No. 24-

IN THE

Supreme Court of the United States

JUAN CARTAYA,

Petitioner,

v.

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the insurance industry's appraisal process, which fully and finally resolves insurer-insured disputes over the loss amount when two of three appraisers agree to a figure, is an arbitration under the Federal Arbitration Act.

PARTIES TO THE PROCEEDING

Below, Respondent Travelers Indemnity Company was the Plaintiff-Appellee, and Petitioner Juan Cartaya was the Defendant-Appellant.

RELATED PROCEEDINGS

- *Cartaya v. Travelers Indemnity Co.*, No. 23SC880, Supreme Court of Colorado. Petition for review denied June 17, 2024. (App. 37.)

- *Travelers Indemnity Co. v. Cartaya*, No. 22CA739, Colorado Court of Appeals, Division VI. Judgment entered October 5, 2023. (App. 1-33.) Rehearing denied November 2, 2023. (App. 35.)

- *Travelers Indemnity Company v. Cartaya*, No. 20CV32891, District Court, Denver County, Colorado. Judgment entered April 21, 2022. (App. 150.)

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PETITION FOR A WRIT OF CERTIORARI

Juan Cartaya petitions this Court for a writ of certiorari to review the decision of the Colorado Court of Appeals which rejected his argument that, as an appraiser in an insurance-loss proceeding, he was entitled to arbitral immunity under the Federal Arbitration Act and affirmed a fraud judgment against him for more than $600,000.

OPINION BELOW

The order of the Supreme Court of Colorado is unreported, as is the opinion of the Colorado Court of Appeals,[1] and the trial court's orders rejecting petitioner's motions for summary judgment and for a directed verdict based on arbitral immunity are also unreported.

JURISDICTION

The Supreme Court of Colorado denied a timely petition for review on June 17, 2024. On September 13, 2024, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari up to and including October 15, 2024. Mr. Cartaya invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

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1. Petitioner's motion for opinion publication was denied November 2, 2023. The Colorado Judiciary makes unpublished Court of Appeals opinions publicly available (https://research.coloradojudicial.gov/), and unpublished decisions of the Colorado Court of Appeals are citable as persuasive authority in Colorado's trial courts, *Patterson v. James*, 2018 COA 173, ¶¶ 38-43.

PROVISIONS INVOLVED

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2024), does not define "arbitration," but provides: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable. . . ." § 2.

STATEMENT OF THE CASE

In an insurance dispute over the amount of a covered loss, Mr. Cartaya served as the insured's appointed appraiser and helped fix the loss amount that bound the insurer and the insured, but after Mr. Cartaya and the insurer's appraiser set the loss amount, the insurer sued Mr. Cartaya for fraud in Colorado state court and won a six-figure judgment against him personally. Mr. Cartaya was not subject to suit, however, because the FAA provided him arbitral immunity.[2] The Colorado Court of Appeals

2. Every circuit "that has considered the issue of arbitral immunity recognizes the doctrine." *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158-59 (10th Cir. 2007) (citing *Hutchins v. Am. Arbitration Ass'n*, 108 Fed. App'x 647, 648 (1st Cir. 2004); *Austern v. Chicago Bd. of Options Exch., Inc.*, 898 F.2d 882 (2d Cir. 1990); *Cahn v. Int'l Ladies Garment Union*, 311 F.2d 113 (3d Cir. 1962); *Shrader v. NASD, Inc.*, 54 F.3d 774 (4th Cir. 1995); *Hawkins v. NASD, Inc.*, 149 F.3d 330 (5th Cir. 1998)*; *Corey v. N.Y. Stock Exch., Inc.*, 691 F.2d 1205 (6th Cir. 1982); *Int'l Med. Grp., Inc. v. Am. Arbitration Ass'n*, 312 F.3d 833 (7th Cir. 2002); *Honn v. NASD*, 182 F.3d 1014 (8th Cir. 1999); *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987)); *see Int'l Union, United Mine Workers of Am. v. CONSOL Energy Inc.*, No. 1:20-CV-01475 (CJN), 2020 WL 7042815, at *5 (D.D.C. Dec. 1, 2020) (finding decisions recognizing

affirmed the denial of Mr. Cartaya's immunity claim by concluding the appraisal process was not "arbitration" under the FAA because the appraisal process left open a possibility that no two of the three appraisers would ever agree about the amount of loss. (App. 19-20.) The Colorado Supreme Court declined review. (*Id.* 37.) This Court should grant review.

After a hailstorm damaged an insured building, the insurer—Respondent, Travelers Indemnity Company (Travelers)—eventually acknowledged there was coverage for the loss but disputed the amount of the loss with its insured, GSL Group, Inc. (GSL). (App. 2-4.)

GSL invoked an appraisal process under the insurance policy, selecting Petitioner, Mr. Cartaya, as its appraiser while Travelers selected Trent Gillette. (*Id.* 2-3.) The appraisal process allowed the appraisers to set a final and binding value for the loss if they agreed to a number. If they failed to agree, an umpire selected by the appraisers would enter the decisional picture.[3] At that point, if two of the three individuals agreed to a loss amount, that determination would be final and binding. Here, there

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arbitral immunity persuasive while acknowledging "the D.C. Circuit has apparently not recognized arbitral immunity"); *see also Burns v. Reed*, 500 U.S. 478, 499-500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part) (looking to T. Cooley, *Law of Torts* 408-409 (1880), and noting that immunity has long extended not only to judges "narrowly speaking" but also to arbitrators).

* *Hawkins* was later abrogated on other grounds by *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374 (2016).

3. If the appraisers could not agree on an umpire, the policy provided that a court would select the umpire. *See also* 9 U.S.C. § 5 (providing for such appointments).

was no need for an umpire because Mr. Cartaya and Mr. Gillette agreed to a compromise award of $1.6 million. (*Id.* 3.)

GSL sued Travelers for bad faith in state court, a suit Travelers removed to federal court (No. 18-cv-00746-MSK-SKC). (App. 4.) Mr. Cartaya was not a party to the federal case. The federal court vacated the appraisal award after determining that Mr. Cartaya was not "impartial," as required by the insurance policy, based on other appraisal work with GSL's counsel. (*See id.*)

Travelers wanted more than vacatur of the appraisal. It sued Mr. Cartaya in Colorado state court for, as relevant here, fraud and negligent misrepresentation.[4] (*Id.* 4-5.) Travelers claimed that its appraiser, Mr. Gillette, agreed to the compromise award because he relied on a fraudulent non-bid from Mr. Cartaya's "Draft" worksheet that replacing the roof's structural support beams would cost $603,864. Mr. Cartaya testified that he spoke with many experts and may have confused the roofing company he listed with another firm. Regardless, Mr. Cartaya and Mr. Gillette agreed during the appraisal process that the supports needed to be replaced and that the cost was about $600,000. But Travelers claimed the lack of a separate bid defrauded Mr. Gillette into agreeing to the compromise award and that Travelers in turn relied on its appraiser's acquiescence.

Mr. Cartaya moved for summary judgment on the ground the FAA conferred on him arbitral immunity for

4. Travelers also sued GSL in the same state-court action, but the trial court severed those claims pending the federal case. (App. 4-5.)

his actions as an appraiser. The trial court ruled that the insurance appraisal process is not arbitration and denied his motion. (*Id.* 38-41.) At trial, the court denied Mr. Cartaya's motion for a directed verdict based on arbitral immunity. (*See id.* 5.)

The trial court told the jury about the federal court's vacatur of the appraisal, and the jury found for Travelers on its fraud claim. (*See id.*) It awarded $603,864 in damages. (*Id.*) On the negligent misrepresentation claim, the jury found for Travelers but awarded no damages. (*Id.*) The trial court denied Mr. Cartaya's motion for post-trial relief. (*Id.* 42-58.)

He appealed, and the Colorado Court of Appeals affirmed. (*Id.* 1-34.) The court concluded that the insurance appraisal process was not an "arbitration" under the FAA because the policy's appraisal clause did not specify what would happen if, even with the umpire, no two individuals could agree to a loss amount. (*Id.* 13-20.) The court held that this hypothetical situation meant the appraisal process did not guarantee a binding decision and thus did not qualify as "arbitration." (*Id.*)

REASONS FOR GRANTING THE PETITION

I. The Meaning of "Arbitration" Is a Fundamental Legal Question That Should Have One Answer Under the FAA, But Courts Look to Different Sources of Law to Define "Arbitration."

This Court has decided many FAA cases, but it has yet to answer perhaps the most basic question, one the statute leaves open: What is an arbitration?

The dictionary supplies an answer.[5] But it's not the answer lower courts give to this question. To decide whether a proceeding is an "arbitration," some circuit courts look to state law and some look to federal law. *Compare Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061-63 (5th Cir. 1990) (state law), *and Wasyl, Inc., v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (state law)[6], *with Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) (federal law), *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012) (federal law), *Salt Lake Tribune Publ. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) (federal law), *and Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6-7 (1st Cir. 2004) (federal law).

The courts looking to state law note that under this Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), the FAA preempts state laws only

5. "Arbitration," Black's Law Dictionary says, is "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. • The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.—Also termed *common-law arbitration*; (redundantly) *binding arbitration*." Black's Law Dictionary (12th ed. 2024).

6. Thirteen years after *Wasyl*, a panel of the Ninth Circuit applied the decision on precedential grounds, but all three judges in concurring opinions questioned *Wasyl*'s "vitality." *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n as Tr. for Tr. No. 1*, 218 F.3d 1085, 1091-92 (9th Cir. 2000) (concurring ops.). Judge Tashima wrote that "the result of the *Wasyl* rule" is "a patchwork in which the FAA will mean one thing in one state and something else in another." *Id.*

to the extent that those laws conflict with the FAA. *See Martinique Properties, LLC v. Certain Underwriters at Lloyd's London*, 567 F. Supp. 3d 1099, 1104-05 (D. Neb. 2021) (assessing split and siding with federal-law approach), *aff'd sub nom. Martinique Properties, LLC v. Certain Underwriters at Lloyd's of London, Subscribing to Pol'y No. W1551E160301*, 60 F.4th 1206 (8th Cir. 2023). Courts looking to state law reason their approach does not frustrate the FAA's purpose of ensuring judicial enforcement of agreements to arbitrate. *Id.* at 1105.

Courts looking to federal law "assert that the meaning of 'arbitration' in the FAA depends on what Congress meant by the term in the federal statute." *Id.* (quotations omitted). Because Congress intended to create a uniform arbitration policy and evidenced no intent to have state laws define "arbitration," these courts look to federal common law to define "arbitration." *Id.* The state-law approach, these courts fear, would allow states to reconfigure the FAA's scope by selecting their own definitions of "arbitration." *Id.*

As Mr. Cartaya argued below, and as Travelers acquiesced for the purpose of this case,[7] the federal

7. Like other insurers, Travelers has taken different positions in different cases and jurisdictions on whether an appraisal is an arbitration. In this case, opposing an arbitration award, Travelers argues appraisal is not arbitration. Defending an arbitration award it favored in *Travelers Ins. Co. v. Scrivani*, No. CV89 26 78 89 S, 1993 WL 512563, at *1 (Conn. Super. Ct. Nov. 12, 1993), Travelers argued appraisal was arbitration under Connecticut law. When Travelers wanted an appraisal award vacated, it successfully argued the process was subject to the Florida Arbitration Code. *See A.L. Gary & Assocs., Inc. v. Travelers Indem. Co. of Conn.*, No. 08-60636-CIV, 2008 WL 11333729, at *5-8 (S.D. Fla. Aug. 27, 2008). This

approach is the correct approach, and it is how the Colorado court analyzed this case. (App. 10-14.) The fundamental, disputed, and certiorari-worthy question here is whether the insurance appraisal process is an "arbitration" under the FAA. In deciding the subsidiary question of what body of law supplies the answer, this Court could assume without deciding that the federal-law approach applies, or this Court could answer the question with the benefit of adversarial briefing by appointing an amicus to argue the state-law side of the issue.[8] What matters is that appraisers who undertake binding resolution of loss-amount disputes engage in arbitration under the FAA.

Defining "arbitration" under the FAA is critically important to the world of dispute resolution. Knowing whether a dispute-resolution process is an arbitration is consequential not only because it forecloses lawsuits against the arbitrators—whether or not they are called appraisers. It is also consequential because it limits by agreement the ability of either party to challenge the merits of the decision they agreed to submit to private dispute resolution, here, the insurance loss amount. Proceedings within the FAA's scope are subject to only very narrow judicial review, such as fraud, § 10(a)(1). Otherwise, a party dissatisfied with a private dispute-resolution process may proceed to court for *de novo* plenary judicial proceedings, as Travelers did.

Court should end this practice by establishing a uniform meaning of "arbitration" under the FAA.

8. Mr. Cartaya would prevail even under a state-law approach. Colorado law makes him an "arbitrator" because he is "an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate." Colo. Rev. Stats. § 13-22-201(2).

Because appraisal provisions are ubiquitous in insurance policies (but are by no means limited to the insurance context), it is critically important for this Court to decide whether an appraisal qualifies as arbitration. With more and bigger weather events coming, and in turn more insurance fights, insurance companies, insureds, and appraisers all deserve to know whether appraisal is "arbitration." This is a fundamental legal question worthy of this Court's review.

II. The Decision Below Is Wrong.

The Colorado court determined that this appraisal was not an "arbitration" because the insurance policy's "appraisal provisions don't lay out a definitive mechanism for reaching a final and binding figure as to the loss amount." (App. 19.) The court adopted the Tenth Circuit's approach to defining "arbitration" for FAA purposes, *see Salt Lake Tribune Publ. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004), in particular a characteristic—finality of the dispute-resolution process—common to most definitions of arbitrations. But the Colorado court wrongly held that dispute resolution cannot be called final if a possibility remains that the members of the tribunal will deadlock and the arbitration provision does not provide for resolution of that possibility.

Courts applying the federal approach, including the lower court here, ask whether "the process at issue sufficiently resembles classic arbitration to fall within the purview of the FAA." *Salt Lake Tribune*, 390 F.3d at 689. (*See* App. 12-13.) "Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute." 390 F.3d at

689. "Parties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances." *Id.* at 690. The "one feature that must necessarily appertain to a process to render it an arbitration is that the third party's decision will settle the dispute." *Id.*; *see also Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 152 (2d Cir. 2019) ("A contractual provision that clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution is arbitration within the meaning of the FAA." (quotations omitted)).

The parties here agreed *Salt Lake Tribune* provided the governing law. (App. 14.) But the Colorado court's application of the correct legal framework does not undermine the need for this Court's review. For one thing, this erroneous decision adds to the local discordance in this area of the law. *Compare Lim v. Am. Econ. Ins. Co.*, No. 13-CV-02063-CMA-KLM, 2014 WL 1464400, at *3 (D. Colo. Apr. 14, 2014) (recognizing that an appraisal process that makes a binding determination of the loss amount "fits many courts' definitions of arbitration, including the Tenth Circuit's definition in *Salt Lake Publishing Co.*, because 'the disputants empowered a third party to render a decision settling their dispute'" and concluding appraisal process was an "arbitration" under Colorado law because it bound the parties to the amount of loss) (quoting 390 F.3d at 689)), *with Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 129 F. Supp. 3d 1150, 1153 (D. Colo. 2015) (finding *Salt Lake Tribune* highly persuasive and using "what if no two agree?" rationale to conclude that appraisal process was not an "arbitration" under Colorado law). More importantly, at stake here is

whether standard insurance appraisal processes are FAA "arbitrations."

Also at stake is whether an "arbitration" under the FAA varies geographically. The Colorado court's decision here amplifies the national divergence that will continue to proliferate in the absence of a uniform definition of FAA "arbitration" from this Court. *See*, *e.g.*, *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062-63 (5th Cir. 1990) (concluding that, because loss-value appraisals were not arbitrations under Texas law, they were outside the FAA's sweep, and contrasting *Wasyl*, 813 F.2d at 1582, which held the FAA covered appraisals, at least in California, where a statutory definition of agreements to arbitrate included appraisals); *see also Klubnikin v. Cal. Fair Plan Ass'n*, 148 Cal. Rptr. 563, 566 (Ct. App. 1978) (recognizing that in 1961 California legislature enacted Code of Civil Procedure § 1280, which provides that an agreement to arbitrate includes "agreements providing for . . . appraisals and similar proceedings").

The Colorado court's resolution is at odds with this Court's strong suggestion in *Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 155-56 n.1 (1931), that appraisals like this one are arbitrations. Six years after the FAA's enactment, the FAA was not at issue there, and this Court did not apply a "what is arbitration?" test, but this Court clearly believed resolution of a loss dispute by two appraisers and an umpire qualifies as an arbitration. *See id.* at 155-59 (referring to the appraisal provision as an "arbitration" clause and the appraisers as "arbitrators" seventeen times in just a five-page opinion). Mr. Cartaya cited this case on reply, but the Colorado court did not acknowledge it.

On the merits, *Salt Lake Tribune* supplies the right law, but the case is distinguishable. It did not concern an insurance dispute. It involved an option contract with an appraisal procedure to set the option's exercise price if the parties could not agree. 390 F.3d at 687. In that event, each side would appoint an appraiser, and, if the appraisers disagreed by more than ten percent, the appraisers would select a third appraiser, with the price equaling the average value of the two closest estimates of the three. *Id.* After the third appraiser offered its estimate, it was sued by a party to the option contract. *Id.* The Tenth Circuit decided the third appraiser did not enjoy arbitral immunity because, though it supplied a datapoint that was closer to one party than the parties were to each other, "a scenario existed where the parties would not use [this] report at all." *Id.* at 690, 692. That is, depending on the other appraisers' values, the third appraisal might not have mattered. *Id.* at 690. The third appraiser "was not asked to decide between two values" nor was it "asked to assign independently a single value binding on the parties." *Id.* at 690-91. Thus, the "arbitration" test emerging from *Salt Lake Tribune* asks whether the process at issue entails a final and binding dispute resolution by a third party, subject only to the limited judicial review spelled out in the FAA. *Id.* at 689-90.

Here, the Colorado court, applying "the final-and-binding-settlement test," concluded that "the appraisal provisions here are even less definitive than those that didn't pass muster in *Salt Lake Tribune*." (App. 19-20.) This appraisal provision, written from the insurer's perspective, states:

> If we and you disagree on the value of the property . . . or the amount of the loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. . . . The appraisers will state separately the value of the property . . . or the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

But what if, wondered the Colorado court, even after bringing in the umpire, "any two of them don't agree, what then?" (*Id.* 19-20.) "[I]f there are three disparate loss values, the [p]olicy offers no path to finality." (*Id.* 20.)

Potential lack of finality for unexpected impasse does not determine whether a process is arbitration, however. Parties need not meticulously draft a comprehensive clause addressing all hypothetical finality problems to engage in an "arbitration." As the Tenth Circuit held in *Salt Lake Tribune*, 390 F.3d at 690, they "may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances."

When arbitrators cannot reach a decision, the FAA fills the gap, *see* 9 U.S.C. §§ 4-5, and the resort to background law does not mean the process was not an arbitration. *See*, *e.g.*, *Qwest Corp. v. ZiaNet, Inc.*, 2005 WL 8163729, at *5 (D.N.M. June 2, 2005) (noting courts have appointed arbitrators where "one member of a three-person arbitration panel resigned due to illness . . . , the remaining

two arbitrators could not agree on a replacement, and the arbitration clause had not anticipated such a development, and where one arbitration panel member died . . . and the arbitration clause was silent as to the effect of such a death" (citations omitted)); *see also Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 814 F.2d 1324, 1328-29 (9th Cir. 1987) (affirming district court's umpire appointment where parties were at an impasse).

Here, unlike the process in *Salt Lake Tribune*, where the third appraiser "was *not* asked to decide between two values," 390 F.3d at 690 (emphasis added), the process here asked the umpire (should she be needed) to make a binding decision by agreeing with one of the appraisers. The umpire need not participate, however, if, as happened here, the appraisers themselves reach agreement. Thus, unlike in *Salt Lake Tribune*, where the third appraiser provided a datapoint that might or might not factor into the ultimate price, there was no scenario where Mr. Cartaya would not play a decisional role in resolution of this loss dispute. Even the appraiser who winds up in the minority participates by trying to sway the umpire's tie-breaking vote.

This appraisal process is an agreement between the insurer and the insured to "empower[] a third party to render a decision settling their dispute" over the loss amount. *Salt Lake Tribune*, 390 F.3d at 689; *see* 9 U.S.C. § 3 (parties may refer "any issue" to arbitration); *Fit Tech*, 374 F.3d at 7 (reasoning that contract provision for resolution of an element of dispute does not bear on whether it is an arbitration under the FAA because "arbitrations sometimes do cover only a part of the overall

dispute between the parties"). The policy empowers the two appraisers to resolve the loss-amount dispute. If the appraisers "fail to agree," they "will submit their differences to the umpire. A decision agreed to by any two will be binding." Travelers' appraisal process necessarily and finally settles any dispute over the loss amount. This is arbitration.

But this case is not about whether the Colorado court misapplied *Salt Lake Tribune*, which does not bind this Court. Courts in other parts of the country would recognize this appraisal process as an FAA "arbitration." *See Milligan*, 920 F.3d at 152 (concluding appraisal process "constitute[d] arbitration for purposes of the FAA" where a contractual provision identified category of disputes (loss-amount disagreements), provided for submission of those disputes to specified third parties (two appraisers and a jointly-selected umpire), and made third parties' resolution binding ("by stating that '[a]n award in writing of any two *will determine* the amount of the loss'")). Such divergence is at odds with this Court's explanation that the FAA "declared a *national* policy favoring arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (emphasis added) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

What's more, if the Colorado court's reasoning is correct, it calls into question the "arbitration" status of agreements that provide for arbitration but do not anticipate conceivable problems that could interfere with final dispute resolution. For example, the Commercial Arbitration Rules of the American Arbitration Association (AAA) require that when a panel of arbitrators convenes, a majority vote is needed to enter an award. AAA

Commercial Arbitration Rules, R48(a) (Sept. 1, 2022) ("Any award shall be in writing and signed by a majority of the arbitrators.").[9] But the AAA Rules do not say what happens if a majority of the arbitrators can't agree.[10] Under the Colorado court's decision, an agreement requiring "arbitration by a panel of arbitrators pursuant to the procedures of the American Arbitration Association" would be insufficient to bring the dispute-resolution process within the FAA. This Court should grant review.

III. This Case Is an Excellent Vehicle to Define FAA "Arbitration."

This is the right case to decide whether insurance appraisals are FAA arbitrations. For Mr. Cartaya, the stakes are an enormous judgment or potential immunity from suit. "[T]he doctrine of arbitral immunity does not protect arbitrators or their employing organizations from all claims asserted against them." *Pfannenstiel*, 477 F.3d at 1159. Immunity turns on "whether the claim at issue arises out of a decisional act." *Id.* This case does not call into question this formulation of arbitral immunity or arbitral immunity at all. Because the Colorado court decided that this standard insurance appraisal was not an arbitration, it never reached the issue of immunity for

9. Available at https://www.adr.org/sites/default/files/Commercial_Rules_Web.pdf

10. The Rules provide a procedure for replacing an arbitrator who "is unable or unwilling to perform the duties of the office," R-21(a), but nothing in the Rules says one of those duties is "to agree" on an award. The original arbitrators could refuse or be unable to agree, be replaced, and the new arbitrators could also refuse or be unable to agree. And so on.

Mr. Cartaya. The Colorado court's decision, however, has likely allowed a state cause of action to prevail over federal arbitral immunity. With this case, this Court should define FAA "arbitration."

Further, the Colorado court's resolution of two potential bases for affirmance on alternative grounds makes this case the right vehicle to decide the question presented. First, some courts hold that an appraisal is not an arbitration where the insurance policy has a reservation-of-rights clause, i.e., where the insurer specifies that, even with an appraisal, "we will still retain our right to deny the claim." *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012) (alterations omitted). *Evanston*, applying *Salt Lake Tribune*, decided that such a clause meant an appraisal was not an arbitration. *Id.* at 693-94; *see also Summit Park Townhome Ass'n*, 129 F. Supp. 3d at 1154 (using this rationale to find an appraisal was not an "arbitration" under state law).

The policy at bar similarly provides, "If there is an appraisal, we will still retain our right to deny the claim." But the Colorado court "decline[d] to resolve this case pursuant to the [p]olicy's reservation-of-rights clause" because coverage for this loss was not disputed. (*Id.* 18-19.) Further, the Colorado court recognized "the *Evanston* rationale" as dictum in that case, which has been persuasively rejected by other federal authorities. (*Id.* (citing *Milligan*, 920 F.3d at 149, 152, and *Martinique Props., LLC*, 567 F. Supp. 3d at 1107-08 (collecting cases))); *see Martinique Props., LLC*, 567 F. Supp. 3d at 1107 ("A dispute over the value of property or amount of loss is distinct from a dispute over whether the insurance policy

covers the damage in the first place. Allowing one party the right to dispute one issue does not necessarily make the resolution of another issue nonbinding.").

Second, the Colorado court declined to address Travelers' argument that "the interstate commerce requirement isn't satisfied here" because Congress, through the McCarran-Ferguson Act ("MFA"), *see* 15 U.S.C. §§ 1011-1015, "relinquished its commerce powers over insurance to the states, thereby reverse-preempting the FAA." (App. 8-9.) The trial court never addressed this issue, and the appellate court declined to do so because it could assume interstate commerce was implicated and rule for Travelers on the ground that this appraisal was not an FAA arbitration. (*Id.*) Travelers' policy—issued by a Connecticut company to a Colorado corporation—undoubtedly involves interstate commerce under the FAA. *See Kong v. Allied Prof'l Ins.*, 750 F.3d 1295, 1303 (11th Cir. 2014) ("Here, the insurance contract between Allied and Costello involved interstate commerce. Allied is an Arizona corporation, and Costello is a citizen of Florida. . . . [B]ecause the insurance policy involved interstate commerce, its arbitration provision is governed by FAA."). Moreover, Travelers' MFA argument is meritless because the FAA does not impair a Colorado insurance statute.

By deciding that appraisers who make binding loss determinations pursuant to insurance contracts engage in arbitration, this Court can provide important clarity and settle the split over what source of law—state or federal—defines FAA "arbitration."

CONCLUSION

The petition for a writ of certiorari should be granted.

Originally filed: October 15, 2024; December 16, 2024.

Re-filed: January 6, 2025.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COLORADO COURT OF APPEALS, FILED OCTOBER 5, 2023

COLORADO COURT OF APPEALS

Court of Appeals No. 22CA0739
City and County of Denver District Court No. 20CV32891
Honorable A. Bruce Jones, Judge

TRAVELERS INDEMNITY COMPANY,

Plaintiff-Appellee,

v.

JUAN CARTAYA,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE WELLING
Lipinsky and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 5, 2023

¶ 1 Defendant-appellant, Juan Cartaya, appeals the trial court's entry of judgment and award of costs in favor of Travelers Indemnity Company (Travelers)

after a jury found Cartaya liable for fraud and negligent misrepresentation. We affirm.

I. Background

A. Insurance Claim Dispute and Appraisal

¶ 2 GSL Group, Inc. (GSL) owns a commercial building. Travelers issued an insurance policy (the Policy) to GSL on that property. In June 2015, a storm damaged GSL's building. GSL submitted a claim to Travelers. The parties disagreed on the loss amount. GSL retained a public adjuster, Derek O'Driscoll, who valued the claim at $1,498,771.21. Travelers' adjuster, Justin McKinney, valued the claim at $794,945.88.

¶ 3 The parties invoked an appraisal provision in the Policy, which states as follows:

> If we and you disagree on the value of the property, the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property, the amount of Net Income and operating expense or the amount of loss. If they fail to agree, they will submit their differences

> to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

Travelers selected Trent Gillette as its appraiser; GSL selected Cartaya.

¶ 4 Cartaya estimated a total repair cost of $2,221,537.33. He shared with Gillette his estimate worksheet, in which he included a line item of $556,417.20 for general roof repairs. Separately, he included a line item of $603,864 for "roof purlin repairs" or structural items" related to Lefever Building Systems (Lefever). Lefever, however, had in fact quoted only $27,137 for "purlin replacement." Lefever's president and owner, Rick Taylor, sent this quote to O'Driscoll.

¶ 5 In September 2017, Gillette and Cartaya signed a "compromise agreement" award of $1,600,000 (appraisal award). Gillette sent McKinney a report documenting the appraisal process and the award breakdown." Travelers paid the appraisal award within the thirty-day limit specified in the Policy.

Appendix A

B. Federal Court Proceedings

¶ 6 GSL was dissatisfied with Travelers' handling of its claim. It sued Travelers in state court alleging bad faith, delay, and breach of contract. Travelers removed the case to federal court. Cartaya was not a party to the federal case.

¶ 7 The federal court granted Travelers' motion for partial summary judgment and vacated the appraisal award. The federal court concluded, based on the undisputed facts, that Cartaya wasn't impartial and that the appraisal award included a "grossly-overinflated estimate of the costs of roof repairs." But the federal court denied Travelers' motion for summary judgment on its counterclaims, which included an unjust enrichment claim. Accordingly, Travelers sued GSL and Cartaya in state court.

C. State Court Proceedings

¶ 8 In state court, Travelers brought claims for fraud and negligent misrepresentation against Cartaya and other claims against GSL. The state court severed and stayed Travelers' claims against GSL pending resolution of the federal case.

¶ 9 Cartaya moved for summary judgment. In his motion, Cartaya asserted that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, cloaked him with arbitral immunity for his actions as an appraiser. He further argued that Travelers couldn't justifiably rely on his

estimates. The state court denied Cartaya's motion, and Travelers' claims proceeded to trial.

¶ 10 At trial, over Cartaya's objection, the court took judicial notice of the federal court's vacatur of the appraisal award.

¶ 11 Subsequently, Cartaya moved for a directed verdict; he also asked the court to reconsider its denial of the prior motion for summary judgment. The trial court denied his motion and declined to reconsider its order denying summary judgment.

¶ 12 The jury returned a verdict for Travelers on its fraud claim and awarded $ 603,864 in damages. Although the jury also found for Travelers on its negligent misrepresentation claim, it awarded no damages on that claim. The trial court ordered Cartaya to pay Travelers' costs. The trial court properly certified the judgment and cost order as final orders pursuant to C.R.C.P. 54(b), vesting us with jurisdiction over this appeal.

II. Analysis

¶ 13 On appeal, Cartaya contends that the trial court reversibly erred by (1) finding that he wasn't entitled to arbitral immunity for his conduct as an appraiser; (2) taking judicial notice of the fact that the federal court had vacated the appraisal award; and 3) declining to find, as a matter of law, that Travelers couldn't reasonably rely on his estimate for roof purlin repairs. Accordingly, he asks us to vacate or reverse the judgment and the costs award.

Appendix A

A. Arbitral Immunity Under the FAA

¶ 14 First, Cartaya contends that the trial court erred by concluding that he wasn't entitled to arbitral immunity from civil liability as a matter of law under the FAA for acts performed during the appraisal process. We disagree.

1. Standard of Review

¶ 15 Interpretation of the terms of an insurance policy is a question of law reserved for the trial court, which we review de novo. *See Owners Ins. Co. v. Dakota Station II Condo. Ass'n*, 2019 CO 65, ¶ 31. Whether an individual or an entity is entitled to immunity is also a legal question subject to de novo review. *Jordan v. Panorama Orthopedics & Spine Ctr., PC,* 2013 COA 87, ¶ 11 (citing *Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 20), *aff'd on other grounds*, 2015 CO 24.

2. Trial Court Order and Applicable Law

¶ 16 In his motion for summary judgment, Cartaya argued that the FAA conferred arbitral immunity.[1] He

1. Arbitral immunity is a "doctrine [that] generally rests on the notion that arbitrators acting within their quasi-judicial duties are the functional equivalent of judges and, as such, should be afforded similar protection." *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (citing *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996)). The doctrine is considered "essential to protect the decision-makers from undue influence and protect the decision-

didn't cite to the Colorado Uniform Arbitration Act (CUAA). *See* §§ 13-22-201 to -230, C.R.S. 2023. And the trial court declined to resolve whether state or federal law governed. Nevertheless, in denying Cartaya's motion, the operative portion of the trial court's analysis centers on federal common law addressing the applicability of the FAA. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691-96 (6th Cir. 2012); *Salt Lake Trib. Publ'g Co. v. Mgmt. Plan., Inc.*, 390 F.3d 684, 688-92 (10th Cir. 2004); *cf. Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 129 F. Supp. 3d 1150, 1152-53 (D. Colo. 2015) applying "the substantive law of Colorado," but finding "*Salt Lake Tribune* highly persuasive" and concluding that an appraisal process set forth in an insurance policy was "not an arbitration under the CUAA").

¶ 17 Travelers notes on appeal that Cartaya "cites CUAA cases and appears to suggest obliquely that the CUAA may apply to [him]." We agree with Travelers that such a contention isn't preserved. At base, however, we don't discern that this is a material dispute. Cartaya simply argued in a footnote that he prevails even if the CUAA applies. In his reply brief, he clarifies his position: "the FAA governs" and "federal common law" is determinative. This is where the swords first cross.

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making process from reprisals by dissatisfied litigants." *Id.* (quoting *New Eng. Cleaning Servs., Inc. v. Am. Arb. Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999)). The doctrine, however, "does not protect arbitrators . . . from all claims asserted against them. The key question . . . is whether the claim at issue arises out of a decisional act." *Id.* at 1159.

¶ 18 The FAA applies if a court concludes that (1) a contract containing an arbitration clause (2) evidences a transaction involving interstate commerce. 9 U.S.C. § 2; *see also Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990) The *sine qua non* of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce."); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 425 (Colo. App. 2003) ("This is not a rigorous inquiry. The contract need have only the slightest nexus with interstate commerce." (quoting *Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 725 (Colo. App. 1998))). Travelers asserts that the interstate commerce requirement isn't satisfied here. This is so, it maintains, because pursuant to the McCarran-Ferguson Act, *see* 15 U.S.C. §§ 1011-1015, Congress relinquished its commerce powers over insurance to the states, thereby reverse-preempting the FAA.

¶ 19 The trial court didn't rule on this issue and we needn't resolve it to decide this matter. This is because, even assuming that the transaction implicates interstate commerce, we agree with Travelers' alternative argument: the appraisal provision didn't constitute an arbitration agreement within the coverage of the FAA. Therefore, we decline to address the interstate commerce issue further.

¶ 20 The FAA doesn't define "arbitration," *Evanston Ins. Co.*, 683 F.3d at 693 (citing *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004)), so we must decide which source of law provides that definition, *see also AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456,

460 (E.D.N.Y. 1985) ("The [FAA], adopted in 1925, made agreements to arbitrate enforceable without defining what they were."). The parties effectively stipulate to the application of federal common law. Indeed, one of the bases on which Cartaya challenges the trial court's order is its perceived reliance on *Teachworth*, in which the Fifth Circuit based its analysis on Texas law. *See* 898 F.2d at 1061-62 (finding *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987), "persuasive" and thereby applying Texas law to define "arbitration," ultimately holding that "the appraisal provision was not an arbitration agreement").

¶ 21 Cartaya cites several circuit court decisions that rejected *Teachworth*'s approach and applied federal common law to define arbitration," inviting us to do the same. *See, e.g., Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1091 (9th Cir. 2000) (McKeown, J., concurring) (all three judges specially concurring to "question the vitality of *Wasyl*[, 813 F.2d at 1582]"); *see also Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013); *Evanston Ins. Co.*, 683 F.3d at 693; *Salt Lake Trib. Publ' g Co.*, 390 F.3d at 689 It should not be necessary, but it definitely is, to stress that whether a given dispute resolution procedure is arbitration within the meaning of the FAA is a question of federal, not state, law." quoting I Ian R. MacNeil et al., *Federal Arbitration Law* § 2.1.2A Supp. 1999))).

¶ 22 True enough, in finding that "an appraisal is not, *per se*, a form of arbitration," and in highlighting the significant differences between the respective processes,

the trial court "endorse[d]" *Teachworth*, 898 F.2d at 1061-62. It didn't, however, follow the Fifth Circuit in applying state substantive law to define "arbitration" under the FAA. As noted above, the trial court declined to resolve the governing law issue. Yet, in resolving the limited question of whether this appraisal process was an arbitration, the trial court relied primarily on *Salt Lake Tribune*, 390 F.3d at 689, and other federal cases applying the same rationale. It appears Cartaya invites us to conduct a substantially similar analysis while urging us to reach the opposite conclusion.

¶ 23 Accepting the parties' stipulation that federal common law governs, we lay out the legal framework before applying it to the present case.

¶ 24 Under federal law, whether the appraisal process in this case is "arbitration" under the FAA depends on how closely it resembles classic arbitration. *See Evanston Ins. Co.*, 683 F.3d at 693 (citing *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 689); *see also Martinique Props., LLC v. Certain Underwriters at Lloyd's London*, 567 F. Supp. 3d 1099, 1106 (D. Neb. 2021) (noting that resemblance to "classic arbitration" isn't a "bright-line rule" but endorsing that test because it accurately highlights the "crux of the question"). "Central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute." *Evanston Ins. Co.*, 683 F.3d at 693 (quoting *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 689); *see also Fit Tech, Inc.*, 374 F.3d at 7 (holding that common incidents" of classic arbitration include a final, binding remedy by

a third party, "an independent adjudicator, substantive standards, . . . and an opportunity for each side to present its case"); *see also Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) ("[T]he essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator."). Indeed, arbitration is "a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding[] — [a]lso termed (redundantly) binding arbitration." *Evanston Ins. Co.*, 683 F.3d at 693 (emphasis omitted) quoting Black's Law Dictionary 119 (9th ed. 2009)); *see also Salt Lake Trib. Publ'g Co.*, 390 F.3d at 690 ("Process is arbitration under the FAA where 'the decision of the dispute resolver shall be both final and binding, subject only to the limited judicial review spelled out in the FAA.'" (quoting MacNeil, § 2.3.1.1)).

¶ 25 Furthermore, the language employed by the parties in their contract has little probative weight. *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 690. If the contract states that the third party's decision is final and binding, courts must nonetheless scrutinize the process the parties created to ascertain whether the third party's decision does, in fact, resolve the dispute. *Id.* "[W]hat is important is whether] the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of grievances under the Agreement." *Id.* (quoting *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988)).

3. Analysis

¶ 26 Unlike the present case, *Salt Lake Tribune* didn't implicate insurance appraisal processes. *See* 390 F.3d at 687-88. Nonetheless, the Tenth Circuit's reasoning in that case is instructive. Moreover, the parties agree that it controls.

¶ 27 *Salt Lake Tribune* involved an option contract for the purchase of a newspaper. The contract fixed the option's exercise price at the fair market value of the newspaper's assets. *Id.* at 686-87. In the event the parties couldn't agree on the fair market value, the contract provided that each side was to appoint an appraiser to assess it. If the appraisers' assessments differed from each other by more than ten percent, the parties "would jointly select a third appraiser and the exercise price would equal the average of the two closest appraisal values reported by the three appraisers." *Id.* at 687.

¶ 28 On those terms, the Tenth Circuit concluded that there was no arbitration agreement under the FAA. *Id.* at 690-91. The court determined that, "[a]t most, [the third appraisal] supplied a data point that the parties could use in establishing the exercise price." *Id.* at 690. Because the third appraisal wouldn't be used at all if the first two appraisals were closest in value, it "would hardly settle the parties' dispute" and, therefore, "standing alone, does not constitute an arbitration." *Id.* at 690-91. Likewise, the court rejected the argument that the "entire process" was an arbitration. *Id.* at 691. It explained that "the three-appraisal process does not resemble classic arbitration" and that "to the extent there existed a dispute requiring

arbitration, the [first two appraisers] produced the dispute by affixing values more than ten percent apart." *Id.*

¶ 29 Also informative is *Evanston*, which involved an insurance policy with an appraisal clause. 683 F.3d at 686. The appraisal processes in the *Evanston* policy are identical to those in the present case in all relevant respects. *See id.* In that case, the Sixth Circuit applied *Salt Lake Tribune*'s final-and-binding-settlement test. *Id.* at 693-94. But rather than analyzing the policy's appraisal processes under that test, the court resolved the issue pursuant to the policy's reservation-of-rights clause. *Id.*

¶ 30 In *Evanston*, after a fire damaged a section of the insured's building, the parties disputed the cash value of the loss for which the insurance company was liable. *Id.* at 687. The parties agreed in the policy to submit the determination of the amount of loss and the value of the building to appraisal. *Id.* at 693. The court noted that, although the appraisal provision stated that "[a] decision agreed to by any two [of the umpire and appraisers] will be binding," it also provided that "[i]f there is an appraisal, we [the insurance company] will still retain our right to deny the claim." *Id.* Therefore, the court determined that the "[p]olicy does not provide for a final and binding remedy by a neutral third party." *Id.* at 693-94. It concluded that "the appraisal provision at issue is not akin to an arbitration clause" and the "FAA does not govern the parties' dispute." *Id.* at 696.

¶ 31 As in *Evanston*, the federal district court in Summit Park analyzed an appraisal provision in an insurance policy that was, in all pertinent ways, identical

to the one at issue in the present case. *See Summit Park Townhome Ass'n*, 129 F. Supp. 3d at 1151. Although that case considered the applicability of the CUAA, not the FAA, the court found "*Salt Lake Tribune* highly persuasive," ultimately "conclud[ing] that the appraisal process set forth in the policy is not an arbitration." *Id.* at 1153.

¶ 32 In part, the court's analysis hinged on a faithful application of *Salt Lake Tribune*'s final-and-binding-settlement test. "For one," the court stated, "the [appraisal] process here, under which a decision must be 'agreed to by any two [of the appraisers and the umpire]' will not settle the parties' disagreement over the amount of the loss if no two can agree." *Summit Park Townhome Ass'n*, 129 F. Supp. 3d at 1153 (citing *Enzor v. N.C. Farm Bureau Mut. Ins. Co.*, 473 S.E.2d 638, 640 (N.C. Ct. App. 1996)). This observation, we believe, highlights the confluence between the dispositive inquiry in *Salt Lake Tribune* and the key facts of the present case. We return to it after disposing of an alternative basis for resolving this case.

¶ 33 The *Summit Park* court also focused on the policy's reservation-of-rights clause: "Even assuming the more likely scenario that two [of the appraisers and the umpire] do agree, the parties' dispute will not be settled through to completion because there will still be legal issues for the Court to resolve." *Id.* The court noted that "appraisal establishes only the amount of a loss and not liability for the loss under the insurance contract," whereas arbitration is a quasi-judicial proceeding that

ordinarily will decide the entire controversy." *Id.* (quoting *Minot Town & Country v. Fireman's Fund Ins. Co.*, 1998 ND 215, ¶ 8). Evoking the *Evanston* rationale, the court emphasized the proviso in the policy's appraisal process, which "reserve[d] to [the insurer] its 'right to deny the claim,' likely in recognition of the fact that, whatever the amount of loss, other parts of the policy or applicable law could limit coverage or preclude it altogether." *Id.* at 1154.

¶ 34 We decline to resolve this case pursuant to the Policy's reservation-of-rights clause, thereby stepping away from *Evanston*'s limited application of the *Salt Lake Tribune* test. *See Evanston Ins. Co.*, 683 F.3d at 693-94. Apart from our concern that the *Evanston* court's analysis on this issue was merely dictum, *see id.* at 691-92; *see also Martinique Props.*, LLC, 567 F. Supp. 3d at 1107, we acknowledge other persuasive federal authorities holding that an insurance company's retention of its right to deny the claim doesn't affect the binding nature of an appraisal award, *see Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 149, 152 (2d Cir. 2019); *see also Martinique Props., LLC*, 567 F. Supp. 3d at 1107-08 (collecting cases). What's more, we accept Cartaya's assertion that coverage for the loss here wasn't in dispute.[2] Accordingly, the rationale underlying the Summit Park court's partial reliance on the reservation-of-rights clause — namely, that "there will still be legal issues for the Court to resolve," 129 F. Supp. 3d at 1153 — is inapposite here.

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2. After the appraisal award was issued, Travelers' Executive General Adjuster conceded in an email that "[t]here were no coverage issues at play, this was strictly a disagreement in the amount of damages."

¶ 35 Instead, we apply the final-and-binding-settlement test to the Policy's appraisal processes without regard for the reservation-of-rights clause. On this basis, we discern that the appraisal provisions don't lay out a definitive mechanism for reaching a final and binding figure as to the loss amount.

¶ 36 As indicated above, the Summit Park court's initial observation was prescient. *See id.* ("For one, the process . . . will not settle the parties' disagreement over the amount of the loss if no two can agree."). There, as here, the Policy provided: "A decision agreed to by any two [of the appraisers and the umpire] will be binding." But if any two of them don't agree, what then? The Policy is silent on how to resolve the ongoing dispute. To be sure — though not the facts of this case — it's conceivable that the two appraisers and the appointed umpire could all state different loss values, ergo creating an unresolved impasse despite exhaustion of the Policy's appraisal processes.

¶ 37 Therefore, in our view, the appraisal provisions here are even less definitive than those that didn't pass muster in *Salt Lake Tribune*. There, the third appraisal (a mere data point that may not be used at all) would, at least, trigger an ascertainable result with a semblance of finality — that is, "the exercise price would equal the average of the two closest appraisal values reported by the three appraisers." *Salt Lake Trib. Publ'g Co.*, 390 F.3d at 687. Here, in contrast, if there are three disparate loss values, the Policy offers no path to finality. No third party has the power to render a decision settling the dispute. *See id.* at 689.

¶ 38 Accordingly, the appraisal processes here don't constitute arbitration within the meaning of the FAA. Thus, the FAA didn't confer arbitral immunity to Cartaya for his conduct during the appraisal process.

B. Judicial Notice of Vacatur in Federal Court

¶ 39 Next, Cartaya asserts that the trial court reversibly erred by taking judicial notice of the federal court's vacatur of the appraisal award. The judicial notice, he maintains, concerned facts related to the very issue being litigated in this suit. Further, he argues that the fact of vacatur was irrelevant and that taking judicial notice of it was unfairly prejudicial, particularly given that he wasn't a party to that case. We aren't persuaded.

1. Standard of Review and Applicable Law

¶ 40 We review a trial court's evidentiary decisions, including a decision to take judicial notice, for an abuse of discretion. *See Quintana v. City of Westminster*, 56 P.3d 1193, 1199 (Colo. App. 2002). "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *People v. Orozco*, 210 P.3d 472, 475 (Colo. App. 2009).

¶ 41 Under the Colorado Rules of Evidence, if evidence is probative of a material fact, then it's relevant and presumptively admissible. CRE 401, 402. Only when the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice does it need to be excluded. CRE 403.

¶ 42 Generally, a trial court has discretion to take judicial notice of an adjudicative fact. *People v. Sena*, 2016 COA 161, ¶ 23. CRE 201(b) provides that the kind of fact proper for judicial notice "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

2. Additional Facts

¶ 43 At a pretrial hearing, the trial court invited argument from the parties on whether it could properly take judicial notice of the fact that the federal court had vacated the appraisal award due to Cartaya's partiality.

¶ 44 Cartaya's counsel conceded that the fact of vacatur alone wasn't prejudicial. He contended, however, that it would be impermissible to elaborate on the federal court's reason for ordering vacatur. That is, counsel argued, "telling this jury that a federal judge has vacated the appraisal award because of [Cartaya's] partiality" would be "unfairly prejudicial."

¶ 45 Travelers' counsel responded that the jury "absolutely must be informed" of the vacatur. "If we don't tell them," he continued, "they are going to believe that this appraisal award still exists and that it's valid and binding, and nothing could be more prejudicial [to Travelers] than that."

¶ 46 After weighing the comparative prejudice to each party, the trial court determined that it would take judicial notice of the fact of vacatur, but that it would instruct the jury without mentioning who had vacated the appraisal award and without mentioning the federal court's order. Likewise, although it found that Cartaya's partiality wasn't "a necessary corollary" of the "real issue" — namely, whether Cartaya committed fraud or negligent misrepresentation — the trial court agreed not to indicate why the award had been vacated. Accordingly, Cartaya was still able to argue at trial that he had acted impartially — indeed, he did so.

¶ 47 The court instructed the jury in the following terms:

> [W]hen I was speaking to you, I think on that first day of trial, and giving you some orientation, I mentioned what the evidence in a case consists of, testimony from the witnesses, exhibits that are admitted, as well as stipulations, agreements between the parties and another category is judicial notice. Judicial notice means I'm taking notice of a fact, finding that fact, you should consider as a fact. And it means that there's not a need for any presentation of evidence on the issue.
>
> The Court takes judicial notice as follows: The appraisal award has been vacated, it is void and no longer binding.

3. Analysis

¶ 48 As a threshold matter, the federal court's vacatur of the appraisal award is an adjudicative fact, the type of which is generally appropriate for judicial notice. *See Sena*, ¶ 23 ("The occurrence of legal proceedings or other court actions are proper facts for judicial notice." (citing *Doyle v. People*, 2015 CO 10, 2, 11)); CRE 201(b).

¶ 49 Next, the fact of vacatur was clearly relevant. And, as discussed below, the admission or exclusion of that fact at trial had prejudicial implications for both parties. The issue, however, is whether judicial notice led to any unfair prejudice. That inquiry turns on whether the trial court judicially noticed facts that went directly to the disputed issues.

¶ 50 Here, the parties disputed the propriety of Cartaya's conduct during the appraisal process, or they at least disputed the characterization of that conduct. This dispute related to Cartaya's partiality, which in turn bore on the central issue at trial — that is, whether Cartaya committed fraud or negligent misrepresentation. There is, however, daylight between the simple fact of vacatur of the appraisal award and the very issues the parties were litigating. *See Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999). To be sure, the trial court ensured this by not identifying that the federal court had vacated the appraisal award and by eliminating any reference to the circumstances of the vacatur decision.

¶ 51 There was no mention at trial of the federal court, its order, or Cartaya's underlying partiality. This

is crucial. True enough, as the trial court noted, an actor may be partial without committing fraud and negligent misrepresentation. Even so, knowledge of the federal court's finding regarding Cartaya's partiality would, no doubt, have created an inference that fraud and negligent misrepresentation occurred, thereby tainting the jury's determination of the very issues being litigated. On the other hand, failing to indicate that the putatively "valid and binding" appraisal award had in fact been vacated would've been tantamount to placing a finger on the scale in favor of Cartaya.[3] This, the trial court correctly found, it couldn't do. And we discern that its judicial notice instruction properly balanced those competing prejudice inquiries.[4]

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3. The signed appraisal award form and the Policy were both admitted at trial. The former indicated that the appraisal award was "valid and binding," while the latter stated that an appraisal award is "binding."

4. According to supplemental briefing filed by the parties, long after trial and while this appeal was pending in this court, the parties to the federal case filed a joint stipulation dismissing the federal case with prejudice, terminating that case. The parties to this appeal dispute the effect of the dismissal on the adjudicatory fact of which the trial court took judicial notice. Cartaya contends that the stipulation of voluntary dismissal "nullifies and vitiates" the federal court's interlocutory order vacating the appraisal award. Travelers, on the other hand, contends that the dismissal leaves the order vacating the appraisal award intact as a final judgment on the merits. We don't need to resolve this dispute. For the reasons explained above, at the time of trial, the adjudicative fact of which the trial court took notice — that "[t]he appraisal award has been vacated, it is void and no longer binding" — wasn't improper. Nothing that occurred after trial changes this analysis.

¶ 52 Therefore, the trial court didn't abuse its discretion by taking judicial notice of the fact that "[t]he appraisal award has been vacated."

C. Reasonable Reliance Determination

¶ 53 Next, Cartaya argues that, as a matter of law, Travelers couldn't reasonably rely on Cartaya's representation that roof purlin repairs would cost $603,864. Based on this, Cartaya contends that the trial court should have entered a directed verdict in his favor. We disagree.

1. Standard of Review

¶ 54 We review a trial court's ruling on a motion for directed verdict de novo. *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 982 (Colo. App. 2011) (citing *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 34 (Colo. App. 2010)). "Directed verdicts are not favored." *Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455, 457 (Colo. App. 1999) (citing *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 527 Colo. 1996)). Where the motion for a directed verdict concerns a question of fact, we consider whether the evidence, viewed in the light most favorable to the nonmoving party, "compels the conclusion that reasonable jurors could not disagree and that no evidence or inference [therefrom] has been received at trial upon which a verdict against the moving party could be sustained." *Reigel*, 292 P.3d at 982 (quoting *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1163 (Colo. App. 2010)).

¶ 55 Whether an entity has the right to rely on a misrepresentation is a question of fact. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). The findings of the trier of fact must be accepted on review unless they are so clearly erroneous as not to find support in the record. *Id.* at 1384 (citing *Page v. Clark*, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979)).

2. Additional Facts and Trial Court Findings

¶ 56 Before trial, Cartaya moved for summary judgment, alleging, among other things, that Travelers couldn't establish that it had relied on his repair estimates. In denying the motion, the court said that

> Cartaya makes a variety of arguments concerning reliance. All share a common trait their resolution depends on disputed issues of fact and/ or inferences to be drawn therefrom. Summary judgment is therefore inappropriate.
>
> It is true that [Travelers'] alleged reliance appears somewhat attenuated — by way of its selected appraiser — but the Court is not persuaded that the issue should be resolved as a matter of law.

¶ 57 After the close of evidence, Cartaya moved for a directed verdict on the reliance issue. The court denied the motion, referencing its summary judgment order and reiterating that "there are factual issues that will have to

be resolved by the jury regarding reasonable reliance"; it all depends on "how the jury interprets the conflicting testimony."

3. Analysis

¶ 58 On appeal, Cartaya maintains that, in light of other estimates available to Travelers, his estimate for roof repairs was obviously too high. Thus, he argues, it was unreasonable, as a matter of law, for Travelers to have relied on his estimate.

¶ 59 Cartaya cites *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 749 (Colo. App. 2002), in support of his contention. In that case, a division of this court upheld the trial court's rejection of fraud and misrepresentation claims; it reasoned that reliance wasn't justified because the party claiming fraud had inquiry notice of the true facts. *See id.* ("If the [party] has access to information that was equally available to both parties and would have led to discovery of the true facts, [that party] has no right to rely upon the misrepresentation." (quoting *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000)).

¶ 60 *Brush Creek*, however, isn't dispositive here. Indeed, it's "only when facts are presented to the trial court by stipulation, or uncontested documentary evidence, that an appellate court may draw its own conclusions." *Mortimer*, 866 P.2d at 1382 (first citing *Jelen & Son, Inc. v. Kaiser Steel Corp.*, 807 P.2d 1241, 1244 (Colo. App. 1991); and then citing *Werner v. Baker*,

693 P.2d 385, 387 Colo. App. 1984)). As the supreme court in *Mortimer* emphasized, in both *Jelen* and *Werner* — cases in which the reviewing court properly held that it wasn't bound by the trial court's findings of fact — "no evidentiary hearings were held, no witnesses testified, no contradictory evidence was presented, and the [fact finder] was not required to assess the weight of the evidence or consider the credibility of witnesses." *Mortimer*, 866 P.2d at 1382.

¶ 61 In contrast, here, eight witnesses testified at trial, including Cartaya, Taylor, Gillette, and McKinney. This led to conflicting testimony. As Cartaya concedes, at least three separate sources provided drastically different figures for the same roof repair: 1) Lefever submitted a bid for about $27,000; (2) McKinney commissioned research resulting in an estimate of $102,745.28; and (3) Cartaya submitted an estimate for "roof purlin repairs Lefever bid)" totaling $ 603,864. Far from rendering the reasonableness of reliance a purely legal issue, as we lay out below, the discrepancy between these estimates and the surrounding circumstances created factual issues for the jury to resolve.

¶ 62 For example, Gillette's report — upon which McKinney relied in concluding that the appraisal award was accurate — stated, This report and this writer's conclusions have been based solely on my interpretation of this claim without any influences of either [GSL or Travelers]." It was, Gillette maintained, "an unbiased report with recommendations based on the information that was [available] to me during this appraisal." Gillette

continued, "The largest portion of my increase from the original Travelers estimate is the replacement of the purlin section. There was a bid of over $ 600,000 for this . . . that brought my figures up to arrive at my award amount after working with Mr. Cartaya." Gillette attributed this to many differences of opinion."

¶ 63 Further, Cartaya asserts that, "[b]efore the appraisal, Mr. McKinney was aware of only one Lefever bid for structural roof repair — Lefever's bid to replace a discrete number of purlins for about $ 27,000." Significantly, though, McKinney testified that, at the time he approved the appraisal award, he hadn't seen any documentation listing the $27,000 Lefever bid.[5] Therefore, according to McKinney, he didn't have access to the most glaring counterpoint to Cartaya's $603,864 estimate, but he did have Gillette's assurances that the report, which endorsed the "bid of over $600,000," was the product of independent review.

¶ 64 Thus, there was contradictory evidence for the jury to parse. Further, the jury was required to assess the weight due to that evidence while also considering the credibility of the witnesses. Therefore, Brush Creek is inapposite; this case couldn't be resolved on the basis of inquiry notice as a matter of law. Rather, the trial court correctly found that whether Travelers reasonably relied on Cartaya's representation was a question for the jury.

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5. The record reflects that Lefever sent the initial quote to O'Driscoll, not McKinney.

D. Award of Costs

¶ 65 Because we affirm the judgment in all respects, we also uphold the trial court's costs award to Travelers.

III. Disposition

¶ 66 The judgment is affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.

APPENDIX B — DENIAL OF REHEARING OF THE COLORADO COURT OF APPEALS, FILED NOVEMBER 2, 2023

COLORADO COURT OF APPEALS, DENVER DISTRICT COURT

Case Number: 2022CA739

TRAVELERS IDEMNITY COMPANY,

Plaintiff-Appellee,

v.

JUAN CARTAYA,

Defendant-Appellant.

Filed November 2, 2023

ORDER DENYING PETITION FOR REHEARING

The PETITION FOR REHEARING filed in this appeal by:

Juan Cartaya, Defendant- Appellant,

is **DENIED**.

Issuance of the Mandate is stayed until: December 1, 2023

Appendix B

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: November 2, 2023

BY THE COURT:
Welling, J.
Lipinsky, J.
Gomez, J.

APPENDIX C — DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT, FILED JUNE 17, 2024

COLORADO SUPREME COURT

Case Number: 2022SC880

JUAN CARTAYA,

Petitioner,

v.

TRAVELERS IDEMNITY COMPANY,

Respondent.

Filed June 17, 2024

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 17, 2024.

APPENDIX D — ORDER: MR. CARTAYA'S MOTION FOR SUMMARY JUDGMENT IN THE DENVER COUNTY DISTRICT COURT, COLORADO, FILED MARCH 9, 2022

DISTRICT COURT,
CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Case Number: 2020CV32891

THE TRAVELERS IDEMNITY COMPANY,

Plaintiff,

v.

GSL GROUP, INC and JUAN CARTAYA,

Defendant.

Filed March 9, 2022

ORDER: MR. CARTAYA'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on Defendant Juan Cartaya's Motion for Summary Judgment. The Court, having reviewed Mr. Cartaya's Motion, the parties' other relevant filings, and being fully advised, enters the following order.

Appendix D

Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). A fact is material if it affects the outcome of the case. *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 853 (Colo. App. 2007). The burden is on the movant to establish that no triable issue exists; in considering the motion, the court reviews all facts in the light most favorable to the nonmoving party and gives that party all favorable inferences that can be reasonably drawn from the undisputed facts. *Smith v. Boyett,* 908 P.2d 508, 514 (Colo. 1995).

Defendants' Arguments

Mr. Cartaya makes three basic arguments. First, he asserts that the Federal Arbitration Act ("FAA") cloaks him with arbitral immunity for his actions as an appraiser. Second, he alleges that Plaintiff cannot establish all the elements of fraud, specifically reliance. Third, he contends that Travelers, again, cannot prove reliance with respect to its negligent misrepresentation claim, nor that it was part of a business transaction.

The Court addresses each contention in turn.

Appendix D

Analysis

I. Arbitral Immunity

The core issue here is whether the appraisal under the insurance policy constitutes an arbitration. If it does not, there cannot be immunity under the FAA and the Court need not otherwise address the parties' arguments concerning interstate commerce.

As a general matter, an appraisal is not, *per se,* a form of arbitration. While both procedures call upon a third party to assist in resolving a dispute, they each have significant differences. In this regard, the Court endorses the Fifth Circuit's distinctions between the two, as described in *Hartford v. Lloyd's Ins. Co. v. Teachworth*:

> [A]n arbitration agreement may encompass the entire controversy between parties or it may be tailored to particular legal or factual disputes. In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy. Additionally, an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses. Appraisals are informal. Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without holding formal hearings.

898 F.2d 1058, 1061-62 (5th Cir.1990).

While the Court is not resolving whether state or federal law is controlling on this issue, it is nonetheless worth noting that, under Colorado law, appraisers also are not held to the same standards of impartiality as arbitrators. *See Owners Ins. Co. v. Dakota Station II Condominium Assoc., Inc.*, 443 P.3d 47, 51-52 (Colo. 2019).

According to the Tenth Circuit opinion primarily relied upon by Defendant, whether a given appraisal is an arbitration depends on whether it takes on the qualities of an arbitration. *Salt Lake Tribune Publ. Co. v. Mgmt Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) ("Under federal law, we must determine if the process at issue sufficiently resembles classic arbitration to fall within the purview of the FAA.").

Here, Mr. Cartaya performed an appraisal pursuant to an insurance policy provision, which, in relevant part, states as follows:

> If we and you disagree on the value of the property, the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser.
>
> The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property, the

> amount of Net Income and operating expense or the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding . . . If there is an appraisal, we will still retain our right to deny the claim.

Mr. Cartaya, who was appointed by the insured, and the appraiser appointed by Travelers, initially worked separately to determine the amount of loss. Then they together reached an agreement, legitimately or not, on the estimated property damage incurred by the insured and entered an appraisal award. Quite simply, this process does not "resemble[] classic arbitration." *Id.* Perhaps Mr. Cartaya realized as much at the outset since he appears to have only recently decided that he was an arbitrator—arbitral immunity was not raised in his answer nor in his description of the case in the CMO.

Travelers cites *Auto-Owners Ins. Co. v. Summit Park Townhome Assoc.,* 129 F. Supp. 3d 1150 (D. Colo. 2015), in arguing against Mr. Cartaya's Motion. There, the federal district court held the appraisal process provided in the insurance policy was not an arbitration. In his reply, Mr. Cartaya cites *Lim v. Am. Econ. Ins. Co.*, 2014 WL 1464400 (D. Colo. Apr. 14, 2014), which reached the opposite conclusion. This Court, for the reasons noted above, agrees with the reasoning of the later, published decision.

The Court finds the appraisal here was not an arbitration. Other courts have reached the same conclusion

in analyzing identical, or substantially similar, appraisal clauses in the insurance context. *Evanston Ins. v. Cogswell Properties,* 683 F.3d 684 (6th Cir. 2012); *Hometown Cmty Assoc. v. Philadelphia Indem. Ins. Co.,* 2018 WL 2008853 (D. Colo. 2018); *Auto-Owners Ins. Co.,* 129 F. Supp. 3d at 1153.

Defendant Cartaya is not protected by arbitral immunity from Plaintiffs claims.

II. Fraud and Deceit Claims

Defendant Cartaya makes a variety of arguments concerning reliance. All share a common trait—their resolution depends on disputed issues of fact and/or inferences to be drawn therefrom. Summary judgment is therefore inappropriate.

It is true that Plaintiffs alleged reliance appears somewhat attenuated—by way of its selected appraiser—but the Court is not persuaded that the issue should be resolved as a matter of law.

Plaintiff has withdrawn its claim for deceit, which moots this aspect of the summary judgment motion. If the parties have reached an agreement for dismissal of the claim, appropriate pleadings should be filed.

Appendix D

III. Negligent Misrepresentation Claim

Defendant Cartaya's reliance arguments regarding misrepresentation meet the same fate as with his fraud arguments. Nor is the Court convinced that the alleged misrepresentations were not part of a business transaction. The Court does not view a supposedly impartial appraiser as analogous to the attorney for an adverse party. Again, there are disputed issues of fact for a jury to resolve.

Conclusion

Mr. Cartaya's Motion for Summary Judgment is denied.

DATED AND ORDERED: March 9, 2022.

BY THE COURT:

/s/_____
Judge A. Bruce Jones
Denver District Court Judge

APPENDIX E — ORDER: MR. CARTAYA'S MOTION FOR POST-TRIAL RELIEF IN THE DENVER COUNTY DISTRICT COURT, COLORADO, FILED APRIL 20, 2022

DISTRICT COURT, DENVER COUNTY, COLORADO

Case Number: 2020CV32891

TRAVELERS IDEMNITY COMPANY,

Plaintiff(s),

v.

GSL GROUP INCV et al.,

Defendant(s).

Filed April 20, 2022

ORDER: MR. CARTAYA'S MOTION FOR POST-TRIAL RELIEF WITH ATTACH

The motion/proposed order attached hereto: DENIED.

First, Defendant's appraisal/arbitration argument is little more than an untimely motion to reconsider the Court's summary judgment order. No facts developed at trial warrant a change in the analysis. The Court otherwise stands by its summary judgment decision -- this insurance appraisal was not an arbitration.

Second, based on the evidence, reliance was a jury issue.

Third, the Court did not take judicial notice of "facts," but of another's court's order. That order was in effect at the time of trial in this case and the jury was appropriately informed.

The motion is denied.

Issue Date: 4/20/2022

/s/_____
A. Bruce Jones
District Court Judge

APPENDIX F — MR. CARTAYA'S MOTION FOR POST-TRIAL RELIEF IN THE DENVER COUNTY DISTRICT COURT, COLORADO, FILED APRIL 18, 2022

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORRADO

Case Number: 2020CV32891

THE TRAVELERS IDEMNITY COMPANY,

Plaintiff,

v.

GSL GROPU, INC, and JUAN CARTAYA,

Defendanta.

Filed April 18, 2022

MR. CARTAYA'S MOTION FOR POST-TRIAL RELIEF

Defendant Juan Cartaya, through counsel, moves for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Counsel for Travelers notified us today that the Court on March 25 set a deadline for post-trial motions to be filed within twenty-one days of the date of the verdict and said this Motion is untimely. C.R.C.P. 59(a) provides that post-trial motions are due within fourteen days after entry of judgment, which has not entered. The Court

suggested in its April 13, 2022 Order that a C.R.C.P. 58(a) judgment cannot enter because the other half of this case, *Travelers v. GSL,* has not been resolved. As we said in our April 15, 2022 response to the Court's April 13 Order, notwithstanding Travelers's arguments to the contrary, the Court very well may be correct.

In any case, to the extent this Motion is one day past the appropriate deadline for post-trial motions, we request that the Court enlarge by one business day the time for submitting it and to accept it for filing. This Motion raises serious matters affecting the resolution of Travelers's fraud claim. We conferred with Travelers's counsel on April 14, 2022 -- before expiration of the deadline -- about this Motion. Travelers opposes the relief requested in this Motion.

INTRODUCTION

The Court has presided over the entire trial, has heard all the parties' evidence, and has had an opportunity to see the effect of its taking judicial notice of Judge Krieger's summary judgment order. In the context of the trial, the Court should grant post-trial relief to Mr. Cartaya.

DISCUSSION

I. Mr. Cartaya has absolute immunity under the FAA.

The parties do not dispute that if the Federal Arbitration Act applies to the appraisal at issue in this case, Mr. Cartaya enjoys absolute immunity. The only question is whether the FAA applies. The Court ruled on

March 9, 2022, that the FAA does not. We respectfully submit that in so ruling the Court misapprehended the dispositive law and erred.

The Court ruled that an appraisal "is not, *per se,* a form of arbitration" because of "significant differences" between an arbitration subject to the FAA and an appraisal. Order re Cartaya's Mot. for Summ. Judg. ("SJ Ord.") 2. The Court said it agreed with the distinctions between an arbitration and an appraisal drawn by the Fifth Circuit in *Hartford v. Lloyd's Insurance Co. v. Teachworth,* 898 F.2d 1058, 1061-62 (5th Cir. 1990):

> "[A]n arbitration agreement may encompass the entire controversy between parties or it may be tailored to particular legal or factual disputes. In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy. Additionally, an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses. Appraisals are informal. Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without holding formal hearings."

SJ Ord. 2 (quoting *Hartford;* emphasis supplied).

We respectfully submit that *Hartford* is inapposite and has been discredited. As Travelers acknowledged,[1]

1. *See* Travelers' Resp. to Mot. for Summ. Judg. (filed Jan, 21, 2022).

Hartford declined to apply federal law and instead applied state law, i.e., Texas law, to conclude that "an insurance appraisal which only determines the value of a loss is not an arbitration." 898 F.2d at 1062. *Hartford*'s holding that state law governs what is an FAA "arbitration" was based on *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1581-82 (9th Cir. 1987).

Since its issuance, *Wasyl* has received withering criticism. Three Ninth Circuit judges, including *Wasyl*'s author, Judge McKeown, have said they doubt *Wasyl*'s current "vitality," *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1091 (9th Cir. 2000) (McKeown, J., specially concurring); *see id.* at 1091 (Tashima, J., concurring). The First Circuit noted that *Wasyl* -- "followed by *Hartford*" -- is a "[c]urios[ity]," as *Wasyl* "assumed without real analysis that state law governed" and was "rightly criticized" by the *Portland Gen. Elec. Co.* panel, *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004). The Second Circuit said that the circuit courts, including the Fifth Circuit in *Hartford* and the Ninth Circuit in *Wasyl*, that apply state law to decide what is an arbitration "have articulated few reasons for doing so." *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135,* 707 F.3d 140, 144 (2d Cir. 2013).

The Tenth Circuit expressly rejected *Wasyl's* and *Hartford's* application of state law to determine what is an arbitration under the FAA. *See Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004). The First, Second and Sixth circuits also have rejected the view that state law governs what

is an arbitration under the FAA. *See Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Fit Tech*, 374 F.3d at 6-7. "Congress did not plainly intend arbitration to mean different things in different states," the Tenth Circuit held. "Rather, it sought a uniform federal policy favoring agreements to arbitrate." *Id.* at 689.

Hartford's reasoning is unpersuasive. The Fifth Circuit's holding that an appraisal is not an arbitration was based on "significant differences" between them. But none of the differences is meaningful under the FAA.

1. The first "difference" is that an arbitration agreement "may" encompass "the entire controversy" between parties or "may be tailored to particular legal or factual disputes." 898 F.2d at 1061-62. "In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy." This is not a difference. As the Fifth Circuit acknowledged in the first sentence, the parties may limit an arbitration to "particular legal or factual disputes." That is precisely what an insurance policy's appraisal provision does: it limits the dispute to be decided to one issue-loss amount.

2. The second difference the *Hartford* court identified is that "an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses" while "[a]ppraisals are *informal.* Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without

holding formal hearings." *Id.* at 1062 (emphasis supplied). There is no difference here. The *Hartford* court explicitly acknowledged that *all* arbitrations are "informal." *See id.* at 1061 (observing that FAA was enacted to ensure courts would enforce "agreements of parties who choose to resolve their disputes through the *informal process of arbitration*") (emphasis supplied).

Nothing in the FAA requires that an arbitration have "formal hearings" and "testimony of witnesses." The courts expressly have found a wide range of ADR proceedings to be arbitrations under the FAA notwithstanding the absence of formal hearings and testimony of witnesses. In *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988), the question was whether this provision set up an arbitration subject to the FAA:

> If the Company should disagree with any Owner's computation of the amount of the required indemnity payment or refund ... or if any Owner should disagree with such good faith determination of the Company that there is substantial risk, then *the Company and the Owner shall appoint an independent tax counsel to resolve the dispute* and, if the parties cannot agree to the appointment of such counsel, said independent tax counsel shall be appointed by the American Arbitration Association . . . .

Id. at 827 (emphasis supplied). In holding that it *was* subject to the FAA, the Second Circuit held, "the language clearly

manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution." *Id.* at 830. "It is . . . irrelevant," the court said, "that the contract language in question does not employ the word 'arbitration' as such. Rather, what is important is that the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of certain grievances under the Agreement." *Id.* (cleaned up). Notably, the Second Circuit held the ADR method was subject to the FAA even it contemplated "informal" proceedings and did not require the independent tax counsel to hear "testimony" or hold "formal hearings." *See id.* at 827.

In *Bakoss,* the plaintiff Bakoss held a disability insurance policy. It provided that if a competent medical authority determined he was permanently totally disabled, Bakoss and the insurance company, Lloyds, could select a physician to examine him. "In the event of a disagreement between each party's physician, the [policy provided] that those two physicians 'shall jointly name a third Physician to make a decision on the matter which shall be final and binding.'" *Bakoss,* 707 F.3d at 142 (cleaned up). The question was whether this ADR method constituted an arbitration subject to the FAA.

In ruling that it was an arbitration, the district court relied on *McDonnell Douglas* and *AMF Inc. v. Brunswick Corp.,* 621 F. Supp. 456 (E.D.N.Y. 1985). In *AMF,* Judge Weinstein ruled that under the FAA, "an adversary proceeding, submission of evidence, witnesses and cross-examination *are not essential elements of arbitration*"; "if the parties have agreed

to submit a dispute for a decision by a third party, they have agreed to arbitration." 621 F. Supp. at 460 (emphasis supplied; cleaned up). The Second Circuit affirmed, holding that the district court properly applied federal common law to determine whether the ADR method was an arbitration subject to the FAA. *Bakoss,* 707 F.3d at 143.

In *Milligan v. CCC Information Services Inc.*, 920 F.3d 146 (2d Cir. 2019), plaintiff Milligan obtained an automobile insurance policy from GEICO. In the event of an auto claim in which the insured and GEICO could not agree on the loss amount, the policy provided for an appraisal procedure substantially identical to the one at issue *sub judice*: either the policyholder or GEICO could demand an appraisal of the loss; once demanded, each would select a "competent" appraiser; the appraisers would select a "competent and disinterested umpire"; if the appraisers could not agree on a loss amount, "they will submit the dispute to the umpire"; an award by any two would determine the loss amount; notwithstanding an appraisal, the policy provided that GEICO would not "waive [its] rights." 920 F.3d at 149.

The Second Circuit held this ADR method "constitutes arbitration for purposes of the FAA." *Id.* at 152. It reasoned:

> The appraisal provision identifies a category of disputes (disagreements between the parties over "the amount of loss"), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected

> umpire), and makes the resolution by those third parties of the dispute binding (by stating that "[a]n award in writing of any two will determine the amount of the loss").

Id.

In *Salt Lake Tribune,* the Tenth Circuit -- like the Second Circuit -- held that the threshold for what constitutes an arbitration is minimal: "Parties *need not establish quasi-judicial proceedings* resolving their disputes to gain the protections of the FAA but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances." *Id.* at 690 (emphasis supplied). The Tenth Circuit cited favorably to both *McDonnell Douglas* and *AMF,* 390 F.3d at 690 & n.3. It ultimately distinguished both cases, however, because the ADR method in the contract at issue in *Salt Lake Tribune* would not necessarily result in a final and binding decision. *Id.*

This Court ruled the appraisal method at issue *sub judice* is not an arbitration under the FAA because Travelers and GSL appointed the appraisers who "initially worked separately to determine the amount of loss [and [t]hen they together reached an agreement . . . on the estimated property damage incurred by the insured and entered an Appraisal Award." SJ Ord. 3. Respectfully, this analysis is incorrect. As the Second and Tenth circuits have held, nothing in the FAA requires that an arbitration consist of anything more than the parties' submission to a third party a dispute for binding and final resolution.

Appendix F

This Court relied on *Evanston Insurance Co. v. Cogswell Properties, LLC,* 683 F.3d 864 (6th Cir. 2012); *Hometown Community Association, Inc. v. Philadelphia Indemnity Insurance Co.*, 2018 WL 2008853, No. 17-cv-777-RBJ (Apr. 30, 2018); and *Auto-Owners Insurance Co. v. Summit Park Townhome Association,* 129 F. Supp. 3d 1150 (D. Colo. 2015). We respectfully submit that none of these cases controls the FAA question in this case.

In *Evanston,* the Sixth Circuit held that an insurance appraisal ADR method substantially similar to the one at issue in the case at bar was not an arbitration subject to the FAA. The court's analysis was flawed and contrary to the Tenth Circuit's decision in *Salt Lake Tribune.* First, it was dictum. *See* 683 F.3d at 691-93 (reaching insured's argument whether appraisal was subject to FAA after concluding it had forfeited the argument). Second, while it recognized that the Tenth Circuit in *Salt Lake Tribune* held that "classic arbitration" occurs when "'disputants empower[] a third party to render a decision settling their dispute,'" the court failed to apply this low threshold for finding arbitration to the appraisal at issue. Nor did the court address the two cases the Tenth Circuit in *Salt Lake Tribune* had cited favorably, i.e., *McDonnell Douglas* and *AMF.*

Finally, the Sixth Circuit ultimately held that appraisal is not arbitration because the insurance policy provided that the insurance company retained the right to deny the claim notwithstanding appraisal; because of this reservation of right over the claim, the court held, the ADR method "does not provide for a final and binding

remedy." This analysis flies in the face of the Supreme Court's holding that an arbitration is subject to the FAA even if it does not resolve all issues in dispute. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995), the Court held that "parties are generally free to structure their arbitration agreements as they see fit" and "*may limit by contract the issues which they will arbitrate.*" It follows necessarily that simply because Travelers and GSL chose to limit their appraisal dispute resolution to the loss amount, and not the viability of the claim, has no bearing on whether the dispute resolution process as to the loss amount is arbitration under the FAA. Instead, as the Second and Tenth circuits have held, the "is it arbitration?" question is answered simply by whether the parties have submitted their dispute to a third party for final and binding resolution. As to the amount of loss, there is no doubt Travelers and GSL did. That is conclusive.

The appraisal process set up by the Travelers insurance policy is an arbitration subject to the FAA. Both parties expressly agreed they would "limit by contract the issues" they would submit to a third party, i.e., the two appraisers and umpire. They agreed to limit that issue to one: the amount of loss sustained by the insured. The evidence at trial established that both Travelers and GSL submitted materials to the appraisers they selected, e.g., Tr. Ex. 45; both appraisers conducted their due diligence investigation, including twice jointly visiting the GSL property; and they then deliberated on the amount of loss and agreed on an award setting the amount of loss. Had they disagreed on the amount

of loss, they would have moved on to the umpire part of the appraisal process, in which the appraisers would have submitted documents and testimony to the umpire. *See* EXHIBIT A.

That the policy provides Travelers may deny the claim regardless of any appraisal is of no moment. Travelers and GSL could and did have disputes over both whether GSL's claim was covered and, later, the amount of loss. But these are separate issues. One thing that is clear from the policy is that once an appraisal has determined the amount of loss, that determination was binding on both Travelers and GSL. That is to say, GSL's claim could have been denied before or after the appraisal, but neither Travelers nor GSL had any ability to dispute *the amount of loss.* The policy sets up arbitration for a single issue-amount of loss. That the claim that put the loss amount in dispute later can be denied has no bearing on whether as to the loss amount the policy set up an arbitration. Moreover, as discussed in Mr. Cartaya's summary judgment motion, here Travelers admitted that coverage was *not* in issue, only the loss amount.

Hometown Community Association and *Auto-Owners Insurance Co.* suffer from the same flaws. Neither is consistent with *Salt Lake Tribune, McDonnell Douglas,* and *AMF.*

Because the FAA applies to the appraisal method of resolving disputes over amount of loss, Mr. Cartaya enjoyed absolute immunity in connection with his actions as an appraiser to resolve the loss-amount dispute. *See*

Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158-59 (2007). The Court should enter judgment in favor of Mr. Cartaya and against Travelers on its claims.

II. The trial evidence established as a matter of law that Travelers did not justifiably rely on any representation by Mr. Cartaya.

"Reasonable reliance is satisfied when circumstances were such as to make it reasonable for the plaintiff to accept the defendant's statements without an independent inquiry or investigation." *Bristol Bay Prods., LLC v. Lampack,* 313 P.3d 674, 680 (Colo. App. 2011), *rev'd in part on other grounds,* 2013 CO 60. Reliance can be unreasonable as a matter of law. For example, reliance "is not justified when the party is aware of or on inquiry notice of the falsity of the representation." *Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP,* 2018 CO 54 ¶ 53.

The trial evidence established: Mr. Cartaya and Mr. Gillette used a "worksheet," on which Mr. Cartaya had included a figure of $603,864 for structural roof repair "per LeFever bid." Although LeFever had submitted an updated bid in the amount of $603,864 for general roof repair, no one had asked it to, and it never did, submit a bid for structural roof repair. Nonetheless, Travelers's claims adjuster, Mr. McKinney, was intimately familiar with the cost of structural roof repair. Before appraisal, Mr. McKinney was aware of only one LeFever bid for structural roof repair, namely, LeFever's bid to replace three-four purlins (525 lineal feet) for about $27,000,

see Tr.Exs.29, at 2 & 0000, at 2. This was *4%* of the $603,864 bid amount listed in the worksheet. Although Mr. Cartaya never authorized the "*DRAFT*" worksheet to be shared with anyone, Mr. Gillette unilaterally decided to send it to Mr. McKinney, who reviewed the worksheet. Mr. McKinney had commissioned his own research -- in February 2016 -- of the cost to replace all the purlins, i.e., to complete the structural roof repair of the northeast roof. His own estimate-Travelers's estimate-was that it would take less than $102,745.28,[2] or 17% of the $603,864 bid amount he saw in the worksheet. Tr.Ex. II, at 24. In his October 20, 2017 report to Mr. McKinney explaining the Appraisal Award, Mr. Gillette explicitly told Travelers that "[t]he largest portion of my increase from the original Travelers estimate" -- this is a direct reference to the estimate Mr. McKinney commissioned, i.e., Tr.Ex. II -- was the $603,864 amount for structural roof replacement. Tr.Exs. 74, at 5 & Z, at 5.

Brush Creek Airport, LLC v. Avian Park, LLC, 57 P.3d 738, 749 (Colo. App. 2002), controls. There, the court of appeals concluded that the plaintiff did not justifiably rely on a representation that an airport runway was 4,700 feet long "when the party had seen or obtained documents showing a 4,000-foot runway." In contrast, Travelers had even more information than the *Brush Creek* plaintiff. Travelers *commissioned* the estimate showing that structural roof repair would cost substantially less than $603,864, *see* This Mot., at 12 n.2, and the only LeFever

2. Travelers's estimate of $102,745.28 did not separate general from structural roof repairs to the northeast roof.

bid Travelers knew about before the appraisal was one for about $27,000. As a matter of law, it was Unreasonable for Travelers to rely on the $603,864 in the "*DRAFT*" worksheet that Mr. Gillette sent without approval or sign-off from Mr. Cartaya.

III. TheCourt improperly instructed the jury on the vacatur of the Appraisal Award.

The Court should order a new trial because it impermissibly instructed the jury that the Appraisal Award had been vacated. The statement that the Appraisal Award "has been vacated and is void and no longer legally binding" was not appropriate for judicial notice as it relies on a factual assessment of the validity of the Appraisal Award. The instruction was also misleading, as the vacatur occurred through an interlocutory order which may yet be overturned on appeal; the Appraisal Award has not been finally and definitively vacated. Moreover, the instruction prejudiced Mr. Cartaya to the extent it suggested to the jury that the Appraisal Award was vacated due to his fraud or other wrongdoing.

While a court may take judicial notice of its own records in a related case - assuming that the other case involved the same parties and issue -- it "may not take judicial notice of facts on the very same issue the parties are litigating." *Mun. Subdist., N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999); *see Bristol Bay Prods.*, 313 P.3d at 686 ("A court may not judicially notice facts on the matter that the parties are litigating."). Thus, where a court takes judicial notice of

developments in a related proceeding, it may notice certain rulings, but not the factual or legal basis for such rulings. *See Let's Go Aero, Inc. v. Cequent Performance Prods., Inc.,* 78 F. Supp. 3d 1363, 1379 (D. Colo. 2015) (taking judicial notice of existence of related proceeding but not weighing factual determinations from that proceeding). While such findings in a prior proceeding are capable of accurate and ready determination from judicial records, "it cannot be said that these same findings are not subject to reasonable dispute." *Fain v. Islamic Republic of Iran,* 856 F. Supp. 2d 109, 115 (D.D.C. 2012).

The validity of the Appraisal Award was a central issue in this case, given that Travelers's theory was that Mr. Cartaya's alleged fraud inflated the award amount. Taking judicial notice that the Award was vacated and was no longer in effect necessarily would have induced the jurors to speculate about why the Award was vacated. There were only two parties in the courtroom, and only one -- Mr. Cartaya -- was accused of wrongdoing that could have led the Award to be vacated. Having the judge in the case notify the jury that he was finding the Appraisal Award to be vacated and no longer in effect placed the Court on Travelers's side. It indicated that the Award already had been vacated and now the only question remaining was whether Mr. Cartaya acted improperly, i.e., committed fraud. Taking judicial notice effectively determined a central issue that the parties were litigating and was improper. *See Mun. Subdist.,* 990 P.2d at 711.

Additionally, "when a court takes judicial notice of another court's opinion, it may do so not for the truth

of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Lee v. City of Los Angeles,* 250 F.3d 668, 690 (9th Cir. 2001) (internal quotation marks omitted); see *Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir. 1991) ("[C]ourts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings."). In *Lee,* the court found that the lower court had improperly taken judicial notice and assessed the validity of the plaintiffs purported waiver of his right to challenge extradition. *See* 250 F.3d at 690. Because the lower court had made a factual determination as to the effectiveness of a document at issue, the *Lee* court reversed and remanded the case. *See id.*

Similarly, the Court properly could not have taken a position on the effect of Judge Krieger's order on the validity of the Appraisal Award, particularly when Mr. Cartaya did not participate in the federal case and Judge Krieger's order was interlocutory. *See id.* This issue is not yet definitively resolved, as it will be subject to appeal after resolution the remaining claims in the Federal Case. Judge Krieger's findings "represent merely a court's probabilistic determination as to what happened." *Fain,* 856 F. Supp. 2d at 116. Her conclusion was based on the summary judgment record before her, which Mr. Cartaya did not take part in.

The interlocutory nature of Judge Krieger's order underscores the prejudice of taking judicial notice of the order. We understand the Federal Case has been re-assigned

to Judge Moore. Whether or not that had happened, the federal judge has the right at any time to reconsider the order and vacate it. Even if the judge never reconsidered and vacated it, in the likely event that GSL appeals the order, the Tenth Circuit could and for all we know will vacate the order. If the order is vacated, what does that mean for the jury verdict in the case at bar? It is no answer to say, we'll cross that bridge when we get there, because the question says something about the appropriateness of informing the jury that the Court is taking judicial notice of a "fact" that is not actually a fact; it is a fact subject to becoming fiction. A new trial is warranted.

CONCLUSION

The Court should enter judgment notwithstanding the verdict; in the alternative, the Court should grant a new trial.

April 18, 2022.

Respectfully submitted,

/s/_____
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APPENDIX G — FINAL JUDGMENT IN THE DENVER COUNTY DISTRICT COURT, COLORADO, FILED APRIL 21, 2022

DENVER COUNTY DISTRICT COURT, COLORADO

Case Number: 2020CV32891

THE TRAVELERS IDEMNITY COMPANY,

Plaintiff,

v.

JUAN CARTAYA,

Defendant.

Filed April 21, 2022

FINAL JUDGMENT

THIS MATTER comes before the Court following a jury trial, which commenced on March 21, 2022 and concluded on March 25, 2022. Consistent with the jury's verdict returned on March 25, 2022, the Court hereby enters judgment in favor of Plaintiff on its claim for fraud in this matter and awards $763,048.69, including prejudgment interest, *nunc pro tunc*, March 25, 2022. The Court enters judgment in favor of Defendant on Plaintiff's claim for negligent misrepresentation. Costs are yet to be determined.

Further, to the extent the Court's prior severance order does not resolve the issue, the Court finds, under Rule 54(b), that the jury's verdicts resolved all claims between these parties. Therefore, there is no just reason for delay and the Court expressly directs entry of judgment.

DATED AND ORDERED: April 21, 2022

BY THE COURT:

/s/_____
Judge A. Bruce Jones
Denver District Court Judge