HON. JOHN D. O'DWYER, J.S.C.
BERGEN COUNTY COURTHOUSE
10 MAIN STREET, ROOM 324
HACKENSACK, NEW JERSEY 07601
(201) 221-0700 EX. 25563
*Order Prepared by the Court*

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| **PETER MAX, VIAMAX, INC. and ALP INC.,**<br><br>**Plaintiffs,**<br>**v.**<br><br>**GREAT AMERICAN SECURITY INSURANCE CO. and INTERESTED UNDERWRITERS AT LLOYDS,**<br><br>**Defendants.** | **SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY**<br><br>**Docket No. BER-L-7136-18**<br><br>**Civil Action**<br><br>**ORDER** |

**THIS MATTER** having been opened to the Court on the application of Cullen and Dykman LLP, attorneys for plaintiffs, Peter Max, Viamax, Inc. and ALP, Inc. (hereafter "Plaintiffs") (Jane A. Grinch, Esq., appearing), for the entry of an Order modifying the Umpire's Award dated August 25, 2018 in this matter (hereafter "the Umpire's Award"); and on notice to Mound Cotton Wollan & Greenglass LLP (Philip C. Silverberg, Esq., appearing), counsel for Defendant Great American Security Insurance Company (hereafter "Great American"), and Fleischner Potash LLP (Benjamin A. Fleischner, Esq., appearing), counsel for Interested Underwriters at Lloyd's, London (hereafter "Lloyds"); and the Court having read and considered Plaintiffs' papers submitted in support of this application and Defendants' papers submitted in opposition thereto, and the arguments of counsel; and for good cause shown;

**IT IS** on this 21st day of May, 2019,

**ORDERED** that Plaintiff's Motion to Modify and/or Vacate the Umpire's Rulings and

Award is hereby DENIED for the reasons set forth in the attached Rider.

The Court provides a copy of this Order to all counsel of record on this date via eCourts Civil.

SEE RIDER ATTACHED

Hon. John D. O'Dwyer J.S.C

**PETER MAX**

**V.**

**GREAT AMERICAN SECURITY INSURANCE**

**Docket No. BER-L-7136-18**

**Rider to the Order Dated May 21, 2019**

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On October 29, 2012, Superstorm Sandy struck New Jersey causing massive flooding. Peter Max, a successful commercial artist, and his associated companies Viamax, Inc. and ALP Inc. (together, "Plaintiffs" or "the Max Organization") warehoused a significant portion of the artwork of Peter Max at a warehouse in Lyndhurst, New Jersey. This warehouse sustained significant flooding causing destruction and/or damage to a portion of the inventory located therein. This inventory consisted of paintings, posters, and works on paper in various formats that had been accumulated over the years.

At the time of the flooding, Plaintiffs maintained insurance policies with two insurance companies, Great American Security Insurance Company ("Great American"), which was the primary insurer with limits of $75 million, and Interested Underwriters at Lloyds ("Lloyds"), which provided excess coverage of $325 million (together, "Defendants"). Plaintiffs made claims to each of the insurers for the loss and/or damage to the various artwork.

Early on, Defendants retained the Williamstown Act Conservation Center ("WACC") to assist in determining the extent of damage to the works and in evaluating the possibility of conserving or restoring the damaged works in whole or part. WACC devised a system to identify different types and degrees of damage, which Defendants utilized to separate all the works included in the claim into four grades. This system was further refined during the claims analysis

stage. "Bin sheets" were associated with each crate of material to verify the accuracy of the count and identity of works in each crate as well as catalog the damaged or destroyed contents.

Following this work, the Max Organization submitted a valuation of the claim. Defendants then took examinations under oath of representatives of the Max Organization. Thereafter, Defendants rejected the loss valuation submitted by the Max Organization. The parties then appointed appraisers to review and evaluate the artworks. Each team of appraisers examined every one of the works categorized as a painting and reviewed representative samples of all of the other claimed works.

The appraisers exchanged reports in April 2015 and mid May 2015 in an effort to reach consensus on the value of the loss. Unable to resolve their differences, the parties invoked the terms of the policy and appointed an Umpire, retired Supreme Court Justice Helen Hoens ("Umpire Hoens"). The parties agreed that any decision by the Umpire would be subject to review in accordance with the rules of New Jersey's Alternative Procedure for Dispute Resolution ("APDRA").

The primary Policy provided as follows:

> If you and we do not agree on the amount of the loss or the value of the covered property, either party may demand that the amounts be determined by appraisal.
>
> If either party makes a written demand for appraisal, each will select a competent independent appraiser and notify the other of the appraiser's identity within 20 days of the receipt of the written demand. The two appraisers will then select a competent impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the property is located to select an umpire. The appraisers will then determine and state separately the amount of each loss. The appraisers will also determine the value of covered property items at the time of the loss, if requested.
>
> If the appraisers submit a written report of any agreement to us, the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit only their difference to the umpire. Written

> agreement so itemized and signed by any two of these three, sets the amount of the loss.
>
> Each Appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire will be paid equally by you and us.

Umpire Hoens undertook a painstaking and detailed investigation and analysis in conjunction with the various appraisers and experts. The appraisers on each side of the dispute conducted analysis, conferred by and between themselves, revised their valuations, and attempted to reach consensus. This process occurred over many months and involved various categories and sub-categories of artwork. This resulted in narrowing of disputes in discrete areas but did not come close to resolving the matter.

The Umpire had repeated interactions with the appraisers and other experts on the valuation of losses on particular categories of artwork, attempting to both narrow issues in dispute and to reach consensus in various areas and potentially globally. Without recounting that which is set forth in detail in Umpire Hoens' Opinion, suffice it to say there were significant differences in the approaches, methodology and analysis by the competing experts on either side of the dispute.

Following the extensive work, including multiple revisions and much analysis, consistent with the language of the insurance policies, Umpire Hoens held detailed discussions with the appraisers. In accordance with the governing policy provisions, when a majority amongst the Umpire and two appraisers were in agreement on any particular category of loss, this became the decision of the Umpire.

Umpire Hoens rendered a 51 page Decision and Appendix on September 21, 2018, awarding Plaintiffs in excess of forty-eight million dollars. On October 5, 2018, Plaintiffs filed an Order to Show Cause and Verified Complaint seeking to modify the Umpire's award.

This Court is now presented with Plaintiffs' legal challenge to the findings of Umpire Hoens. Plaintiffs find error in the Umpire's decisions as follows:

1. The Umpire's failure to apply the doctrine of *contra proferentem* to this insurance dispute;
2. The Umpire's failure to construe the subject Insurance Policies as "valued policies" and failure to apply the agreed value of the insured property;
3. The Umpire's application of a "blockage discount" to a portion of the insured loss;
4. The Umpire's construction of the Policy term, "retail value," and her rejection of Winston Art Group's Original Appraisal values notwithstanding that the Umpire herself found that "[i]n WAG's original analysis, retail meant retail, in the sense of the price for which an item is offered for sale or the price for which an end user purchases an item" (Opinion at 31-32); and
5. The Umpire's determination of the number of damaged items in the claim notwithstanding that the Insureds and the Insurers has stipulated to a higher number of damages items.

## STANDARD OF REVIEW

The parties agreed to be bound, in terms of judicial review, in accordance with the rules of New Jersey's Alternative Procedures for Dispute Resolution ("APDRA"). This statute was adopted in New Jersey in 1987 and expanded the right of review over that provided by the Arbitration Act, N.J.S.A. 2A:23A-1 to -19.

N.J.S.A 2A:23A-13 (b) and (c) provide the framework for judicial consideration of an umpire's award. Pursuant to N.J.S.A 2A:23A-13 (b), "a decision of the umpire on the facts shall be final if there is substantial evidence to support that decision..." Section (c) provides for modification of an award if:

1. There was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;

2. The umpire has made an award based on a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted;

3. The award is imperfect in a matter of form, not affecting the merits of the controversy; or

4. The rights of the party applying for the modification were prejudiced by the umpire erroneously applying law to the issues and facts presented for alternative resolution.

The ADPRA permits review of an umpire's decision for prejudicial error resulting from erroneous application of law to the issues and facts presented. Weinstock v Weinstock, 377 N.J. Super. 182, 188 (App. Div. 2005). Stated another way, the APDRA authorizes vacation or modification of an arbitration award on two grounds – (1) where the arbitrator "erroneously applied law to the issues and facts," N.J.S.A. 2A:23A-13(c); or (2) the award is not based on "substantial evidence." N.J.S.A. 2A:23A-13(b).

For each of the legal challenges noted above, Plaintiffs assert that the Umpire erred in application of law to the facts/interpretation of policy provisions. As such, Plaintiffs assert such matters are subject to de novo review by this Court. Furthermore, Plaintiffs asserts that even if this Court determines there was no legal error, the "substantial evidence" standard applies, warranting reversal of the Umpire's various decisions.

Defendants stress the limited parameters of review permitted of an Umpire's decision under New Jersey's Alternative Procedure for Dispute Resolution (APDRA), N.J.S.A. 2A:23A-1-30. The fundamental policy of the Act is "finality and limited judicial involvement. Tretina Printing, Inc. v. Fitzpatrick Associates Inc., 135 N.J. 349, 361 (1994). It is recognized that review under ADPRA is narrow. In the context of the matter before this Court, Defendats point out that if

the Umpire committed prejudicial error in applying applicable law to the issues and facts presented, the Court shall, pursuant to N.J.S.A. 2A:23-13 (f), after vacating or modifying the erroneous determination of the Umpire, appropriately set forth the applicable law and arrive at an appropriate determination under the applicable facts determined by the Umpire.

While Plaintiffs advocate that Umpire Hoens committed prejudicial errors of law, Defendants assert that this is not truly Plaintiffs' position. Rather, Defendants stress that Plaintiffs' position is that the Umpire drew the "wrong" conclusions based on her findings of fact. If one accepts Defendants' position, the analysis then becomes whether the Umpire had substantial credible evidence to support her conclusions.

In their reply brief, Plaintiffs acknowledge that the substantial evidence standard typically requires deference to the trial courts factual findings. (Plaintiffs' Reply Brief at 9). However, "deference need not be accorded to the trial court findings of fact it its determination is so wide of the mark as to be clearly mistaken." Pressler & Verniero. Current N.J. Court Rules, Comment 6.1 to R. 2:10-2.

The Point Headings in Plaintiffs' reply brief addressing each of the five areas under challenge all indicate:

> The de novo standard of review applies to the Umpire's failure to (INSERT LEGAL CHALLENGE).[1] In the alternative, even if the substantial evidence standard were deemed to apply, the result reached under the substantial evidence standard is no different than the result reached under the de novo standard.

[1] The point heading in Plaintiffs' reply brief asserts that a de novo standard of review applies to the following errors of law: the Umpire's failure to apply the doctrine of *contra proferentem* to this insurance dispute; the Umpire's failure to construe the subject Insurance Policies as "valued policies" and failure to apply the agreed value of the insured property; the Umpire's application of a "blockage discount" to a portion of the insured loss; the Umpire's construction of the Policy term, "retail value"; and the Umpire's determination of the number of damages items in the claim.

Based on the foregoing, Plaintiffs urge this Court to apply a de novo standard with respect to the Umpire's application of law to undisputed facts and a "substantial evidence" standard with respect to the Umpire's findings of fact. With the above framework of review in mind, this Court addresses herein the claimed errors alleged by Plaintiffs. The task of this Court is to determine whether the Umpire committed prejudicial error of law for any of the items enumerated by Plaintiffs. For any for which this Court determines there was not prejudicial error the Court must apply the substantial evidence standard.

## FINDING OF EQUAL BARGANING POWER

The issue of whether the parties were of equal bargaining power was necessarily a threshold and important decision for Umpire Hoens. However, Plaintiffs claim that Umpire Hoens erred in making the determination that the parties had equal bargaining power in the negotiation and purchase of the insurance policies at issue.

The impact of a determination of equal bargaining power is significant. Such a conclusion obviates the doctrine of *contra proferentem*. Said doctrine provides that "where a word or phrase is ambiguous, a Court generally will adopt the meaning that is most favorable to the non-drafting party if the contract was the result of negotiations between parties of unequal bargaining power." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008). As noted in Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Company, "*contra proferentem* is a consumer protective doctrine only available in situations where the parties have unequal bargaining power." 229 N.J. 196, 207 (2017). But, "[i]f both parties are equally 'worldly-wise' and sophisticated, *contra proferentem* is inappropriate." Ibid. (quoting Pacifico v. Pacifico, 190 N.J. 258, 268 (2007)).

Plaintiffs submit that the following undisputed facts militate in favor of the doctrine of *contra proferentem* in this matter. Peter Max is a person who: (1) was unrepresented by counsel in connection with the 2012 procurement of insurance; (2) was experiencing cognitive difficulties that later resulted in the appointment of a guardian; and (3) was in desperate financial condition in 2012 and on the brink of bankruptcy. From Plaintiffs' perspective, these facts precluded a finding of equal bargaining power between the parties.

The Umpire focused on three facts in her decision on the issue of the applicability of *contra proferentem*. The first fact was that the Max Organization was a sophisticated business. The Umpire noted that it sought insurance coverage in excess of $1 billion for a large collection of artworks. The second fact relied upon by Umpire Hoens was the collection of Plaintiffs' tax records, showing revenue of $6 million in 2012. Lastly, the Umpire found that the Max Organization was capably represented by its insurance broker and bargained for General Endorsement 4. This bargained for change altered the measure of value for the standard dealer's policy. This was done by first instituting Retail Value for selling price and second by increasing the loss valuation from 80% to 100%. Umpire Hoens found significant that this bargained for more generous measure of loss valuation came with no increase in premium. (Opinion at 27-28).

In her decision, the bargaining noted above led Umpire Hoens to conclude that the parties were "sophisticated, capably represented, and acting at arms-length…" Id. at 28. She further found that the policies were not contracts of adhesion. (Opinion at 26-27). It is clear that Umpire Hoens set forth the correct legal principles regarding interpretation of insurance contracts. Yet, Plaintiffs advocate that the Umpire's conclusion of equal bargaining power was based on flawed factual findings that are not derived from substantial evidence in the record. Plaintiffs point to: (1) financial distress (extreme) at the time the policy was procured in 2012; (2) the lack of legal

counsel as opposed to an insurance broker; and (3) that the policy issued was almost entirely a standard boilerplate policy issued by Great American. Counsel for Plaintiffs stressed at oral argument that there was minimal negotiation between the parties to what Plaintiffs assert remained largely a boilerplate policy. Based on these facts, Plaintiffs submit that the correct application of law to the facts require a finding that *contra proferentem* applies. It is for this Court to determine both if there was substantial evidence and whether the law was applied correctly to the facts to support the conclusion reached by Umpire Hoens.

Plaintiffs assert that the general rule is to apply *contra proferentem* and that there is only a very narrow exception which should not apply herein. Rather, the exception applies only when the insured was a meaningful participant in the drafting of the insurance contracts and where the policyholder had bargaining power and sophistication.

This Court is unpersuaded by Plaintiffs' position. As noted in Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Company, *contra proferentem* is a consumer-protective device "only available in situations where parties have unequal bargaining power." 229 N.J. 196, 208 (2017). If both parties are equally "worldly-wise" and sophisticated, *contra proferentem* is inappropriate. Ibid. Umpire Hoens carefully examined the controlling legal principles and applied same to the facts herein. That Umpire Hoens relied upon certain facts to a greater degree than the facts emphasized by Plaintiffs does not render her decision flawed legally. Umpire Hoens found, "we do not here deal with a contract of adhesion, but with a standard form dealer's policy that was altered by sophisticated parties, capably represented, who engaged in arms-length transitions." (Opinion at 27). Based upon this finding, the Umpire determined that the "insurance policies at issue are not contracts of adhesion that require application of presumption in favor of the insured. Id. 28.

Utilizing the de novo standard of review urged by Plaintiffs, it cannot be said that there was error in application of the law to the facts. Umpire Hoens recognized and understood the doctrine of *contra proferentem* but found that the facts as to the dealings between the parties was such that the doctrine should not apply. At oral argument, Defendants stressed that Umpire Hoens clearly set forth the controlling legal principles and that Plaintiffs' objection was not one of legal error but one where the Umpire relied on certain facts more than others.

There was substantial evidence in the record to support the Umpire's decision that the parties were of equal bargaining power. The three facts relied upon by Umpire Hoens set forth above provide a more than adequate basis to uphold the decision. Seeking the level of coverage sought coupled with negotiations to change a specific complex term of the policy bespeaks a level of sophistication well beyond the normal insurer-insured relationship. This Court according deference to the Umpire's factual determination does not find that the findings were so wide of the mark as to be clearly mistaken. The Umpire's determination to not invoke the doctrine of *contra proferentem* is upheld.[2]

**DECISION AS TO "VALUED POLICIES"**

The second error claimed by Plaintiffs focuses on Umpire Hoens' decision that the policies were not "valued policies." A "valued" policy is one in which the "value of the property insured is definitely settled by the contract engagement of the parties so that in the event of a total loss proof of the actual value becomes unnecessary." Karcher v. Philadelphia Fire & Marine Insur Co., 32 N.J. Super 496, 499 (App Div 1954), modified 19 N.J. 214 (1955).

[2] Plaintiffs submit that the failure of Umpire Hoens to apply the doctrine of *contra proferentem* is a basis for upsetting the other findings of Umpire Hoens as to which Plaintiffs claim error. Given this Court's determination that the doctrine does not apply, the Court does not analyze the additional claimed errors of policy interpretation under the doctrine.

Plaintiffs submit that the course and conduct of the parties in the negotiation and procurement of the policies, including documents and valuations submitted and referred to therein, results in a determination that the policies were valued policies. Plaintiffs point to two spreadsheets annexed to the Lloyds excess policy that set forth the value of the Insured Property. The spreadsheets provide a listing of the artworks covered under the Policy; the location of the artworks; and the retail and wholesale value of the artworks. Further reliance is placed upon a written statement provided by Catherine Tornsey, Plaintiffs' insurance broker who represented Plaintiffs in the negotiation for the procurement of the policies. It is Plaintiffs' position that extrinsic evidence in the record establishes that Great American and Lloyds "agreed to use the provided inventory spreadsheet and sample retail price lists… as the basis of valuation in the event of a claim." (Plaintiff's Reply Brief at 3).

The spreadsheets attached to the excess policy do not contain a specific value for any one item insured and the amount of insurance does not match the total of the values reported to the Excess Insurer. Given that the spreadsheets do not provide the value for any specific work of art, Defendants assert these were not "valued policies."

Defendants stress that the primary policy issued by Great American does not contain nor reference the spreadsheets annexed to the excess policy. Furthermore, the language of the primary policy contains the following valuation provision:

> How Much We Will Pay
> In case of a partial loss, we will pay all related expenses to restore the item to its condition prior to loss. Loss in value, if any, following restoration is covered and shall be agreed by you and us.
> If an item is lost or destroyed, we will pay the value of that item as follows:
> - For property of others that has been consigned to you for sale, we will pay the amounts agreed upon by you and the owner prior to any loss plus 10%.
> - For your stock held for sale, we will pay the greater of the selling price less 20% or cost plus 10%.

- For items sold but not delivered or removed, we will pay the selling price.
- For your art reference library, we will pay the current market value of the property at the time of the loss.
The most we will pay in total for each incident of loss is the amount shown on the policy information page.

Defendants also point out that the valuation provision was amended by way of negotiation of the parties:

General Change Endorsement No. 4
This endorsement amends your policy as follows:
In the event of physical loss or damage to the insured property, we agree to the following valuation:
Retail Value: In respect of original works of art and original posters being part of the unsold stock belonging to you.
Wholesale Value: Being 50% of the retail value in respect of other prints and posters forming part of the unsold stock belonging to you.
There is no premium charge for this change.
All other terms and conditions of your policy remain the same.

As noted by the defense, Umpire Hoens found the negotiated change to Endorsement No. 4 to be of importance. As set forth in her decision, "[t]he broad effect of this Endorsement, therefore, as the parties agree, was to leave unchanged the mechanics for addressing partial losses but to alter the calculation of value in general." (Opinion at 14). It is the view of this Court that the negotiation of the change to Endorsement No. 4 necessarily reflects a recognition that the position now advocated by Plaintiffs is flawed. The change to Endorsement No. 4 is of no moment if the valuation contained in the spreadsheet annexed to the Excess Policy (but not to the Primary Policy) is controlling. Defense counsel further points out that Plaintiffs utilized appraisers who rendered a valuation assessment while participating in the appraisal process, which would be inconsistent and at odds with an agreed value policy.

The Umpire's finding that the policies were not "valued policies" has substantial credible evidence to support same. Although Plaintiffs forcefully argue for the proposition that the attachment of the spreadsheets to the Excess Policy results in a finding that the valuation on the spreadsheets controls for the Primary Policy, there is no evidence to support same. The Primary Policy is silent as to spreadsheets. The spreadsheets are neither attached to the Primary Policy nor referenced within same. Moreover, although Plaintiffs assert the policies were written in tandem, there is little evidence to support this conclusion.

Accepting Plaintiffs' claim that the policies were "valued policies," there would have been no necessity for the extensive, painstaking and detailed appraisal evaluations undertaken by each side of the dispute. Same would not have been necessary as the values would have already been determined.

It is clear to this Court that the Umpire made a correct legal determination that the policies were not "valued policies." The Umpire fully considered the policies and construed same in an appropriate fashion.

**RETAIL VALUE**

Plaintiffs assert that even if the policies are not "valued policies," Umpire Hoens erred in construing and applying the policy term "retail value." It is the position of Plaintiffs that the policies provide that in the event of a loss, Defendants shall pay the "retail value" of original works of art and original posters and the "wholesale value of prints and posters, defined as 50% of 'retail value.'" In other words, "retail value" is the agreed value that determines the loss payout.

The term retail value, according to Plaintiffs, although not defined in the policies, has a well-understood definition in the context of the valuation of fine art. The Appraisers Association

of America ("AAA") defines retail value as a "reasonable amount in terms of US dollars that would be required to purchase a property of similar age, quality, origin, appearance, provenance and condition within a reasonable length of time in an appropriate and relevant market." (Plaintiffs' Reply Brief at 24).

Utilizing the AAA definition of retail value, Plaintiffs' appraiser Winston Art Group ("WAG") provided a methodology for calculating the loss. According to Plaintiffs, this methodology which adopted "retail value" rather than "retail replacement value" was proper. The methodology used extensive sales records provided by the Max Organization and kept in the regular course of business as well as Road Show records. Road Shows had a consignment agreement with the Max Organization. In addition to sales data, WAG consulted with third-party galleries concerning pricing. WAG continued to refine its loss calculations over time and in doing so recognized that the "listed prices were almost invariably discounted in sales to direct purchasers and consignments to galleries and in transactions with other sales partners." (Opinion at 22).

The thrust of Plaintiffs' claimed error is that the Umpire was required to utilize the policy term "retail value" as it is defined by AAA. Plaintiffs further note that Endorsement No. 4 was changed by mutual bargaining of the parties and the intent was to apply retail value.

At oral argument, Defendants stressed that from a factual standpoint an overwhelming majority of immediate purchasers were purchasers of large bulk quantities that were later resold for higher amounts. Defendants assert that it is the price paid by the direct purchasers to the Max Organization rather than the price paid by end-purchasers which should control the analysis.

Defendants assert that the measure of retail value utilized by the Umpire was supported by substantial evidence in the record. The prices relied upon by Plaintiffs often reflected sales to

individuals by galleries as opposed to direct sales by Plaintiffs to the galleries themselves, which were Plaintiffs' actual customers. The Umpire noted that the facts demonstrated that the great majority of sales were bulk sales. Such sales sold at a steep discount from the Max list price. According to Defendants' appraiser, Victor Weiner Associates ("VWA"), the methodology relied upon by WAG, resulted in grossly inflated retail value numbers that did not reflect sales prices in any market.

While Plaintiffs argue that the matter before this Court is a straightforward legal analysis upon which Umpire Hoens erred, such an argument is itself simplistic. Plaintiffs assert that it is for this Court to apply the definition of "retail value" and accept the data and methodology relied upon by WAG. The problem is that the "retail value" is not a legal determination in this instance but a factual one. As Umpire Hoens recognized, to accept Plaintiffs' argument would be to divorce the term "retail value" from the realities of the Max Organization and its sales history. The term "retail value" in the matter before this Court can only be understood by reference to and consideration of the past sales history. Stated another way, the concept of "retail value" is not one fixed by precise definition in the law. Rather, it is determined on a case-by-case basis.

Umpire Hoens determination of retail value was derived from her in-depth study and consideration of the Max Organization and its sales history, volume, and practices. The undisputed facts demonstrate that in many categories of artwork (the categories having been particularly determined), the sales were largely bulk sales at prices far removed from gallery asking prices. Umpire Hoens recognized this reality and employed a methodology to effectuate same. This Court does not find an error of law in doing so. Umpire Hoens' Opinion demonstrates consideration of each methodology recommended by either side of the dispute. As she noted:

> There is some merit in each of the approaches, but each runs afoul of the overarching principles of law expressed above by presenting the distinct possibility that one party will gain a better deal than the one to which the parties agreed, resulting in a windfall.
>
> [Id. at 35.]

The Umpire adopted a methodology for determining retail value based on substantial credible evidence. This necessarily was not an error legal in nature. It cannot be said that Umpire Hoens' failure to adopt the definition of "retail value" set forth by the AAA was error. There is no established legal precedent requiring use of same. Instead, the Umpire utilized a methodology particularly attuned to the particular facts of this matter. To do same was both legally proper and supported by the evidence.

## USE OF BLOCKAGE DISCOUNT

Plaintiffs submit that the Umpire's decision to apply a "blockage discount" to a portion of the loss was erroneous. A blockage discount was applied to three categories of Property for which Plaintiffs sought reimbursement: (1) Overpaints: 15%; (2) Prints: 15%; and (3) Posters: 25%. This resulted in a reduction in the claim's value of $5,303,979.00.

It is Plaintiffs' position that given the absence of any reference in the Policies to a blockage discount, the discount cannot as a matter of law be applied in calculating the amount of the claim. Plaintiffs further submit that the use of blockage discounting, typically involving the bulk sale of personal property, is not applicable herein.

Blockage discounting is most frequently utilized in tax and estate cases involving liquidation of art following the death of an artist. Plaintiffs' counsel argues that it is inappropriate in the context of valuing art for purposes of an insurance claim. Plaintiffs emphasize that the use of blockage discount is premised on the need to liquidate the estate of a recently deceased artist in

a short timeframe due to tax considerations. This is in contrast to the situation where a living artist seeks to strategically sell artworks over time to maximize value.

Plaintiffs stress that given the absence of any language in the policies referencing blockage discount, it should not be applied. Such application has the impact of materially reducing an insured's recovery. Furthermore, Plaintiffs argue that use of a blockage discount refers to a situation of a bulk buyer purchasing a large block of art, which is not the scenario herein nor was it envisioned under the terms of the insurance policies. Plaintiffs assert that under the doctrine of *contra proferentem*, the use of a blockage discount was inappropriate.[3]

Defendants, not surprisingly, assert that Umpire Hoens was correct in her application of blockage discount to certain categories of artwork at issue. In utilizing the blockage discount, WAG, Plaintiffs' appraiser, relied upon the Uniform Standards of Professional Appraisal Practice ("USPAP"), which provides that an "appraiser must refrain from valuing the whole solely by adding together the individual values of the various component parts" in a mass appraisal. (Opinion at 36-37). Defendants emphasize that the term "retail," as used in the policies, had to be defined by the Insurance Appraiser in the context of the significant number of bulk sales by the Max Organization. Such a concept was vigorously opposed by the appraisers for Plaintiffs.

The appraisers on each side of the issue had sharply divergent views on the issue of applying blockage discount to the loss. VWA, Defendants' appraiser, opines that blockage discounts apply because the loss was a great quantity of items valued as of a single date, thereby requiring appraisal on a mass basis. WAG, Plaintiffs' appraiser, rejects the concept of blockage discount in its entirety. Rather, WAG asserts that blockage discount was not included in the

[3] Plaintiffs also argue that the doctrine of *contra proferentem* should be applied. As set forth in Point 1, this Court has declined to invoke this doctrine based upon the Umpire's decision and this Court's determination upon de novo review.

policies' provisions and is inconsistent with the use of the term Retail Value. Furthermore, WAG contends the assumption that the value should depend on selling the complete body of work at one time is a flawed concept. Lastly, WAG claims that the discounts calculated by VWA were so large that they render the coverage effectively unavailable.

In the continued back and forth exchange between the appraisers and the Umpire, VWA also provided court decisions to support the acceptance of blockage discounts. Plaintiffs take exception to the Umpire's consideration and use of an unreported decision out of the Southern District of New York, Silverstein v. XL Specialty Ins. Co., 2016 WL 3963129 (S.D.N.Y. July 21, 2016). Plaintiffs point to the fact that it is both out-of-state and unreported and contend that the Umpire's reliance upon same was misplaced for multiple reasons. Plaintiffs stress that aside from Silverstein, no Court in the United States has recognized that a blockage discount should apply in the context of valuing fine art when determining a payout in an insurance claim during the artist's lifetime. An entirely different set of considerations are present when blockage discounts are applied following the death of an artist.

Umpire Hoens' decision discusses at great length both the Silverstein decision and the competing positions on blockage discounts and notes "[t]hese diametrically opposed positions each had some merit." (Opinion at 40). Ultimately, Umpire Hoens determined:

> It became apparent that it was not appropriate to consider the entire claim to be a single mass for any appraisal purposes. Rather, the claim needed to be addressed as the appraisers had throughout, by reference to the categories and subcategories, not all of which would appropriately be considered to be a mass. Some, such as the Other Category and the Paintings Category were not filled with identical pieces of art nor were they of such numbers as to fit within the concepts that underlie valuation as a mass. Other categories, including Posters and Prints, fit more closely into the theory that gives rise to a mass appraisal, making it reasonable to apply a blockage discount but one that would not so diminish the value as to violate the overarching considerations imposed by the governing legal principles.

[Id. at 41-42.]

Of particular note is the fact that Umpire Hoens carefully assessed the various categories of artwork. For some categories, i.e. "Other" and "Works on Paper," Umpire Hoens rejected a blockage discount. For others, such as "Posters and Prints," a blockage discount was applied. In determining that a blockage discount should apply to Posters, the Umpire found "because of the very large quantities of items included in this category (84,596) and because the category consisted of multiple identical works that were fungible, unlike categories such as Paintings in which each item was an individual work of art, a mass appraisal valuation was deemed to be appropriate." (Opinion at 47).

Much like Plaintiffs' criticism of Umpire Hoens' decision on "retail value," Plaintiffs' criticism of the use of blockage discount fails to take into account the realities of the sales by the Max Organization. Umpire Hoens recognized that to reach a fair and just resolution it was incumbent upon her as Umpire to effectuate the purpose of the insurance policies. In doing so, Umpire Hoens applied the Board Evidence approach, Elberon Bathing Co., Inc. v. Ambassador Insurance Co., Inc., 77 N.J. 1 (1978).

In deciding to utilize the blockage discount, Umpire Hoens commented on Plaintiffs' appraisers' approach to valuation and observed that the approach "overlooked the possibility that many of the items had not sold in the past and that the entire body of works likely would not in the future be sold at those prices." Id. at 35.

This Court finds that the Umpire did not err in her determination to the use of blockage discount. There was no error of law in applying a blockage discount. Much like the issue with

regard to "retail value" blockage discount was appropriate in the particular factual scenario herein. As set forth above, the decision was supported by substantial credible evidence.

## THE COUNT OF ITEMS

The last error Plaintiffs claim centers around the Umpire's determination as to the number of damaged items. The Umpire found there were xxx[4] insured and damaged items. Plaintiffs assert that this determination was reached despite the stipulation between the parties to a higher number of damaged items.

The discrepancy Plaintiffs allege is based upon sign-off sheets, which contain the signatures of representatives of the insurers. Plaintiff asserts that the sign-off sheets demonstrate xxx items. Defendants challenged this count and requested that plaintiff provide the documentation to support such a count. Plaintiff was unable to do so. Umpire Hoens chose not to review the sign-off sheets independently, but rather requested that the parties meet and resolve any differences as to the count. Plaintiff asserts that "HSNO, the Insurer's forensic accountant, failed and refused to review the sign-off sheets proferred by Max." (Plaintiffs' Reply Brief at 26). From Plaintiffs' perspective, the dispute as to the count was not resolved due to the fact that necessary tasks were not performed. Simply put, Plaintiffs claim the Umpire failed to carry out an essential function. Plaintiffs take issue with the Umpire's conclusion that "there was no method to verify higher counts asserted by the Insured." (Opinion at 30).

Defendants deny there was error, noting that throughout the process the counts differed between the parties. Defendants assert that the challenge to the count fails because Plaintiffs submitted no evidence to support a calculation different from that of the Umpire. Umpire Hoens'

[4] Redacted at request of parties. Not essential to set forth herein.

Opinion notes same and recounts the attempts made throughout the process to resolve the discrepancy. Defendants assert that Plaintiffs failed to provide any documents to support a tabulation error.

The Opinion sets forth the factual background to her determination to accept the undisputed agreed to lower count number:

> The original compilation of the items to be included in the claim was undertaken in circumstances, described above, that through the fault of none of the participants was chaotic. This led to the creation of a system for inspecting, grading, and cataloguing the items in the claim the relied on thousands of bin sheets, each bearing multiple sets of initial that, when tabulated by the accountants for the Max Organization and for the Insurers, did not match. Although it initially appeared that the discrepancy might be due to the inclusion of items on the bin sheets, and therefore in the claim, that were inspected but found not to be damaged, when those items were removed from the claim by agreement of the parties, the differences in the count of items asserted by each party to be correctly included in the claim were still significantly different.
>
> [Opinion at 29.]

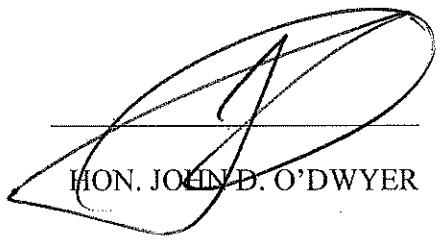
Plaintiffs allege that Defendants agreed to a higher number of damaged items than that found by Umpire Hoens. Contrarily, Defendants assert that Plaintiffs have failed to present any documents, either during the appraisal processor on the discovery phase of the litigation, to support the claim of a higher number of damages items.

Given that Plaintiffs have not provided evidence to establish there were a higher number of damaged items, the decision by Umpire Hoens cannot be assailed as lacking in substantial credible evidence. The evidence demonstrates that there existed, without dispute, the number of items considered by Umpire Hoens. This is not a scenario where there was or could be an error of law. In determining the count, the Umpire relied upon information and documentation which clearly supported that number. Plaintiffs were unable to provide evidence to the Umpire to support a different, higher number.

**CONCLUSION**

This Court has thoroughly reviewed the decision of Umpire Hoens and the detailed submissions by all counsel to the dispute. This Court finds that the Umpire did not err in her legal determinations. Furthermore, the factual determinations of the Umpire were based on substantial credible evidence. This Court finds no basis to disturb the legal ruling and factual findings of the Umpire under the standard of review afforded by New Jersey's Alternative Procedures for Dispute Resolution Act, N.J.S.A 2A:23A-1 to 19.

**SO ORDERED** this 20th day of **May, 2019.**



HON. JOHN D. O'DWYER