UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Harmony East Condominium Association,

Plaintiff,

v.

Falls Lake Fire and Casualty Company,

Defendant.

Case Number: 24-CV-2048 SRN/ECW

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MOTION TO COMPEL APPRAISAL

Defendant Falls Lake Fire and Casualty Company ("Falls Lake") hereby responds to the June 24, 2024 Motion to Compel Appraisal And Appoint Umpire (ECF Doc. 18) (the "Motion") filed by Plaintiff Harmony East Condominium Association (the "Association").

INTRODUCTION

The Association's Motion fails for three reasons, each of which on its own is a sufficient basis for denial. First, the Association's entire lawsuit is time-barred because the Association failed to commence suit until long after the Policy suit limitation period had expired.[1] Second, under Minnesota law, when a lawsuit is barred by a suit limitation provision, the right to compel appraisal is also barred. Third, motions to compel appraisal are treated as motions for partial summary judgment, and there are several genuine fact issues that are material to the Motion. Additionally, because the Motion must be denied,

[1] *See* Defendant's Motion to Dismiss and supporting memorandum, ECF Docs. 9, 11.

the Association's request for the Court to appoint an umpire is moot. Accordingly, Falls Lake respectfully requests that the Motion be denied in full.

ADDITIONAL DOCUMENTS COMPRISING THE RECORD

In addition to Exhibits 1 through 17 submitted by the Association in support of the Motion, Falls Lake requests the Court's consideration of other documents filed in this case, which are cited herein as "ECF Doc. #," and the following exhibits to the Declaration of Dennis Anderson, filed herewith, which this memorandum refers to as "**Exhibit #**.".

Exhibit 1: **Email chain August 7, 2023 to Feb. 5, 2024**

Exhibit 2: **File closure letter, October 10, 2023**

Exhibit 3: **Shannon Pierce CV**

Exhibit 4: **Sean Miller CV**

Exhibit 5: **Wade Roos CV**

This memorandum refers to these documents as "**Exhibit #**."

RESPONSE TO ASSOCIATION'S STATEMENT OF FACTS[2]

Page 4, first paragraph: Falls Lake disputes the assertion that a May 11, 2024 storm caused damage to the Property, and the assertion that the public adjuster identified damage attributable to such a storm.

[2] The Association's memorandum of law does not include a statement of undisputed facts in numbered paragraphs but does include a section identified as the "Factual Background" for the Motion. (ECF Doc. 18 at 4-6.) To respond to the Association's factual assertions in compliance with Fed. R. Civ. P. 56, Falls Lake responds to the Factual Background section of the memorandum. For ease of reference, Falls Lake identifies and responds to each paragraph in the Factual Background section before stating additional facts relevant to the Motion.

Page 4, second paragraph: Falls Lake does not dispute the facts in this paragraph per se, but does dispute the timeline it implies. The paragraph states first that the public adjuster prepared its estimate, and then Falls Lake investigated the claim. In fact, the public adjuster's estimate was not prepared until July 17, 2023. (ECF Doc. 19-1 at 3-92 (the "print date" of 7/17/2023 is at the bottom of every page except page 2, which is the cover page).) All of the other events described in this paragraph occurred much earlier. As stated by the Association in this paragraph, Falls Lake issued its first reservation of rights letter on August 24, 2022. (ECF Doc. 18 at 4; ECF Doc. 19-2 at 2.)[3] Falls Lake's denial of the claim occurred on November 23, 2022. (ECF Doc. 19-3.) The public adjuster generated its estimate nine months after the claim was denied.

Page 4, third paragraph (which continues on page 5): Falls Lake does not dispute that the Policy includes the appraisal provision reproduced in this paragraph.

Page 5, only paragraph: Falls Lake disputes that appraisal was demanded in April 2023. The appraisal demand letter cited by the Association in support of this assertion is dated April 4, 2023. (ECF Doc. 19-4 at 2.) However, as stated by the Association in this same paragraph, the letter was not received by Falls Lake until July 17, 2023. (ECF Doc. 18 at 5.) Falls Lake also disputes whether the Association made the July 2023 appraisal

[3] ECF Docs. 19-2 and 19-3 were sent by Claims Adjusting Group, Inc ("CAG"). As noted in Doc. 19-2, CAG is the authorized claims administrator for Falls Lake. Thus, it is undisputed that CAG's communications with the Association and Gavnat were made on behalf of Falls Lake. For ease of reference, the memorandum refers to such communications (and communications coming from Falls Lake's legal counsel) as coming from Falls Lake.

demand. The demand letter submitted in July 2023 states that Gavnat Public Insurance Adjusters – not the Association – is demanding appraisal. (ECF Doc. 19-4 at 2.) It is signed by Gavnat employee Jason Callais and ***is not*** signed by a representative of the Association. (*Id.*) In fact, the letter does not even mention the Association. (*Id.*) Furthermore, the letter does not identify the issues proposed to be submitted to an appraisal panel. (*Id.*) Falls Lake does not dispute the remaining assertions in this paragraph, but states that the documents the Association cites to support the assertions speak for themselves. Falls Lake also does not dispute the factual assertion, stated in footnote 1 on page 5, that an appraisal demand letter signed by the president of the Association's board was submitted four months later, in October 2023. (*See* ECF Doc. 19-4 at 3.) Indeed, Falls Lake affirmatively asserts that the October appraisal demand was the first demand validly signed by an authorized representative of the Association.

Page 6, first paragraph: Falls Lake does not dispute that in September 2023 it requested a cessation of communications with its appraiser until a valid appraisal demand was received but lacks knowledge or information about whether the Association complied with that request. Falls lake does not dispute the remaining allegations in this paragraph, but states that the documents cited to support them speak for themselves.

Page 6, second paragraph: Falls Lake disputes whether the Association complied with its duty to provide information responsive to Falls Lake's document requests and disputes the assertion that the Association "confirmed that it could not locate any additional responsive information." The Association cites the email chain filed as ECF Doc. 19-10 to support this assertion, but the last Gavnat email in that email chain states that Gavnat would

continue to follow up with the Association about additional information responsive to Falls Lake's requests. (ECF Doc. 19-10 at 2.)

Page 6, third paragraph: Falls Lake does not dispute that the Association commenced litigation, and affirmatively asserts that the Association did so in May 2024. (ECF Doc. 1-1 at 2-35.) But Falls Lake does dispute whether the Association's commencement of suit in May 2024 resulted in the preservation of its rights. Falls Lake also disputes that a "2-year statute of limitations" applies to this matter. Indeed, Falls Lake affirmatively asserts that this case is time-barred by the Association's failure to commence litigation within the 1-year suit limitation period clearly and unambiguously stated in the Policy. Falls Lake does not dispute that it has filed a Motion to Dismiss on this basis. (*See* ECF Docs 9, 11.)

Page 6, last paragraph: Falls Lake does not dispute the factual assertions in this paragraph.

ADDITIONAL FACTS RELEVANT TO THE MOTION

1. Minnesota's hail insurance statute, Minn. Stat. § 65A.26, mandates that "[e]very policy of insurance against damage by hail issued by any company, however organized" must provide that "[n]o suit for the recovery of any claim by virtue of this policy may be sustained unless commenced within one year after the loss occurred."

2. Consistent with that statute, the Policy includes this provision limiting the time in which suit may be brought against Falls Lake:

> **32. SUIT AGAINST COMPANY**
>
> No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the "Named Insured" shall have fully complied with all the requirements of this policy, nor unless the same be commenced within twelve (12) months next after inception of the loss . . . .

(ECF Doc. 12-1 at 50.)

3. According to the Association's Complaint, the hail loss allegedly occurred on May 11, 2022. (ECF Doc. 1-1 ¶¶ 12-23; *see also* ECF Doc 18 at 1.) Thus, based on the Association's own allegations, the 12-month suit limitation period stated in the SUIT AGAINST COMPANY provision ended on May 11, 2023.

4. The Policy also provides that the Association has the following duties (among others) after a loss occurs:

> **35. DUTIES OF THE "NAMED INSURED" IN THE EVENT OF LOSS OR DAMAGE**
>
> It is a condition precedent to any payment of loss that the "Named Insured" must see that the following are done in the event of loss or damage to insured property as soon as possible:
>
> ***
>
> c. Give the Company a description of how, when and where the loss or damage occurred.

5. Falls Lake was notified of the Association's insurance claim on August 2, 2022. (ECF Doc. 19-2 at 2.)

6. On August 24, 2022, while its investigation was ongoing, Falls Lake issued a reservation of rights letter informing the Association of the status of the investigation and

reserving its rights under the Policy. (ECF Doc. 19-2.)

7. On November 23, 2022, Falls Lake denied the claim on the basis that the alleged damage to the Association's property did not occur during the policy period. (ECF Doc. 19-3 at 3.) The denial was supported by the conclusions of a roofing expert Falls Lake had engaged to inspect the loss. (*Id.*)

8. On July 17, 2023, Gavnat Public Insurance Adjusters submitted a letter demanding appraisal. (ECF Doc. 19-4.) The letter was signed by Gavnat employee Jason Callais but was not signed by a representative of the Association. (*Id.*)

9. As to the issues to be appraised, the letter includes bracketed text that appears to be an unmodified part of the letter template. (*Id.*) Thus, it is not clear what issues are proposed for appraisal.

10. Also on July 17, 2023, Gavnat prepared its repair estimate. (ECF Doc. 19-1 at 3-92 (the "print date" of 7/17/2023 is at the bottom of every page except page 2, which is the cover page).)

11. On July 27, 2023, Falls Lake acknowledged receipt of the appraisal letter as of July 17, 2023, and acknowledged that the Association had a contractual right to demand appraisal, but noting that to be valid, an appraisal demand would have to be made by the Association. (ECF Doc. 19-5 at 4.)

12. Falls Lake also noted that "[f]rom the text of the appraisal demand letter, it is not clear what issues are to be appraised" and requested clarification of what issues Gavnat was proposing to submit to an appraisal panel. (*Id.*) Neither Gavnat nor the Association have responded to that request.

13. In the same letter, Falls Lake stated 13 Requests for Information ("RFIs") "intended to gather information necessary for the further investigation of the Claim, and particularly information relevant to the issues to be appraised." (*Id*. at 5.)

14. RFI 1 was a request for the Association to "[p]rovide written confirmation from an authorized representative of the Association that the Association wishes to proceed with appraisal . . . . (A copy of your appraisal demand letter countersigned by an authorized representative of the Association would be sufficient.)." (*Id*. at 5.)

15. The July 27, 2023 letter also directed the Association's attention to the SUIT AGAINST COMPANY and DUTIES OF THE "NAMED INSURED" provisions of the Policy excerpted above, specifically reserved rights arising from those provisions, and generally reserved all of Falls Lake's rights under the under the Policy, the common law, and applicable statutes. (*Id.* at 6-8.)

16. After the July 27, 2023 letter, Falls Lake repeatedly followed up to assess the status of the Association's responses to the RFIs. (*See*, *e.g.*, ECF Doc. 19-7 at 12 (August 17, 2023 email: "Friendly reminder about the attached [July 27, 2023] correspondence. Could you please advise when the Association will provide responses to the RFIs?"); *id*. at 11 (August 18, 2023 email: "Can you advise when we will get responses to the RFIs?"); *id*. (August 24, 2023 email: "Friendly reminder about our status requests below, and the outstanding RFIs.").

17. On September 7, 2023, after a month and a half with no substantive response, Falls Lake advised the Association it would close its file 30 days later if the Association did not make a valid appraisal demand and respond to the RFIs. (*Id*. at 2-3.)

18. In follow-up emails on September 26, 2023, Gavnat indicated that additional information would be forthcoming. (**Exhibit 1** at 11-12.)

19. On October 10, 2024, having received no further information, Falls Lake informed Gavnat by letter that the file had been closed. (**Exhibit 2** at 1.)

20. Gavnat responded the same day, requesting that the file be reopened for consideration of additional information. (**Exhibit 1** at 11.)

21. On October 24, 2023 – eleven months after the November 23, 2022, denial of the Claim, and more than five months after the May 11, 2023 expiration of the suit limitation period – the Association finally responded to Falls Lake's RFI 1 by providing a copy of the appraisal demand letter signed by the president of its board. (ECF Doc. 19-8 at 2 (October 24, 2023 email attaching "the appraisal demand letter signed by the current board president"); ECF Doc. 19-4 at 3 (copy of Gavnat's appraisal demand letter countersigned by the board president on October 17, 2024).

22. The new appraisal demand letter includes the same bracketed text as the earlier version, which appears to be unmodified text from the letter template. (ECF Doc. 19-4 at 3.) Thus, despite requests to clarify, it remains unclear what issues the Association proposes to appraise.

23. Nonetheless, in an abundance of good faith, Falls Lake reopened the claim file, noting that "[w]hen full responses to the RFIs are received [Defendant] will consider whether the new information justifies reconsideration of the denial of the claim, and whether an appraisable dispute exists." (ECF Doc. 19-8 at 2.)

24. In a further abundance of good faith, Falls Lake continued to periodically follow up with the Association about the rest of the RFIs and the question of whether an appraisable dispute existed. (*See*, *e.g.*, *id*. at 2 (November 1, 2023 email: "we continue to await responses to the rest of the RFIs that might clarify" whether "an appraisable dispute exists".)

25. On December 4, 2024, Falls Lake's counsel was alerted that on November 6, 2024, Gavnat had submitted additional documents for review that counsel had not received. (**Exhibit 1** at 8.)

26. Falls Lake analyzed the new documents and responded, noting that the information provided pertained to hail damage that allegedly occurred in September 2020. (**Exhibit 1** at 6.)

27. Because the new information confirmed Falls Lake's previous conclusion that the loss did not occur during the May 1, 2022 to May 2023 Policy Period, Falls Lake stood by its denial, but continued to hold the file open for submission of any new information that might impact the coverage determination. (**Exhibit 1** at 6.)

28. Falls Lake thereafter continued to check with Gavnat about any new information that might change the coverage analysis. (ECF Doc. 19-9 at 2 (December 21, 2023 email: "it's my understanding [based on conversations with Gavnat] that the Association is checking for any additional information it may have"); *id*. (January 12, 2024 email: "Checking back to see whether the Association has identified any additional information for [Falls Lake] to consider"); ECF Doc. 19-10 at 2 (February 5, 2024 email: "Please advise whether you have received any additional information from the property

manager for [Falls Lake] to consider"); ECF Doc. 19-12 at 2 (February 27, 2024 email: "We note for the record that the [RFIs] w[ere] originally requested on July 27, 2023 and the claim has been basically stuck in limbo for seven month . . . . [T]he Association needs to either provide the information or let this go").)

29. At various times, Gavnat responded to Falls Lake's inquiries by stating that the Association was still searching for information responsive to the RFIs. (ECF Doc. 19-10 at 2 (January 23, 2024 email: "our client is still searching for additional information regarding your requests); ECF Doc. 19-11 at 2 (February 9, 2024 email: "[The Association] has not been able to provide any additional information. I am hoping for more information in the coming weeks . . . ."); ECF Doc. 19-12 at 2 (February 26, 2024 email: "I have not received any updates from our client. Gavnat will be following up with our client again and will advise if there is more information . . . that they are able to find regarding your requests.")

30. Throughout the time the Association was failing to respond to the remaining RFIs, the parties' appraisers conferred periodically in an effort to select an umpire. (*See*, *e.g.*, ECF Doc. 19-6 at 2 (August 24, 2023 email: "I am told that the appraisers have been exchanging names of umpire candidates, but have not reached agreement on an umpire yet"); ECF Doc. 19-7 at.2-3 (September 7, 2023 letter: "We understand that [the parties' appraisers] have exchanged names of many umpire candidates but have not reached agreement"); ECF Doc. 19-13 at 2 (April 3, 2024 email requesting the appraisers inform Gavnat when an umpire is appointed).)

31. On June 4, 2024, the Association's appraiser stated in writing that umpire selection had ended in impasse. (ECF Doc. 19-13 at 2.)

32. On May 2, 2024, the Association commenced suit against Falls Lake. (ECF Doc. 1-1 at 2.)

33. Thus, the Association commenced suit 23 months after alleged date of loss in May 2022, 18 months after Falls Lake denied the claim in November 2022, and 11 months after the expiration of the Policy's 12-month suit limitation period.

34. Falls Lake removed the case to this Court, and on June 7, 2023 filed its Motion to Dismiss based on the expiration of the suit limitation period. (ECF Docs. 9, 11.)

35. To date, the Association has still failed to comply with its contractual duties under the DUTIES OF THE "NAMED INSURED" provision of the Policy by failing to cooperate with Falls Lake's investigation of the Claim and failing to provide information relevant to the Claim as requested by Falls Lake

36. Falls Lake's Motion to Dismiss is pending.

37. There has been no discovery.

LEGAL STANDARDS

I. The summary judgment standard applies to a motion to compel appraisal.

In *St. Panteleimon Russian Orthodox Church, Inc. v. Church Mutual Insurance Co.*, Civ. No. 13-19787 (SRN/JJK), 2013 WL 6190400 (D. Minn. Nov. 27, 2013) Your Honor adopted the Report and Recommendation of Magistrate Judge Keyes treating the plaintiff's motion to compel appraisal as a motion for partial summary judgment because it sought specific performance of the appraisal provision in the insurance contract. *Id.* at *1-2. Since

then, other judges in this Court have consistently followed the same approach. *See, e.g.*, *Dewall v Am. Family Mut. Ins. Co.*, No. 15-cv-1954 ADM/HB, 2015 WL 5719143, at *1 (D. Minn. Sept. 29, 2015) (granting partial summary judgment in the form of compelling appraisal); *McCoy v. Am. Family Mut. Ins. Co.*, 189 F. Supp. 3d 896 (D. Minn. 2016) (treating a motion to compel as a motion for partial summary judgment); *Darmer v. State Farm Fire & Casualty Co.*, No. 0:17-CV-04309-JRT-KMM, 2018 WL 4443167, at *3 (D. Minn. Feb. 26, 2018) (same).

II. Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The moving party bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment. *McCoy*, 189 F. Supp. 3d at 900 (citing *Shelter Ins. Cos. v. Hildreth*, 255 F.3d 921, 924 (8th Cir. 2001)).

A fact is "material" if it "might affect the outcome of the suit[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a rational factfinder could reasonably determine the issue in the non-moving party's favor. *Brand v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 934 F.3d 799, 802 (8th Cir. 2019).

Especially relevant here is the rule that "[c]ourts look with particular caution at pre-discovery summary judgment motions." *Darmer*, 2018 WL 4443167, at *4 (citing *Brown v. Ameriprise Fin. Servs., Inc.,* 707 F. Supp. 2d 971, 979 (D. Minn. 2010) (denying a

motion for summary judgment before the nonmovant "had the benefit of discovery"); *Stanback v. Best Diversified Prods., Inc.,* 180 F.3d 903, 911 (8th Cir. 1999) ("[S]ummary judgment is proper only after the non-movant has had adequate time to engage in discovery.")

ARGUMENT

I. The Motion cannot be granted because the Association's entire lawsuit is time-barred.

On June 7, 2024, Falls Lake moved to dismiss this case. (ECF Docs. 9, 11.) As explained in Falls Lake's supporting memorandum, three facts are material to that motion. ***First***, the Association has alleged that its loss occurred on May 11, 2022. (ECF Doc. 1-1 ¶ 21.) ***Second***, the Policy's suit limitation provision bars, as a matter of contract, lawsuits commenced more than 12 months after the alleged date of loss. (ECF Doc. 12 at 20.) ***Third***, the Association commenced this lawsuit on May 2, 2024, (ECF Doc. 6) more than 23 months after the alleged date of loss.

Based on Falls Lake's arguments in support of its Motion to Dismiss – which are incorporated here by reference – the application of Minnesota law to those facts leads to one conclusion: this entire lawsuit is time-barred as a matter of law and must be dismissed *ab initio*. Because such a dismissal terminates the Court's authority to adjudicate a case, the Court lacks authority to grant the Association's Motion to Compel. Thus, the only option is to dismiss it. This alone provides a sufficient basis for denying the Motion.

II. Even if the entire lawsuit were not time-barred, the Motion still could not be granted because under Minnesota law appraisal cannot be compelled after a suit limitation period has expired.

In *Johnson v. Mutual Service Casualty Insurance Co.*, 732 N.W.2d 340 (Minn. App. 2007), the Minnesota Court of Appeals held that the expiration of a suit limitation period bars the ability to compel appraisal. The facts in that case are highly analogous to this case, and the same rule applies here.

In *Johnson*, the insured had submitted a claim for fire damage, and a dispute developed over the amount of the loss. *Id.* at 342. Specifically, the carrier paid a certain amount, the carrier demanded more, and the carrier denied liability as to the additional amount. *See id.* n.1. The policy was governed by the Minnesota Standard Fire Policy statute, Minn. Stat. 65A.01. *Id.* at 342. In accordance with the Standard Fire Policy statute – which does not apply in this case[4] – the policy included a two-year suit limitation provision running from the date of the loss. *Id.* Three months after the limitation period expired, the insured demanded appraisal, but the carrier declined to participate in appraisal and denied liability for the additional amount. *Id.* The insured then sued, and the carrier moved for summary judgment, arguing that the suit was barred by the expiration of the limitation period. *Id.* In response, the insured renewed its appraisal demand. *Id.* The carrier

---

[4] Plaintiff argues that the Minnesota standard fire insurance policy's appraisal provision should apply here. ECF Doc. 18 at 1, 7, 8. The Eighth Circuit has held that "the minimum requirements of the [Minnesota] standard fire insurance policy 'apply only to fire losses, and not nonfire losses, under an all-risk insurance policy'" like the Association's. *Noonan v. Am. Family Mut. Ins. Co.*, 924 F.3d 1026, 1030 (8th Cir. 2019) (citing and quoting *Henning Nelson Const. Co.*, 383 N.W.2d 645, 651 n.8 (Minn. 1986)).

still refused to participate, but provisionally appointed an appraiser in case its summary judgment motion was denied. *Id.*

The insured then moved to stay legal proceedings and compel appraisal. *Id.* But the district court granted the carrier's summary judgment motion, holding that the lawsuit was barred by the suit limitation period. *Id.* at 343. The insured appealed, arguing that the suit limitation period did not apply to its motion to compel appraisal. The appellate court disagreed and affirmed the district court's grant of summary judgment, and its implicit denial of the insured's motion to compel. *Id.* at 346.

To explain its decision, the court began by noting, "[i]t is well settled that appraisal does not determine liability under a policy. Liability depends on a judicial determination." *Id.* at 346 (citing *Mork v Eureka-Security Fire & marine Ins. Co.*, 42 N.W.2d 33, 35 (Minn. 1950) (appraisers did not have authority to determine whether a loss was covered under the policy); *Glidden Co. v. Retain Hardware Mut. Fire Ins. Co. of Minn.*, 233 N.W. 310, 312 (Minn. 1930) (appraisal "does not determine liability but only the amount of the loss"); *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425, 427 (Minn. 1928) (an appraisal award "does not preclude the insurer from subsequently having its liability on the policy judicially determined")).

Regarding the liability dispute, the court observed that "even if [the insured] succeeded in determining the amount of the loss through appraisal, she would have to bring an action to determine [the carrier's] liability, and . . . such an action is barred by the limitation on actions contained in the policy." *Id.* Thus, because the lawsuit was time-barred, the appraisal demand was time-barred too. *See id.*

In *Amro v. Liberty Ins. Corp.*, No. CV 12-2753 (DWF/JSM), 2013 WL 12149250 (D. Minn. Apr. 15, 2013), Magistrate Judge Mayeron examined the *Johnson* case and observed, "*Johnson* stands for the proposition that where the insurer's liability under the policy can only be determined in a court of law, and the insured did not commence her suit within the . . . statute of limitations set forth in the policy, as mandated by [statute], the insured cannot side-step that provision and statutory mandate by seeking an appraisal after the [limitation period] ha[s] passed." *Id.* at *7.[5]

The factual similarities between *Johnson* and this case are striking:

- As in *Johnson*, the Policy in this case includes an appraisal provision and a suit limitation provision mandated by statute.[6]

- In both cases, the suit limitation period expired before the insured commenced suit or demanded appraisal.

- Like the carrier in *Johnson*, Falls Lake has denied liability, refused to participate in appraisal, and provisionally appointed an appraiser in case the appraisal should eventually go forward.

- The Association – just like the insured in *Johnson* – has demanded appraisal after the suit limitation period expired, commenced a time-barred lawsuit, and within that lawsuit has moved to compel appraisal.

---

[5] In *Amro*, the outcome was different based on distinguishable facts. Specifically, the insured in *Amro* commenced suit ***before*** the limitation period had expired. Accordingly, Judge Mayeron held that the appraisal demand was not barred, even though it was made after the suit limitation period expired, because it ***would*** be possible to resolve post-appraisal liability questions in the litigation.

[6] In this case the mandate comes from Minnesota's hail insurance statute, Minn. Stat. § 65A.026, which states that "[n]o suit for the recovery of any claim by virtue of this policy may be sustained unless commenced ***within one year after the loss occurred***." (Emphasis added.)

Because the key facts of both cases are essentially the same, the rule that appraisal cannot be compelled after a suit limitation period has expired should also be applied here, and the Association's motion to compel should accordingly be denied.

III. Even if neither the lawsuit nor the Motion were time-barred, the Motion could not be granted because genuine issues of material fact preclude that outcome.

For the reasons explained above, the Association's lawsuit and motion are both clearly time barred because the demand for appraisal and the commencement of the lawsuit both occurred well after the suit limitation period expired. Even if this were not the case, the Association's motion would be precluded by genuine issues of material fact about when and whether appraisal was properly demanded, whether the issues to be appraised are appraisable, whether the Association has complied with its duties under the Policy, and whether Falls Lake impermissibly interfered with umpire selection.

A. There is a genuine issue of material fact about when and whether the Association made a valid appraisal demand.

The Association argues that "immediate appraisal is mandated by statute and black letter law," (ECF Doc. 18 at 7), but overlooks the fact that this argument raises fact questions material to its motion.

Under the Policy, the right to appraisal arises "[i]f the Named Insured and the Company fail to agree on the amount of loss," and then only "upon the written demand either of the Named Insured or of the Company . . . ." (ECF Doc. 12-1 at 48.) Under Minnesota's hail insurance statute, a right to appraisal arises when there is "failure of the parties to agree as to the amount of the loss," plus "written demand of either party . . . ." Minn. Stat. § 65A.26. Either way, the right to appraise arises when there is disagreement

about the amount of loss and a valid appraisal demand by one party or the other. Additionally, for the reasons explained above, when an insured demands appraisal, it must do so within the applicable suit limitation period. In this case, that period ended 12 months after the claimed date of loss, on May 11, 2023.

In its motion, the Association states that it demanded appraisal in April 2023 (ECF Doc. 18 at 5), which is before the suit limitation period expired. But Falls Lake disputes that fact and asserts, with proper support from the record, that the appraisal demand was not provided to Falls Lake until July 17, 2023. *See supra* p. 3. Falls Lake also disputes whether this initial appraisal demand was made by the Association, as required by the Policy and the statute (*supra* pp. 3-4) and asserts that the October 2023 appraisal letter signed by the Association's board president is the only valid appraisal demand in this case (*supra* p. 4). These fact questions are material to the motion, and the fact that they are unanswered precludes summary judgment.

B. There is a genuine issue of material fact about whether the issues the Association seeks to appraise are appraisable.

As noted in Falls Lake's statement of facts, neither the initial appraisal demand signed by Gavnat, nor the October 2023 appraisal demand signed by the Association's board president clearly state what issues the Association proposes to appraise. (*Supra* p. 7 ¶ 8; p. 9 ¶ 21.) Falls Lake has requested clarification but has not received a response. Thus, it is unclear whether the Association's appraisal demand may include issues that cannot be resolved through appraisal. This is also a material fact question that precludes granting the Motion.

C. There is a genuine issue of material fact about whether the Association has complied with its duties to provide information and cooperate with Falls Lake's investigation.

The Policy plainly requires the Association to cooperate with Falls Lake's investigation of the claim and provide the documents requested in Falls Lake's RFIs. The Court has held in other cases that insureds who have not complied with these duties are not entitled to compel appraisal. In *Darmer*, Judge Menendez denied the insured's motion to compel, in part because there was "a very significant factual disagreement between the parties about whether Mr. Darmer ha[d] satisfied his obligations under any reading of the policy." 2018 WL 4443167, at *6. In *St. Panteleimon Russian Orthodox Church v. Church Mut. Ins. Co.*, No. 13-CV-1977 (SRN/HB), 2015 WL 283044 (D. Minn. Jan. 22, 2015), Your Honor considered the carrier's argument that the insured was not entitled to appraisal because it had not provided sufficient documentation to support its claim, and similarly concluded that summary judgment was inappropriate. *Id.* at *3-7.

In July 2023, Falls Lake requested responses to 13 RFIs. Three months later, the Association responded to one of them by submitting a copy of the appraisal demand signed by its board president. One month after that, the Association provided some documents responsive to another RFI, but with no indication of whether that was a complete response. For the 11 other RFIs, the Association has provided nothing. Nonetheless, the Association asserts that "throughout 2023 and into 2024, [the Association] complied with [Falls Lake's] document requests and provided the information it could locate. On February 26, 2024, [the Association] confirmed that it could not locate any additional responsive information." (ECF Doc. 18 p. 6.) That assertion is belied by the very documents cited to support it. In

the February 6, 2024 email, the public adjuster states that "I have not received any updates from our client. Gavnat will be following up with our client again and will advise if there is more information . . . that they are able to find regarding your requests." (ECF Doc. 19-12 at 2.) That statement does not indicate that the Association has no more documents to produce.[7] Thus, there is an open fact question about whether the Association has complied with its duty to respond to Falls Lake's RFIs, and which precludes granting the Motion.

D. There is a genuine issue of material fact about whether Falls Lake interfered with umpire selection.

The Association has asserted that Falls Lake impermissibly interfered with the appraisal process by preventing its appraiser from participating in umpire selection. (ECF Doc. 18 at 11-12.) But the letter cited to support that assertion actually states that Falls Lake instructed its appraiser that he ***should*** proceed with umpire selection. (ECF Doc. 19-

---

[7] The Association also raises a misguided legal argument that it is not obligated to respond to the RFIs because it demanded appraisal. (*See* ECF Doc. 18 at 12-13.) Relying on *White Bear Yacht Club v. Cincinnati Ins. Co.*, 582 F. Supp. 3d 624 (D. Minn. 2022) the Association argues that Falls Lake is not entitled to "pre-appraisal discovery" because "[t]here is no provision in the Policy that speaks to discovery pursuant to the Federal Rules prior to appraisal." (*Id.*) This argument fails because Falls Lake was not seeking discovery under the Federal Rules, but rather as a function of the Association's contractual duties under the Policy. Furthermore, *White Bear Yacht Club* is distinguishable because in that case, litigation and appraisal were proceeding in tandem until the insured refused to proceed and argued that litigation discovery must be completed before the appraisal could proceed. 582 F. Supp. 3d at 632-33. Those facts are not analogous to this case, and Falls Lake is not making that argument. Finally, permitting insureds to evade their contractual obligation to cooperate with claims investigations and provide documents whenever appraisal has been demanded would create a perverse incentive to demand appraisal that would appeal to insureds who may wish to conceal facts about their insurance claims.

5 at 5.) This discrepancy highlights yet another question of fact that – at least according to the Association's legal arguments – is material to the Motion and precludes granting it.

IV. Because the Motion must be denied, the Association's request to appoint an umpire is moot.

For the reasons explained above, the Association's motion must be denied. Without an appraisal, appointing an umpire to serve on the appraisal panel would serve no purpose. This part of the Association's motion should therefore be denied as moot.

Nonetheless, if the Court should order the parties to proceed with appraisal, Falls Lake respectfully requests that the Court consider the following umpire candidates whose CVs have been filed as exhibits:

1. **Shannon Pierce P.E**, Lerch Bates (**Exhibit 3**)
2. **Sean Miller**, J.S. Held LLC (**Exhibit 4**)
3. **Wade Roos**, Jade Claims Services (**Exhibit 5**)

These proposed umpires are duly qualified and experienced, and upon appointment would be requested to confirm that they have no conflicts of interest.

CONCLUSION

Even if this lawsuit and this Motion were not time-barred, the Motion could not be granted because of numerous genuine issues of material fact. Because the Motion cannot be granted, the Association's request for appointment of an umpire is moot. Therefore, Falls Lake respectfully requests that the Motion be denied in full.

ZELLE LLP

July 16, 2024

/s/ Dennis Anderson
Dennis Anderson (#0396147)
Akira Céspedes Gilheany (#0398858)
500 Washington Ave. S., Suite 4000
Minneapolis, MN 55415
(612) 339-2020
danderson@zellelaw.com
acespedes@zellelaw.com

Attorneys for Defendant