IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 14-CV-20524-JLK

PAVARINI CONSTRUCTION CO. (SE), Inc., a Delaware Corporation, individually, and for the use and benefit of STEADFAST INSURANCE COMPANY, a Delaware Corporation,

Plaintiff,

vs.

ACE American Insurance Company, a Pennsylvania Corporation,

Defendant.

_____ /

DEFENDANT, ACE AMERICAN INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendant, ACE AMERICAN INSURANCE COMPANY (hereinafter "ACE"), pursuant to F.R.C.P. 56 and S.D. Fla. L.R. 56.1 and pursuant to this Court's *sua sponte* and *ore tenus* Order dated May 28, 2015 [D.E. 123], files this Motion for Final Summary Judgment and Incorporated Memorandum of Law, and in support thereof, states as follows:

I.
Procedural and Factual Background, and ACE's Basis for the Instant Motion

This is an insurance coverage action in which PAVARINI CONSTRUCTION CO. (SE), INC., individually, and for the use and benefit of STEADFAST INSURANCE COMPANY, seeks coverage from ACE for costs incurred to resolve a claim for property damage at a luxury condominium project located at 900 Biscayne Boulevard, Miami, Florida (the "900 Biscayne

Project"), under a general liability policy in the Project's Owner Controlled Insurance Program ("OCIP"). The Project was developed by Terra-Adi International Bayshore, LLC ("Terra"). Terra is the "Owner" under the Project OCIP and the first named insured under the OCIP policies. PAVARINI was the general contractor for the Project, but did not self-perform any construction work. Rather, all construction work was performed by PAVARNI's subcontractors. PAVARINI and its subcontractors are insureds under the Project OCIP policies.

The OCIP includes a primary layer of commercial general liability insurance provided by American Home Assurance Company ("American Home") and excess coverage provided by ACE. Separate from the OCIP policies, Steadfast Insurance Company issued a Subguard policy to PAVARINI, which provided subcontractor default insurance for the 900 Biscayne Project, and specifically covered, among other things, the costs of correcting defective or non-conforming work or materials performed by PAVARINI's subcontractors. The ACE policy does not cover defective or non-conforming work.

PAVARINI made a claim for insurance coverage under the American Home and ACE policies alleging that Pavarini's subcontractors, A.W. Smith and TCOE failed or improperly installed structural steel throughout the 900 Biscayne building which caused excessive building movement, which in turn caused cracking in the stucco, and some minor cracking in the columns and beams. A.W. Smith, who had been contracted to furnish and install the concrete masonry units (CMU), including the reinforcement (i.e rebar and anchors), had apparently failed to install or improperly installed, reinforcement within the CMU causing the stucco to crack and/or delaminate from the building. TCOE, who had been retained to install structural steel in the

building's columns and beams, placed inadequate or misplaced steel in the columns and beams causing approximately 300 linear feet of non-structural cracking in the columns and beams.

To address the defective work performed by A.W. Smith and TCOE and to stabilize the building and prevent further damage, PAVARINI's experts designed an exterior metal panel wall system for the outside of the building. The exterior metal wall system provides structural support for the building. The cost of the exterior metal panel wall system was approximately $25 million. PAVARINI demanded that American Home and ACE pay for the cost of this repair- despite the fact that the repair was designed and installed to address A.W. Smith's and TCOE's defective work.

Eventually, American Home paid its full $2 million limit towards the PAVARINI claim. Steadfast has paid for the remaining costs incurred by PAVARINI in installing the exterior metal panel wall system (approximately $23 million). Although PAVARINI has been reimbursed (by American Home and Steadfast) for all of the repair work at the project, PAVARINI is demanding that ACE pay for the cost of this repair. However, PAVARINI has been made whole for the loss by American Home and Steadfast and is not entitled to double recovery. Additionally, this lawsuit was filed by PAVARINI, as Steadfast's assignee, to seek recoupment of the monies from ACE on Steadfast's behalf. Steadfast is not a party to this litigation. Steadfast entered into an Agreement and Assignment with PAVARINI whereby Steadfast assigned to PAVARINI its subrogation rights under the Subguard policy, and PAVARINI alone filed suit against ACE. The Agreement and Assignment, however, were entered years after Steadfast deleted the subrogation provision within its Subguard policy.

Given the clear and unambiguous language of the insurance policies at issue and given the record evidence in this case, ACE seeks an Order from this Court granting it summary final judgement. ACE's argument on final judgment can be summarized in three points:

1) The Agreement and Assignment entered into by PAVARINI and Steadfast is invalid because Steadfast and PAVARINI had previously deleted the subrogation provision to the Subguard policy; and therefore, no subrogation rights could be assigned. Additionally, PAVARINI has been reimbursed and cannot recover twice for the same damages. Therefore, PAVARINI does not have standing either as assignee or individually to bring this lawsuit.

2) Although Steadfast's Subguard policy covers both a subcontractor's defective work as well as "damage to other property" stemming from that defective work, ACE's policy does not. ACE's policy does not cover defective work and only covers damage to other property- as set forth in *United States Fire Insurance Company v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007) and *Auto-Owners Insurance Company v. Pozzi Window Company*, 984 So.2d 1241 (Fla. 2008). It is also ACE's position that the $25 million curtain wall system, designed by PAVARINI and paid for by Steadfast, corrects the defective work of A.W. Smith and TCOE- specifically the missing or misplaced structural steel in the building's concrete masonry units, and concrete columns and beams.

3) Even if the Court were to find that PAVARINI has standing to bring this suit and even if this Court were to find that there are covered damages under ACE's Excess Liability policy, Steadfast's $25 million Subguard policy prorates, on

covered damages, with American Home's $2 million primary policy first. Only if American Home's $2 million policy is exhausted does Steadfast's Subguard Policy then prorate with ACE's $25 million Excess Liability Policy.

ACE's factual basis and legal analysis for these positions follows.

II.
Statement of Material Facts Pursuant to S.D. Fla. L.R. 56.1(a)

1. The Defendant, ACE issued an Excess Liability policy (Policy No. G21974845; Policy Period: 10/25/04-5/31/08) to its named insured, Terra-Adi International Bayshore, LLC (hereinafter "Terra-Adi"). The ACE Excess Liability policy was issued as part of an Owner Controlled Insurance Program ("OCIP"). ACE's Excess Liability policy is attached here as Exhibit "A."

2. ACE's named insured, Terra-Adi, by and through 900 Biscayne, LLC (hereinafter the "Developer"), is the owner and developer of the condominium tower known as 900 Biscayne Bay Condominium located at 900 Biscayne Boulevard, Miami, Florida. The 900 Biscayne Bay Condominium is a 63 floor luxury condominium tower with 516 residential units with office and retail space.

3. The Plaintiff, PAVARINI is an insured under ACE's Excess Liability policy. PAVARINI was the general contractor contracted by the Developer to construct 900 Biscayne Bay Condominium pursuant to a construction contract dated December 30, 2004.

4. A.W. Smith was the "concrete masonry unit" (CMU) subcontractor hired by PAVARINI to do work at the 900 Biscayne Bay Condominium, including rebar and anchors for the CMU, pursuant to a construction contract dated August 4, 2005. TCOE Corporation

(hereinafter "TCOE") was the rebar, post-tension, column/beam and reinforcing steel subcontractor hired by PAVARINI to do work at the 900 Biscayne Bay Condominium pursuant to a construction contract dated June 14, 2005.

5. According to its Complaint, PAVARINI is seeking reimbursement, individually and for the use and benefit of STEADFAST, for in excess of $23 million in costs associated with installing a metal curtain wall that would repair the defective work of its subcontractors AWSI and TCOE. In its Complaint, PAVARINI alleges:

> 16. Pavarini engaged engineers to determine the cause of the problems alleged. Ultimately, it was determined that deficiencies in the concrete masonry unit (CMU) walls, particularly with respect to reinforcing steel in the CMU walls, combined with the improper location of reinforcing steel in the building's concrete columns and beams, resulted in excessive movement of the building and other problems. This in turn was causing stucco cracking and delamination, as well as micro-cracking in the concrete of the columns, beams and shear walls. The subcontractor responsible for the CMU walls, and the separate subcontractor responsible for reinforcing steel fabrication and placement in columns, shear walls, and beams, were distinct from the subcontractors responsible for installing concrete, stucco, paint and other damaged building components.
>
> 17. A multi-stage remediation effort was designed to undertake needed repairs at the Project. Initially, hurricane netting had been installed to prevent falling debris from causing injuries to the public. The permanent repair involves, among other things, the construction of a metal curtain wall system which is designed to both address much of the existing physical damage to the building, and to mitigate against further damage. The selected design allows for the repair of the building without the need to vacate it.
>
> ***
>
> 23. Steadfast has reimbursed and continues to reimburse Pavarini for certain damages covered by Subguard on the Project. To the extent of its payments, Steadfast is subrogated to the rights and stands in the shoes of Pavarini, including Pavarini's rights against responsible subcontractors and insurers. Steadfast subsequently assigned its rights to recover amounts it paid under Subguard, including its subrogation rights to Pavarini. Pavarini is pursuing in this action both its own rights, and Steadfast's assigned subrogation rights.

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> 29. Pavarini's repair effort is continuing. Pavarini estimates that by the end of the repair program, the total cost of the repairs will exceed $23 million.

See, paragraphs 16, 17, 23 and 29 of PAVARINI's Complaint. [D.E. 1]. Therefore, by PAVARINI's own admission in its Complaint, the $25 million metal curtain wall being installed at the project is correcting the defective concrete masonry work performed by AWSI and the defective reinforcing steel work performed by TCOE.

6. PAVARINI filed the instant suit in its own capacity and "for the use and benefit" of STEADFAST. STEADFAST issued a Primary Subguard policy to PAVARINI (Policy No. SGD 9306239-03; Policy Period: 6/06/05-6/06/06). STEADFAST's Subguard policy is attached here as Exhibit "B."

7. Per the allegations in its Complaint, PAVARINI seeks indemnity under the ACE Excess Liability policy for the defective work of AWSI and TCOE. As alleged in the Complaint, PAVARINI has demanded that ACE pay in excess of $23 million due to the faulty workmanship of its subcontractors, plus fees, costs and prejudgment interest.

ACE 's Excess Liability Policy

8. ACE's Excess Liability policy was for the period October 25, 2004 to January 25, 2008, and has a $25 million "each occurrence" limit, and a $25,000,000 aggregate limit.

9. ACE's Excess Liability policy provides general liability coverage to the Developer, PAVARINI and its subcontractors, including AWSI and TCOE, for any "property damage" arising out of an insured's defective work. ACE's Excess Liability Policy provides no coverage for any insured's defective work.

10. The ACE Excess Liability policy is excess over the Commercial General Liability policy issued by American Home Assurance Company to TERRA-ADI. American Home's Commercial General Liability policy contains a $2 million "each occurrence" limit and $4 million aggregate limit. American Home's Commercial General Liability policy is attached here as Exhibit "C."

11. This Court ruled on February 25, 2015 that ACE's Excess Liability policy is excess to American Home's policy. [D.E. 104].

12. The American Home policy contains an "Amendment of Other Insurance" Endorsement that states as follows:

> b. Excess Insurance
>
> This insurance is excess over any other insurance whether primary, excess, contingent or on any other basis:
> (1) Unless such Insurance is specifically purchased to apply as excess of this policy, or
> (2) You are obligated by contract to provide primary insurance.

See, Endorsement [Form 67265 (3/97)] to Exhibit "C."

13. ACE's Excess Liability policy follows form to American Home's Commercial General Liability policy which contains the following "your work" exclusions and definitions of "occurrence" and "property damage":

> **j. Damage to Property**
>
> "Property damage" to:
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products completed operations hazard".

* * *

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

* * *

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

* * *

13. "Occurrence" means:

An accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. As such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

STEADFAST's Subguard Policy

14. STEADFAST issued a Subguard policy to PAVARINI. Unlike the ACE Excess Liability policy, STEADFAST's Subguard policy provides coverage for "property damage," including a subcontractor's defective work. *See*, STEADFAST's Primary Subguard policy attached as Exhibit "B."

15. STEADFAST's Primary Subguard policy contains a $25 million "each loss" limit and a $25 million aggregate limit.

16. STEADFAST's Primary Subguard policy provides coverage for PAVARINI'S defective work, specifically:

> 1. Insuring Agreement
>
> Subject to the Limits of Insurance stated in Item 3, of the Declarations, we will indemnify [PAVARINI] for Loss … but only to the extent of a Default of performance by your Subcontractor/Supplier as respects any covered subcontract or purchase order agreement.

17. STEADFAST'S Subguard Insurance Policy, further defined Loss as:

> Loss means the costs and expenses paid by you to the extent caused by a Default of performance of a Subcontractor/Supplier under the terms of a Covered Subcontract or purchase agreement.
>
> Such costs and expenses are:
>
> 2. Cost of correcting defective or nonconforming work or materials.

18. While the Subguard policy has a bodily injury exclusion there is no exclusion for property damage.

19. The Steadfast Subguard policy contains the following subrogation provision which was later deleted by endorsement:

> VIII. Subrogation and recoveries
>
> In the event of any payment by us under this Policy, we shall be subrogated to the extent of such payment to all of your rights of recovery or other remedies against any persons or organizations with respect to such payment …

See, Section VIII. to Exhibit "B."

20. Endorsement No. 1 to the Steadfast Subguard policy states as follows:

> 10. Section VIII. Subrogation and recoveries is deleted in its entirety and replaced by the following:
>
> You must cooperate with us in any reasonable request that we make of you in the investigation, settlement, or defense of any claim or suit; and you must assist us, upon reasonable request, in the enforcement of any right against any person or organization which may be liable to you because of Loss to which this insurance applies, including but not limited to filing any claims and enforcing any liens or security interest against a Subcontractor/supplier or its property.
>
> After payment of the Lien, any such funds or salvage received will be paid to us and shared between you and us as follows:
>
> 1. First, we and you will be fully reimbursed for our costs of recovery.
> 2. Second, we will be fully reimbursed for the insured Loss amount in excess of the sum of the Deductible and Co-payment amount as stated in Item 4, and 5b. of the Declarations, respectively.
> 3. Then you and we shall share, based on the Co-payment percentage stated in Item 5a. of the Declarations, any remaining sums until the amount of our payment of the Loss and our cost of recovery have been fully reimbursed.
> 4. All further sums recovered shall be retained by you.
>
> The application of amounts recovered as described above apply regardless of any designation of amounts by the Subcontractor/Supplier or any other party.

See, Section 10. of Endorsement No. 1 to Exhibit "B."

21. Steadfast's Subguard policy contains the following "Other Insurance" provision:

> F. Other Insurance
>
> This insurance shall be excess only and non-contributing over any other valid and collectible insurance available to you, whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent, or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of insurance provided in this policy.

See, Section F. to Exhibit "B."

22. This Court ruled on February 25, 2015 that ACE's Excess Liability policy and Steadfast's Subguard policy contain "other insurance" provisions that are "substantively identical." [D.E. 104].

The Agreement and Assignment Between PAVARINI and Steadfast

23. According to the opening paragraph in its Complaint, PAVARINI filed the instant suit "individually, and as assignee of and for the use and benefit of Steadfast Insurance Company." [D.E. 1].

24. The instant suit was filed in on February 12, 2014. [D.E. 1].

25. The Assignment under which PAVARINI filed the instant suit was entered on January 7, 2014. The January 7, 2014 Assignment between PAVARINI and Steadfast is attached as Exhibit "D."

26. The January 7, 2014 Assignment references an October 5, 2011 Agreement that was also signed by PAVARINI and Steadfast. The October 5, 2011 Agreement between PAVARINI and Steadfast is attached as Exhibit "E."

27. The January 7, 2014 Assignment and the October 5, 2011 Agreement were both entered into years after the Subguard policy expired. See, Exhibits "B," "D" and "E."

28. The Subguard policy deleted, by endorsement, Steadfast's Insurance Company's subrogation rights. See, Exhibit "B."

III.
Standard of Review

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Pace v. Capobianco*, 283 F.3d 1275, 1284 (11th Cir. 2002). Summary judgment is appropriate unless there is a genuine issue of fact for trial. *Agee v. Porter*, 216 Fed.Appx. 837, 840 (11th Cir. 2007). "There is not an issue for trial unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). "If the evidence [presented by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50. Indeed, more than a "scintilla of evidence" in opposition is required. *Id.* at 252. "For factual issues to be considered genuine, they must have a real basis in the record." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). "[T]he construction and effect of a written contract of insurance is a matter of law to be determined by the court." *Payne v. United States Fidelity & Guar. Co.*, 625 F.Supp. 1189, 1191 (S.D. Fla. 1985), *citing St. Paul Mercury Ins. Co. v. Huitt*, 336 F.2d 37 (6th Cir. 1964). The interpretation of an insurance contract "is most appropriate for summary judgment" determination by the court. *Id. See also, Hancock v. New York Life Ins. Co.*, 899 F.2d 1131 (11th Cir. 1990); *Jones v. Utica Mutual Ins. Co.*, 463 So.2d 1153, 1157 (Fla. 1985).

IV.
Law and Analysis

A. PAVARINI and STEADFAST INSURANCE COMPANY have no legal standing, whether in contract or in equity, to bring suit against ACE.

i. The subrogation provision within STEADFAST's Subguard Policy was deleted by endorsement.

Section VIII. of Steadfast's Subguard policy originally provided that "[i]n the event of any payment by us under this Policy, **we shall be subrogated** to the extent of such payment to all of your rights of recovery or other remedies against any persons or organizations with respect to such payment." (Emphasis Added). However, this contractual subrogation language was "deleted in its entirety" by Endorsement No. 1 to the Steadfast policy and was replaced with a cooperation clause as between Steadfast and PAVARINI.

Despite having been deleted by Endorsement No. 1., PAVARINI and Steadfast cite to the subrogation rights due under the Steadfast policy and entered into an Assignment on January 7, 2014. Exhibit "D." The Assignment referred to an October 5, 2011 Agreement, wherein Steadfast claims to have "reserved the right to assign to Pavarini for Losses at the Project covered under the Subguard Policy because the OCIP carriers failed to accept coverage." See, Exhibit "D." However, both the October 5, 2011 Agreement and the January 7, 2014 were entered years after the 2004-2009 Subguard policy was issued and the Subguard policy deleted by endorsement any contractual subrogation rights Steadfast may have had. See, Exhibit "B."

Contractual subrogation arises out of the insurance contract. This means that the parties to the insurance contract must look to the language of the policy to determine subrogation rights. As eloquently stated by the legal scholar on insurance law, Professor George Couch, "where the right of an insurer to subrogation is expressly provided for in the policy, its rights must be

measured by, and depend solely on, the terms of such provisions." 16 Couch on Ins. Sec. 222:23; *Zurich-American Ins. Co. v. Eckert*, 770 F.Supp. 269 (E.D. Pa. 1991) (insurer's right to subrogation is measured by, and depends upon, terms of such subrogation provision). Thus, where the policy of insurance expressly deletes contractual subrogation, the parties are held to the clear and unambiguous terms of the policy.

Here, the Steadfast Subguard policy originally contained a subrogation provision at Section VIII. However, PAVARINI and Steadfast agreed to amend the terms of their contract and deleted that subrogation provision. As a result of that deletion, Steadfast no longer held any contractual subrogation rights, and could not have validly "assigned" any subrogation rights to PAVARINI. PAVARINI claims it is a proper assignee by virtue of the January 2014 Assignment and the October 2011 Agreement. However, any plain reading of those two contracts, in conjunction with the Subguard policy and Endorsement No. 1 to the Subguard policy, belies PAVARINI's position. PAVARINI is not a proper assignee. Steadfast held no subrogation rights it could have assigned at the time that the January 2014 Assignment and October 2011 Agreement were entered.

ii. PAVARINI and STEADFAST have no equitable subrogation rights, because they deleted by endorsement their contractual subrogation rights.

In addition to having no contractual subrogation rights to bring this suit, PAVARINI also has no equitable subrogation rights.

The law is well settled that where the right of an insurer to subrogation is expressly provided for in the insurance policy, the insurer's right to subrogation is measured by, and depends solely upon, the terms of such provision. 16 Couch on Insurance 2d Section 61:23, p.

101 (2nd Ed. 1983). A majority of the courts throughout the country have found that contractual subrogation rights trump equitable subrogation rights. *Texas Health Insurance Risk Pool v. Signmundik*, 315 S.W.3d 12 (Tex. 2010), *citing Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007) ("contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement"); *Northern Buckeye Education Council Group Health Benefits Plan v. Lawson*, 103 Ohio St. 188 (Oh. 2007) (cases of contractual interpretation should not be decided on the basis of what is just or equitable, even where a party has made a bad bargain, contracted away all his rights, and has been left in the position of doing the work while another may benefit from the work); *State Farm Fire and Casualty Company v. Pacific Rent-All, Inc*., 90 Hawai'i 315 (Hi. 1999) (while principles of equity may apply to a payment made pursuant to a contract, any subrogation terms written into that contract will govern).

An insurer may waive its subrogation right either expressly or impliedly. *Pacific Rent-All, Inc.,* 90 Hawai'i at 333. In fact, an "insurer may relinquish its subrogation rights, either knowingly or unknowingly." The Law of Liability Insurance, Section 23.04[2]. Here, Steadfast, expressly and knowingly, waived its subrogation rights when, by endorsement, it **deleted** the following sentence from its policy:

> VIII. Subrogation and recoveries
>
> In the event of any payment by us under this Policy, we shall be subrogated to the extent of such payment to all of your rights of recovery or other remedies against any persons or organizations with respect to such payment …

See, Section VIII. to Exhibit "B." Because that subrogation right was deleted, expressly and knowingly, by none other than Steadfast itself, within its own contract and at the time the

Subguard policy was issued, Steadfast had no subrogation rights to "assign" to PAVARINI years later. PAVARINI, therefore, was not a recipient of valid assignment rights and lacks standing to be before this Court "on behalf of Steadfast."

In addition, PAVARINI has no "individual" rights to bring this suit either, as the testimony is undisputed (and PAVARINI admits) that it has been made whole for the $25 million curtain wall repair by American Home and Steadfast. As part of the parties' Joint Pre-Trial Stipulation, PAVARINI admits to the following **uncontested facts:**

> "American Home paid $2 million to Pavarini in connection with the hurricane netting and the Panel System."
>
> "Pavarini has made 32 submissions to Steadfast."
>
> "As of Submission 32, dated Feb. 2, 2015, Pavarini has submitted costs of $24,454,771.60, and Steadfast has documents (i.e. approved) costs of $23,927,587.39."

See, pages 5-6 of the parties' Joint Pre-Trial Stipulation filed with this Court on April 24, 2015. [D.E. 110].

In addition, PAVARINI's William Noonan and Pavarini expert, John Marsicano, admitted that Steadfast has reimbursed PAVARINI over $24 million for the cost of the curtain wall repair. *See*, Deposition transcripts of William Noonan and John Marsicano attached as Exhibits "F" and "G," respectively.

In addition, PAVARINI's own submitted trial exhibit, Reconciliation No. 33, confirms that it has been reimbursed over $24 million for the loss. Reconciliation No. 33 is attached as Exhibit "H."

Thus, this suit must be dismissed for lack of standing.

B. ACE's Excess Liability Policy follows form to American Home's Commercial General Liability Policy which contains the same policy language addressed in *J.S.U.B.*, precluding coverage for defective or nonconforming work.

As this Court already ruled in its February 25, 2015 Order Denying ACE's Motion for Summary Judgment [D.E. 104], the Florida Supreme Court holding in *U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So.2d 871 (Fla. 2000) applies to the facts of this case.

In the *U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So.2d 871 (Fla. 2000), a general contractor engaged in home construction purchased a CGL policy with provisions virtually identical to the American Home Commercial General Liability policy issued to PAVARINI. In *J.S.U.B.*, a subcontractor's failure to use proper soil compaction caused damage to the home's foundation and drywall. *Id*. at 875. Pursuant to the CGL policy, the insurer paid for damage to the homeowner's personal property that resulted from the subcontractor's faulty work, but denied insurance coverage for the cost of repairing the structural damage to the home. *Id*. at 876. The general contractor which had repaired the home's structural damage, sought coverage for the repair expenses under its CGL policy, claiming that the structural damage caused by the subcontractor's work was "property damage" and covered under the policy. *Id*.

Before adjusting the claim of "property damage," the Florida Supreme Court had to determine whether the faulty construction work constituted an "occurrence" under the standard form CGL policy language. *Id*. at 880. Based on prior decisions from the Supreme Court, it held that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy." *Id*. at 888. Because J.S.U.B. did not expect nor intend its subcontractor's faulty work, the defective soil preparation was held to constitute an "occurrence." *Id.*

Having determined that a subcontractor's faulty workmanship could give rise to an occurrence, the Supreme Court turned to whether the subcontractor's faulty soil work had caused "property damage" within the meaning of the CGL policy. The court rejected the insurance company's contention that a subcontractor's defective work rendered the entire project damaged from its inception and instead made the following distinction.

> [F]aulty workmanship or defective work that had damaged the otherwise nondefective completed project has caused "physical injury to tangible property" within the plain meaning of the definition of the policy. If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting "property damage."

Id. at 889.

In so holding, the Supreme Court cited a long list of cases from Florida and other jurisdictions recognizing this distinction that claims solely for "the cost for repairing and replacing the actual defects in…construction" are not covered under CGL policies. *Id*. at 889-890, *citing West Orange Lumber Co. v. Ind. Lumbermens Mut. Ins. Co.*, 898 So.2d 1147, 1148 (Fla. 5th DCA 2005); *Auto Owners Ins. Co. v. Tripp Const. Inc.*, 737 So.2d 600, 601 (Fla. 3d DCA 1999). In *West Orange*, for example, the cost for removing and replacing cedar siding of the wrong grade installed in breach of contract was not "property damage." *Id*. at 1148.

The Supreme Court reasoned that the claim in *J.S.U.B.* did not involve a claim for the cost of repairing the subcontractor's defective work – the soil preparation itself – but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work. *Id*. at 890. The Court stated:

> Accordingly, we hold that a post-1986 standard form commercial general liability policy with products completed-operations hazard coverage, issued to a general contractor, provides coverage for a claim made against the contractor for damage

> to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage.

Id. at 891.

Finding no CGL exclusion applicable, the Supreme Court held that the structural damage to the homes J.S.U.B. built was covered by its CGL insurance policies. Id. In doing so, the Court noted "there is a difference between the claim for the cost of repairing or removing defective work, which is not a claim for 'property,' and the claim for the cost for repairing damage caused by the defective work, which is a claim for 'property damage.'" (citing *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 679-680 (Tex. App. 2006), distinguishing between the cost to remove and replace defective stucco as a preventative measure, which are not "damages because of…property damage", and the cost to repair water damage that resulted from the application of the defective stucco, which were "damages because of…property damage"). Quoting the Supreme Court of Tennessee, the *J.S.U.B.* Court explained "a claim limited to faulty workmanship or materials is one in which the sole damages are for replacement of a defective component or correction of faulty installation." *Id*. at 889. The Court went on to state that the case did not involve a claim for cost of repairing the subcontractor's defective work, but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work; which was the subsequent soil settlement due to the subcontractor's faulty workmanship that caused the structural damage to the homes. "Because there was 'physical injury to tangible property,' we conclude that the structural damage to the homes is 'property damage' within the meaning of the policies" thus finding coverage." *Id.* at 890.

The Supreme Court held:

> We conclude that faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an "accident" and thus an

> "occurrence" under a post-1986 standard form CGL policy. We further conclude that physical injury to the completed project that occurs as a result of the defective work can constitute "property damage" as defined in a CGL policy. Accordingly, we hold that a post-1986 standard form commercial general liability policy with products completed-operations hazard coverage, issued to a general contractor, provides coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage.

Id. at 891.

The Florida Supreme Court further examined its decision in *J.S.U.B., supra*, again addressing a policy with the same language and business risk exclusions governing ACE's Excess CGL policy:

> In *J.S.U.B.*, after the contractor completed the construction of several homes, damage to the foundations, drywall, and other interior portions of the homes appeared. *See* 979 So.2d at 875. It was undisputed that the damage to the homes was caused by subcontractors' use of poor soil and improper soil compaction and testing. *See id.* The contractor sought coverage under its CGL policies issued by United States Fire Insurance Company. The insurer agreed that the policies provided coverage for damage to the homeowners' personal property, such as the homeowners' wallpaper, but asserted that there was no insurance coverage for the costs of repairing the structural damage to the homes, such as the damage to the foundations and drywall. *See id.* at 876.
>
> The issue presented to this Court was "whether a post-1986 standard form commercial general liability policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work." *Id*. at 877. We addressed this question in two parts. We first determined whether faulty workmanship can constitute an "occurrence." *See id*. at 883. After reviewing our decisions in *LaMarche* and decisions from other jurisdictions, we held that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an "accident" and, thus, an "occurrence" under a post-1986 CGL policy." *Id.* at 888. In doing so, we rejected the insurer's assertion that a subcontractor's faulty workmanship can never be an "occurrence," which is defined as "an accident," because faulty workmanship results in reasonably foreseeable damages and is a breach of contract not covered by general liability policies. We explained that we previously "rejected the use of the concept of 'natural and probable consequences' or 'foreseeability' in insurance contract interpretation in *CTC Development*," *id.* at 883, and that nothing in the language of the insuring

> agreement differentiated between tort and contract claims. *See id.* at 884. We also noted that "a construction of the insuring agreement that precludes recovery for damage caused to the completed project by the subcontractor's defective work renders the 'products-completed operations hazard' exception to exclusion (j)(6) and the subcontractor exception to exclusion (ℓ) meaningless." *Id.* at 887. Accordingly, we concluded that the subcontractors' defective soil preparation, which was neither intended nor expected by *J.S.U.B.*, was an "occurrence." *Id.* at 888.
>
> We then addressed whether the subcontractors' defective soil preparation caused "property damage" within the meaning of the policy. *See id.* at 888-89. We held that faulty workmanship or defective work that has damaged the completed project has caused "physical injury to tangible property" within the plain meaning of the definition in the policy. *See id.* at 889. In reaching this conclusion, we rejected the insurer's arguments that faulty workmanship that injures only the work product itself does not result in "property damage" and that "there can never be 'property damage' in cases of faulty construction because the defective work rendered the entire project damaged from its inception." *Id.*
>
> We also observed that "[i]f there is no damage beyond the faulty workmanship or defective work, then there may be no resulting 'property damage.'" *Id.* Because structural damage to the completed homes was caused by the defective work, we concluded that there was "physical injury to tangible property" and thus the claim against the contractor for the structural damage was a claim for "property damage" within the meaning of the policies. *See id.* at 890. *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241, 1246-1248 (Fla. 2008)

The decision in *J.S.U.B.* is controlling in this case and establishes that the ACE Excess Liability policy covers only "property damage" to "other property" and, without question, does not cover the defective work of defaulting subcontractors A.W. Smith and TCOE.

The Subguard policy provides broader coverage than ACE's Policy, because the Subguard policy covers all property damage caused by a defaulting subcontractor; **including** the costs and expenses to correct defective or non-conforming work. The Subguard primary property coverage contains no limitations or exclusions for the type of property damage it covers as a loss:

> 1. Section I. Insuring Agreement is deleted in its entirety and replaced by the following:

Insuring Agreement

Subject to the Limits of insurance stated in Item 3. of the Declarations, we will indemnify you for Loss after application of the Deductible and Co-payment amounts as stated in Items 4. & 5. of the Declarations and subject to the Retention aggregate stated in Item 6. of the Declarations, but only to the extent of a Default of performance by your Subcontractor/Supplier as respects any Covered subcontract or purchase order agreement executed in connections with a Covered project.

The following are modifications made to Section II. Definitions:

3. Definition H. Loss is deleted in its entirety and replaced by the following:

Loss means the costs and expenses paid by you to the extent caused by a Default of performance of a Subcontractor/Supplier in fulfilling the terms of a Covered Subcontract or purchase order agreement, less the unpaid Balance of the Subcontract or purchase order agreement price, including any amounts retained or recovered by you with respect to the Covered Subcontract or purchase order agreement of the defaulted Subcontractor/Supplier.

Such costs and expenses are:

1. Cost of completing Subcontractor/Supplier's obligations under the Covered Subcontract or purchase order agreement, including amounts the defaulted Subcontractor/Supplier is required to pay under the Covered subcontract or purchase order agreement to third parties.
2. Cost of correcting defective or nonconforming work or materials.
3. Legal and other professional expenses paid by you to the extent caused by the Subcontractor/Supplier Default of performance and directly related to those costs described in 1 and 2 above.
4. Costs, charges, and expenses paid in the investigation, adjustment, and defense of disputes of such Loss directly related to a Default of Performance.
5. Indirect Costs.

Multiple defaults of performance by a Subcontractor/Supplier on Covered Projects scheduled to a particular Policy period shall be considered a single Loss for that Policy period.

For the purposes of this insurance, Loss(es) paid by you and our indemnification of such Losses will be attributed to the Policy

> period in which a Covered project is scheduled, not the year(s) in which Loss(es) are actually paid by you.

The default of the subcontractor can be the result of the subcontractor's non-conforming or defective work. While the Subguard policy defines "bodily injury" (II.3) and then excludes it from coverage (III, I.); the policy does not define nor limit its coverage for the property damage caused by a defaulting insured's defective work. The Subguard definition of Loss substantiates this broader and more expansive primary property insurance coverage than the limited coverage provided for damage to "other property" under the American Home primary and the ACE excess policies. This broader coverage is confirmed by the Definitions section of the Subguard policy which states:

> D. Default of performance means failure of the Subcontractor/Supplier to fulfill the terms of the Covered subcontract or purchase order agreement as determined by you or a legally binding authority. A determination by a legally binding authority shall supersede any previous determination.

Pursuant to the definitions of Loss and Default of Performance, Subguard rightfully paid PAVARINI the costs of designing and installing the metal panel system that would repair and replace the defective and non-conforming work of PAVARINI's subcontractors.

"Florida law is quite clear that the parties' intent is to be measured only by the language of the policies unless the language is ambiguous." *Towne Realty v. Safeco Ins. Co. of America*, 854 F.2d 1264, 1267 (11th Cir. 1988).

The ACE excess property liability coverage only takes effect if there is property damage as a result of defective work. *J.S.U.B., supra* at 889.

ACE's excess liability coverage follows form to the underlying American Home primary CGL policy, which contains the following business risk exclusions, limiting "property damage," under the "your work" exclusions and definition of "property damage":

> **j. Damage to Property**
>
> "Property damage" to:
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products completed operations hazard."
>
> * * *
>
> **k. Damage To Your Product**
>
> "Property damage" to "your product" arising out of it or any part of it.
>
> * * *
>
> **l. Damage To Your Work**
>
> "Property damage" to "your work" arising out of it of any part of it and included in the "products completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.
>
> * * *
>
> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. As such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

These provisions led the court in *J.S.U.B., supra*, to find no CGL coverage for faulty or defective construction work; a risk covered by the Subguard policy.

The American Home Commercial General Liability policy provides coverage to the general contractor, PAVARINI, and its subcontractors, including AWSI and TCOE, for any "property damage" arising out of an insured's defective work. *Id.* at 890. The American Home policy does not provide coverage for an insured's defective or non-conforming work (like the

Subguard Policy does), but it does cover "property damage" to other property caused by an insured's defective work. "There is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage' (damage to other property)." *Id.* at 889.

Therefore, Subguard paid PAVARINI for defective work that was only covered by the Subguard policy.

i. PAVARINI failed to identify those damages that would be covered under the ACE policy.

According to Florida law, it is PAVARINI's duty to allocate between covered and uncovered damages. *Trovillion Construction & Development, Inc. v. Mid-Continent Casualty Co.*, 2014 WL 201678, *9 (M.D. Fla. 2014) (finding insured failed to provide a scintilla of evidence suggesting that non-excluded property damages occurred at the condominium). PAVARINI has failed to satisfy that duty. Although PAVARINI claims, in conclusory fashion, that the defective work of its subcontractors at the 900 Biscayne project resulted in "damage to other property" that would be covered under the ACE Policy, PAVARINI has failed to identify any such damages. PAVARINI simply takes the position that 100% of the repair cost is covered under the ACE policy. In fact, because of PAVARINI's refusal to identify that "damage to other property" that would be covered under the ACE Policy, ACE, by and through its experts, did so.

The testimony of ACE expert, Jon Held is uncontested in this case. By and through his October 9, 2014 expert report and later in his deposition testimony, Mr. Held quantified the

"damage to other property" that stemmed from the missing reinforcing steel in the CMU, columns and beams. He identified the "damage to the other property" as the stucco that cracked and/or delaminated from the building envelope and the approximate 300 linear feet caused by the missing or misplaced steel in the columns and beams. He prepared a detailed report and analysis, and concluded that re-applying the stucco and correcting the 300 linear feet of non-structural cracks would have cost approximately $1.7 million. Mr. Held's October 9, 2014 report and Deposition Transcript are attached as Exhibits "I" and "J," respectively. ACE expert, Jon Held's quantification of covered damages at $1.7 million is undisputed and uncontested. None of PAVARINI's experts performed this analysis and PAVARINI never quantified the "damage to other property" that stemmed from the defective and non-confirming work.

ii. PAVARINI only defaulted A.W. Smith and paid all of its $25 million policy limit for the damages caused by A.W. Smith and A.W. Smith alone. Therefore, whether other subcontractors caused "damage to other property" that would be covered under the ACE policy is irrelevant.

Further, despite the discovery in this case placing the lion-share of the blame of the defective work at the site on the CMU subcontractor, A.W. Smith, and despite the fact that PAVARINI only defaulted A.W. Smith, and despite the fact that STEADFAST only paid for the metal panel system repair because of the defaulted and defective work of A.W. Smith, PAVARINI is expected to broadly argue that "other" subcontractors caused "damage to other property" that necessitated the need for the $25 million metal panel system. PAVARINI should be barred from doing so.

PAVARINI has admitted, and it is an **uncontested fact**, that only A.W. Smith was defaulted for this project. See, page 6 of the parties' Joint Pre-Trial Stipulation. [D.E. 110].

("Pavarini declared AWS in default of its subcontract obligations within the meaning of Subguard"). It is also an **uncontested fact** that the "default of" A.W. Smith "triggered coverage under the Subguard Policy, and Steadfast undertook an investigation of the default and the associated loss." *Id*. PAVARINI cannot be allowed, at this 11th hour, to vaguely argue that "others" may have caused "damage to other property" that would be covered under the ACE Policy. Moreover, if Steadfast only paid for the "damage to other property" caused by A.W. Smith's defective work (since A.W. Smith was the only defaulted subcontractor), PAVARINI is barred from making this argument anyway. The record evidence is undisputed that the nearly $24 million in repair costs paid by Steadfast to PAVARINI to date was because of the defaulted (and defective) work of A.W. Smith and A.W. Smith alone. Any argument regarding "others" is barred. No repair costs were incurred for "others." And no payments were made by Steadfast for "others."

C. STEADFAST's Subguard Policy prorates with American Home's primary policy first, and only if American Home's Policy is exhausted does STEADFAST's Subguard Policy then prorate with ACE's Excess Liability Policy.

This Court concluded as part of its February 25, 2015 Order denying ACE's Motion for Summary Judgment that ACE was excess over American Home's $2 million policy, but was not excess over Subguard's $25 million policy. [D.E. 104]. In effect, this Court concluded that there are two lines of coverage- the $25 million afforded through the Steadfast line, and the $27 million afforded through the American Home ($2 million) and ACE ($25 million) line.

Steadfast's Subguard policy contains the following "other insurance" provision:

> F. Other Insurance
>
> This insurance shall be excess only and non-contributing over any other valid and collectible insurance available to you, whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent, or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of insurance provided in this policy.

See, Section F. to Exhibit "B."

American Home's policy contains the following "other insurance" provision:

> b. Excess Insurance
>
> This insurance is excess over any other insurance whether primary, excess, contingent or on any other basis:
>
> (3) Unless such Insurance is specifically purchased to apply as excess of this policy, or
>
> (4) You are obligated by contact to provide primary insurance.

See, Endorsement [Form 67265 (3/97)] to Exhibit "C."

As confirmed by the above quoted language, the "other insurance" provision in Steadfast's Subguard policy and the "other insurance" provision in American Home's policy are substantively identical and cancel each other out. Florida law is clear that when there are two lines of coverage and the "other insurance" provisions between the policies are substantively identical, the policies must contribute by limits. Under this method, each carrier's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all carriers. The "other insurance" clauses in the respective primary policies cancel each other out, which results in our apportioning the policies on a pro-rata basis determined by the policy limits in relation to the loss. *Allstate Insurance Company v. Executive Car and Truck Leasing, Inc.*, 494

So.2d 487 (Fla. 1986); *Motor Vehicle Casualty Co. v. Atlantic National Insurance Co.*, 374 F.2d 601 (5th Cir. 1967). This result is substantiated by the fact that ACE has a true excess policy. *See, Towne Realty, Inc. v. Safeco Insurance Co.*, 854 F.2d 1264 (11th Cir. 1988); *Galen v. Health Care Inc. v. American Casualty Company of Reading*, 913 F.Supp. 1525, 1530 (M.D. Fla. 1996); *Twin City Fire Insurance Company v. Fireman's Fund Insurance Co.*, 386 F.Supp.2d 1272 (S.D. Fla. 2005); *Allstate Insurance Company v. Executive Car and Truck Leasing, Inc.*, 494 So.2d 486 (Fla. 1986) (true excess policies only take effect after all primary policies are exhausted; regardless of "other insurance" provisions in two primary policies).

Here, the Subguard policy must pro-rate first with the American Home and then with the ACE policy as to those damages covered by all three policies. The Subguard policy covers all damages in this case (including the costs incurred in repairing or replacing the defective work of PAVARINI's subcontractors). The American Home Policy and ACE Policy do not cover defective work (or the costs to repair or replace defective work), but would cover "damage to other property" stemming from that defective work. Only ACE, by and through its expert Jon Held, has quantified the "damage to other property" caused by A.W. Smith's and TCOE's defective work. That number is $1,671,157.50 million according to the undisputed testimony of expert, Jon Held. This Court should add to that number the netting/emergency repairs costs incurred prior to installation of the curtain wall of $631,100.76. *See*, page 44 of Exhibit "G." The total costs of repair for damage to other property would then be $2,302,258.26. Thereafter, the following formula must apply:

American Home ($2,000,000) + Subguard ($25,000,000)	=	*$27,000,000*
Total covered damages (excluding defective work)	=	*$2,302,258.26*

American Home pays 2/27 of $2,302,258.26	=	*$170,537.64*
Subguard pays 25/27 of $2,302,258.26	=	*$2,131,720.61*

Even if this Court were to find that PAVARINI has standing to bring this suit on behalf of Steadfast, the American Home and Subguard policies must pro-rate, on covered damages only, by equal shares, under Florida law as noted above. It is undisputed that PAVARINI received the full $2 million limit from American Home. That $2 million more than covers the $170,537.64 actually owed under American Home's line of coverage (once the American Home and Subguard policies pro-rate). No monies are owed by ACE. PAVARINI has been made whole by American Home and Steadfast for the covered damages incurred.

WHEREFORE, the Defendant, ACE AMERICAN INSURANCE COMPANY, respectfully requests that this Court enter an Order:

A) Granting the instant Motion for Summary Judgment;

B) Finding, as a matter of law, that PAVARINI has no standing to bring this suit, individually;

C) Finding, as a matter of law, that PAVARINI has no standing to bring this suit, for the use and benefit of Steadfast Insurance Company;

D) If the Court finds that the Plaintiff does have standing to bring suit, finding, that pursuant to J.S.U.B., ACE has no duty to indemnify PAVARINI for the defective work performed at the project by PAVARINI's subcontractors;

E) If the Court finds that the Plaintiff does have standing to bring suit, finding that the "damage to other property" stemming from the defective work performed by

PAVARINI's subcontractors is capped at $2,302,258.26 given the undisputed testimony of ACE expert, Jon Held in this case;

F) If the Court finds that the Plaintiff does have standing to bring suit, finding that Steadfast Insurance Company's Subguard policy prorates with American Home's primary policy first, and if American Home's policy is exhausted, then it prorates with ACE's Excess Liability policy; as well as,

G) GRANTING any such further relief this Court deems just and proper.

By: /s/ Joel Adler, Esq.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on July 13, 2015, the foregoing document was served via E-mail on all counsel of record identified on the attached Service List.

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