have no place on appeal of an order denying a Rule 50(b) motion. To the extent Rockhill raises a *Daubert* challenge, its complaints similarly go to the weight the jury should have

given Rockhill's expert testimony, not whether the testimony was admissible. The Court should affirm.

A. Rockhill fails to adequately brief Ground 2.

Ground 2 challenges the Association's expert testimony for three specified reasons: "the opinions of the Plaintiff's experts where [sic] based on inadequate independent data, insufficient data, and on their acceptance of the representations [sic] of the Plaintiff's representatives."[10] This Court has clearly and consistently explained that it will not "grant relief based upon an allegation raised where a litigant 'fail[s] to elaborate or provide any citation of authority in support of the . . . allegation.'" *Jones v. Secretary*, 607 F.3d 1346, 1354 (11th Cir. 2010) (citing *Flanigan's Enters. v. Fulton Cty.*, 242 F.3d 976, 987 n.16 (11th Cir. 2001)). There is no reason to make an exception here. By failing to provide any legal or factual

[10] The Court should not consider any argument on Rockhill's policy defenses, a single paragraph on which appears to have been unintentionally copied directly from filings in the district court. (*Compare* Appellant's Br., at 41-44 *with* D.E. 254, at 3-6 *and* Appellant's Br., at 28 *with* D.E. 254, at 6). Rockhill chose to raise the duty of cooperation in connection with the order denying summary judgment, as discussed in the preceding section. To the extent this ground is properly before the Court, it suffers from the same lack of citation to legal or record authority as the rest of Ground 2. Moreover, it lacks merit for the reason described in the preceding section, i.e. because an inference of stonewalling can arise from Rockhill's squandering its "four opportunities to inspect the property between September 2017 and March 2018." (D.E. 185, at 7).

support for its position, Rockhill has forfeited appellate review of the order denying motion for judgment as a matter of law. *E.g.*, *FTC v. Leshin*, 618 F.3d 1221, 1238 (11th Cir. 2010) (arguments "unsupported by legal or record citations" cannot establish an abuse of discretion by the district court); *Duncan v. CitiMortgage, Inc.*, 617 F. App'x 958, 961 (11th Cir. 2015) (declining to consider unsupported assertions that were "no more than a restatement of arguments presented below").

Rule 28(a)(8) of the Federal Rules of Appellate Procedure requires "citations to the authority and parts of the record on which the appellant relies," as well as "a concise statement of the applicable standard of review." Rockhill does not address the standard of review for Ground 2, nor does it cite to any record support. This is not hyperbole: Rockhill's argument on Ground 2 does not feature even one citation to the record!

Rockhill's citations to authority are hardly better. With respect to the standard for a motion for judgment as a matter of law, Rockhill cites only to a marginally relevant Supreme Court case and a district court case from Hawaii – without pinpoint citation, and using only the proprietary Lexis/Nexis numbering for the Hawaii case. (Appellant's Br., at 40). As legal authority for its argument that the Association's experts were insufficiently reliable as a matter of law, Rockhill cites only to *Daubert* itself, and only in describing an interaction with the district court below. (Appellant's

Br., at 42). It does not explain how *Daubert* applies here, much less cite any subsequent decisions that might illustrate the relevant principles.

Rockhill's statement of fact similarly contains only the most cursory mention of relevant facts on this issue. (*See* Appellant's, Br., at 10 (describing creation of Torres estimate), 11 (describing Pyznar's investigation), at 23 (describing Rockhill's argument to the district court that Pyznar and Torres "relied overwhelmingly on factual assertions provided by the Association's representatives and a drone video that refuted the contention that Hurricane Irma caused irreparable damage to the Insured Property.")). Ultimately, the reader is left to take on faith Rockhill's assertion that the Association's experts "relied overwhelmingly on factual assertions provided by Plaintiff's representatives," (Appellant's Br., at 42), which is the only support Rockhill offers for its argument that "the opinions of the Plaintiff's experts where [sic] based on inadequate independent data, insufficient data, and on their acceptance of the reprsentations [sic] of the Plaintiff's representatives."

Therefore, Ground 2 is not adequately raised for review on appeal. Instead of record citation and legal argument demonstrating insufficiency of the evidence, Rockhill relies on jury arguments that unfortunately conflate its "argument with actual genuine issues of fact." (Tr. 274). In an abundance of caution, however, the Association will address the merits of Rockhill's claims.

B. Rockhill's credibility arguments are inappropriate on appeal of a motion for directed verdict.

As a nonmovant who prevailed at trial, the Association is entitled to the benefit of all inferences and credibility determinations. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) ("Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.") (citation omitted). Nevertheless, Rockhill resorts to jury arguments, summarily repeating its experts' opinions as though they were special jury findings. Rockhill makes a host of these irrelevant, conclusory statements. The *ipse dixit* in the Appellant's Brief includes the following accusations and bare assertions of ultimate fact, all of which contradict the findings of the jury and the district court:

- that Rockhill conclusively "showed the complete absence of generally accepted methodology employed by Plaintiff's experts," (Appellant's Br., at 42);
- that "a drone video [] wholly refuted the contention that Hurricane Irma caused irreparable massive damage to the Insured Property" (Id.);
- that all three of the Association's "experts deliberately disregarded a maintenance history which Plaintiff had tried to conceal presuit" (Id.);
- that Rockhill has "clearly demonstrated the absence of a direct physical loss" (Id. at 43);

- that "neither the windows and sliding glass doors nor the building exterior sustained hurricane damages as opposed to wear and tear" (Id.); and,

- that Rockhill's experts "established that the water intrusion damages to the interior units were caused by the pre-existing condition of the windows and balconies" (Id.).

Rockhill could not convince the jury of these propositions, and now it wants a second chance. Unfortunately for Rockhill, this Court does not sit to serve as a second jury, and the evidence is no more favorable now than it was at trial.

Rockhill faces a fundamental problem of relevancy. Whether "Defendant's evidence of zero damages was supported by two engineers," (Appellant's Br., at 44) is irrelevant on appeal from a motion for judgment as a matter of law, because the Court does not re-weigh the evidence as a second jury. To win, Rockhill must show that the Association's evidence was insufficient as a matter of law, not reargue the merits of its case in rebuttal. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (explaining that "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence").

Rockhill's jury arguments to the Court do not matter here, because jury arguments are "not within [the Court's] province to evaluate." *S. States Co-op., Inc. v. Melick Aquafeeds, Inc.*, 476 Fed. App'x 185, 188–89 (11th Cir. 2012). When

Rockhill's irrelevant arguments are stripped away, only its meritless *Daubert* challenge remains.

C. Rockhill's *Daubert* challenge goes to the weight, not the admissibility or the legal sufficiency, of the Association's expert testimony.

Rockhill explains that, in moving for judgment as a matter of law, it "was reasserting its challenges to methodology employed by Plaintiff's experts under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), as set forth in Defendant's *Daubert* Motion to Strike and/or Exclude Plaintiff's Disclosed Experts and Incorporated Memorandum of Law." (Appellant's Br., at 42). The Order denying Rockhill's pretrial *Daubert* motion, in turn, held that relying on firsthand accounts from residents of the building did not render the opinions of the Association's experts inadmissible. (D.E. 183, at 4-5 (citing *Daubert*, 509 U.S. at 580 (reminding Rockhill that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of addressing opinions that are based on data reasonably relied upon by experts in the field))). The district court did not err.

The district court made detailed findings. First, it explained that Hector Torres "conducted a thorough review of the Property in concluding that there was approximately sixteen million in damages. More specifically:

> Mr. Torres inspected at least two-thirds of the condominium's one hundred and thirty units and inspected the Property with visual observations of physical damages to (1) the building's exterior, (2) the roofing of the building, and (3) the areas that were exposed to the elements of the wind. Mr. Torres then visited units at different elevations of the building to look for consistent patterns of damage to the building. Mr. Torres also consulted the property manager and the engineering staff to determine whether there were any water damage complaints from unit owners *prior* to the hurricane. If the answer was no, Mr. Torres suggested that this was hurricane-related damage.

(D.E. 183, at 7). Relying on firsthand accounts of unit owners did not render his opinion so speculative that they became inadmissible. Instead, "[t]he defects Defendant identifies merely affect the weight of Mr. Torres' opinions, as opposed to their admissibility." (D.E. 183, at 7-8).

With respect to William Pyznar, the court similarly explained that Rockhill's "motion misses the mark because Mr. Pyznar did not merely take the information of the property manager at face value. Instead, Mr. Pyznar visually inspected the Property, noticed that windows and doors did not properly open, and visually observed water damages to units at the property." (D.E. 183, at 9). Rockhill's other arguments "merely attack the weight that should be given to those opinions at trial – not their admissibility." (Id.).

Rockhill's argument with respect to Paul Beers was "equally unavailing. During his first day of inspection, Mr. Beers personally inspected multiple units."

(D.E. 183, at 12). He then "spent time with several inspectors who examined many of the doors and windows at the Property. Each inspector took photographs and labelled items with damage descriptions." (Id.). After the inspectors finished their work, "Mr. Beers reviewed their inspections for accuracy and removed any labels as necessary." (Id.). Thus, the data relied upon was not so unreliable as to render the resulting opinion inadmissible.

Here, as below, Rockhill complains that each of the Association's experts "relied too heavily on others to support his finding." (D.E. 183, at 12). But the "fact that [an expert's] opinions are based on data collected by others is immaterial." *Southland Sod Farms v. Stover Seed Co.,* 108 F.3d 1134, 1142 (9th Cir. 1997). Any deficiencies in the information relied on by the Association's experts was a matter for cross-examination. *Ramirez v. E.I. DuPont de Nemours & Co.*, 579 Fed. App'x 878, 882 (11th Cir. 2014). The trial court did not err in denying Rockhill's *Daubert* motion, because Rockhill's arguments "merely attempt[ed] to undermine the weight that should be given" to their opinions, not their admissibility. (D.E. 183, at 12).

Rockhill fails to show any error in admitting the testimony of the Association's experts. In fact, Rockhill fails to show much of anything. To the extent that Ground 2 is adequately briefed, it fails because the Court does not sit as a second jury, and the district court did not abuse its discretion by denying Rockhill's *Daubert* motion. The judgment should be affirmed as to Ground 2.

III. Regarding Ground 3: The district court did not commit reversible error by striking expert Brian Warner.

Rockhill complains in Ground 3 that the district court unfairly struck its witness Brian Warner, who was not made available for deposition until after the expert witness discovery cutoff. According to Rockhill, the court failed to treat like cases alike because it did not also strike two of the Association's witnesses even though they were also never made available before the discovery deadline. (Appellant's Br., at 28, 48). Rockhill argues "it was an abuse of discretion for the District Court not to treat all three experts the same under the exact same facts." (Appellant's Br., at 29). This Court reviews the imposition of Rule 37 sanctions for abuse of discretion. *Romero v. Drummond Co, Inc.*, 552 F.3d 1303, 1314 (11th Cir. 2008) (citing *Prieto v. Malgor*, 361 F.3d 1313, 1317 (11th Cir. 2004)) (reviewing decision to exclude such evidence for abuse of discretion).

Rockhill's presentation of this ground suffers from two serious mistakes. The first is misremembering its own witnesses. Rockhill contends that the "District Court refused to strike Plaintiff's experts, Pardee and Oppenheim." (Appellant's Br., at 28). In fact, Janine Pardee and Irving Oppenheim were Rockhill's own witnesses. (*See, e.g.,* D.E. 134, at 8; Tr. 289, 459). The complained-of unfairness actually demonstrates the district court's willingness to extend leniency to Rockhill.

The second mistake is in mischaracterizing the district court's reasons for not striking Oppenheim and Pardee. According to Rockhill, the district court considered the fact that "they either failed to appear for a subpoenaed deposition or a date were [sic] not provided before the discovery deadline" was considered "not enough to enter Rule 37 sanctions." (Appellant's Br., at 46). The relevant portion of the order is short, and worth reproducing in full here:

> ***D. Whether Janine Pardee and Irving Oppenheim Should be Stricken***
>
> Plaintiff argues that it had no opportunity to depose any of Defendant's five experts yet does not articulate any specific reasons for failing to depose Janine Pardee ("Ms. Pardee") or Irving Oppenheim ("Mr. Oppenheim"). Plaintiff merely suggests that none of the experts were deposed because they either failed to appear for a subpoenaed deposition or dates were not provided before the discovery deadline. That is not enough to enter Rule 37 sanctions and therefore Plaintiff's motion to strike is **DENIED**.

(D.E. 181, at 7). Apparently, the magistrate judge found the Association's allegations – that "the Plaintiff made considerable effort to coordinate the depositions in its countless unreturned voicemails to the Defendant, e-mails, and written correspondence" – insufficiently detailed. (D.E. 122, at 4). He did not hold that failing to appear or to provide deposition availability before the discovery cutoff was not sanctionable.

Thus, the record cannot fairly support Rockhill's argument that the district court unfairly extended leniency to the Association's experts. The witnesses were

all Rockhill's, and there was no finding that the same conduct was sanctionable on one occasion but not the next.

One can certainly understand why Rockhill would prefer the version of the facts it presents in its brief. It faces a high burden to show that the district court abused its discretion. Here, the district court exercised its discretion to reserve the more serious sanction – exclusion of evidence – for the more serious violation of complete unavailability during the discovery period. The court reasoned that "a party cannot disclose its experts and then claim that they are unavailable to be deposed until after the discovery deadline. If parties had that privilege there would be no use for a Scheduling Order because parties could simply disregard it at their convenience." (D.E. 181, at 3). It was entirely appropriate to consider the need to "deter others from engaging in similar conduct" when fashioning discovery sanctions under Rule 37. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1450 (11th Cir. 1985) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam)).

The district court did not need to make any finding of willfulness, because it did not impose terminal sanctions. *O.F.S. Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F. 3d 1344 (11th Cir. 2008). With no violation of this bright-line rule or any other principle of law, it is not enough that this Court "might have struck the balance differently, or imposed a lesser sanction." *Houston Specialty Ins. Co. v.*

Vaughn, 763 Fed. App'x 853, 855 (11th Cir. 2019). District courts enjoy "a range of choice" in imposing appropriate sanctions. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1104 (11th Cir. 2005). The Court should affirm the district court on Rockhill's Ground 3 because the district court did not exceed the bounds of its discretion.

CONCLUSION

The jury's pre-existing damage calculation of $359,578 is not supported by any specific dollar amount evidence, as the law and jury instruction required. No trial evidence linked the full amount of the waterproofing line item in the Torres estimate corresponds to pre-existing damages. The 3% hurricane deductible is not enforceable because Rockhill bypassed Florida's approval process, denying the Office of Insurance Regulation the opportunity to disallow ambiguous language. The Court should remand with instructions to enter a damages award that does not include reductions for pre-existing damages or for the $945,342 hurricane deductible claimed by the Defendant.

As for Rockhill's arguments on appeal, they all lack merit. The district court did not err in denying Rockhill's motion for summary judgment, an issue not cognizable on appeal after the jury's verdict. The district court also did not err in denying Rockhill's motion for judgment as a matter of law. Rockhill failed to adequately brief this ground, but regardless, the record does not reveal any reversible

error. Finally, the district court did not abuse its discretion in excluding Rockhill's expert, Bryan Warner. Mr. Warner was not made available for deposition before the expert witness discovery cutoff, and district courts must be allowed to enforce their scheduling orders. The Court should affirm with respect to all of Rockhill's arguments.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 13,424 words and 1221 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/Gray R. Proctor

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/Gray R. Proctor