**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| Eden Homeowners Association, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>American Family Mutual Insurance Company,<br><br>Defendant. | Case No. 15-cv-3527 (RHK/HB)<br><br>**REPORT AND RECOMMENDATION** |

Anthony T. Smith and Finn S. Jacobsen, Roeder Smith Jadin, PLLC, 7900 Xerxes Avenue, Suite 2020, Bloomington, MN 55437, for Plaintiff

Mark K. Hellie, American Family Insurance, 6131 Blue Circle Drive, Eden Prairie, MN 55343, for Defendant

HILDY BOWBEER, United States Magistrate Judge

This matter is before the Court on Plaintiff's Motion to Confirm Appraisal Award [Doc. Nos. 1-1, 1-3],[1] Plaintiff's Motion to Remand to State Court [Doc. No. 11], and Defendant's Motion to Vacate Arbitration Award [Doc. No. 17]. The motions were referred to the undersigned by the Honorable Richard H. Kyle, United States District Judge, in an Order of Reference dated September 23, 2015. (Order at 1 [Doc. No. 7].)

[1] Plaintiff's original motion was docketed at Docket No. 1-1. An amended motion was docketed at Docket No. 1-3. The Court will refer to the amended motion as the operative motion to confirm.

## I. Background

This lawsuit arises out of an insurance dispute between Eden Homeowners Association, Inc. ("Eden") and American Family Mutual Insurance Company ("American Family"). Eden is a townhome association comprised of twenty-seven buildings. (*See* Jacobsen Aff. Ex. 1 (Businessowners Policy Issued by American Family) [Doc. No. 1-5].) On August 6, 2013, a hail storm damaged the siding on some of the townhomes, and Eden filed an insurance claim with the property's insurer, American Family. (Jacobsen Aff. Ex. 2 at 1 (Smith Letter, Apr. 17, 2015) [Doc. No. 1-5].)

The insurance policy between the parties provides that American Family will not pay for loss or damage caused by or resulting from wear and tear. (Larsen Decl. Ex. 1 at 13 ¶ B.2.*l*(1) (Businessowners Coverage Form) [Doc. No. 9-1].) The policy also provides that American Family will pay for a covered loss or damage within five business days of (1) American Family's receipt of the proof of loss, and (2) American Family's "agreement with you; or, in the event that we use an independent claims adjuster, we have received the agreement and you have satisfied the conditions of the agreement, if any; or an appraisal award has been made." (*Id.* at 37 ¶ B.7.a.) Replacement cost (RC) is not recoverable "[u]ntil the lost or damaged property is actually repaired or replaced" and "[u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage." (*Id.* at 16 ¶ E.5.d.(1)(d)(i)-(ii).)

During its investigation of the claim, American Family located siding materials that it believed to be a reasonable match to the original siding, except for two colors. (Jacobsen Aff. Ex. 4 at 1 (Larsen Letter, July 9, 2015) [Doc. No. 1-5].) The existence of

replacement siding that is a reasonable color match is significant because if such siding exists, it may not be necessary to replace all of the siding on a building, but only the damaged siding. With respect to nine of the buildings, American Family took the position that there existed siding for which there was a reasonable color match where the only difference between the original and the replacement siding colors was due to minimal fading. (Larsen Decl. ¶ 5 & Exs. 3-7 [Doc. Nos. 9, 9-3, 9-4, 9-5, 9-6, 9-7].) In American Family's view, fading is caused by wear and tear, which is excluded from coverage under the insurance policy. (Jacobsen Decl. Ex. 2 at 1 (Larsen Letter, Sept. 25, 2015) [Doc. No. 16-2].)

Eden disputed American Family's position and requested an appraisal. (Jacobsen Aff. Ex. 2 at 1 [Doc. No. 1-5].) Specifically, Eden claimed the insurance policy required American Family to value the loss based on the cost to repair the damaged siding with comparable materials. (*Id.*) Because Eden did not believe the replacement siding identified by American Family was a comparable material, Eden wanted American Family to replace all of the siding on the affected buildings rather than replace only the damaged siding. (*Id.*) The parties proceeded to appraisal.

An insurance appraisal panel appraised damage to twenty-one of the twenty-seven buildings. (Larsen Decl. ¶ 4 [Doc. No. 9].) At the appraisal hearing, American Family presented "Homeowner's Personalized Siding Match Reports," prepared by ITEL Laboratories, Inc., which indicated there was an exact match to the damaged siding on nine of the buildings. (Larsen Decl. ¶ 6 & Exs. 3-7 [Doc. Nos. 9, 9-3, 9-4, 9-5, 9-6, 9-7]; Smith Decl. ¶ 2 [Doc. No. 23].) The appraisal panel also heard testimony from a siding

manufacturer and viewed samples of the siding. (Smith Decl. ¶ 3.) The panel awarded $341,914 in RC and $170,965 in actual cash value (ACV) for the twenty-one buildings. (Jacobsen Aff. Ex. 5 at 1 (Appraisal Award, July 27, 2015) [Doc. No. 1-5].) Under the policy, ACV "is the cost to replace minus depreciation." (Larsen Decl. ¶ 4 [Doc. No. 9].) The appraisal award does not state the specific factual findings underlying the award.

On August 4, 2015, Eden filed a motion in Dakota County District Court to confirm the $341,914 appraisal award, pursuant to Minn. Stat. § 572B.22; for preaward interest, pursuant to Minn. Stat. § 549.09, subd. 1; and for costs and disbursements, pursuant to Minn. Stat. § 549.02 and .04. (Pl.'s Mot. Confirm at 1 [Doc. No. 1-1]; Pl.'s Mem. Supp. Mot. Confirm at 1 [Doc. No. 1-4].) Eden filed an amended motion on August 11, 2015. (Pl.'s Am. Mot. Confirm [Doc. No. 1-3].)

On August 5, 2015, American Family sent Eden a letter challenging the appraisal award for seven of the buildings, which it later increased to nine buildings. (Larsen Decl. ¶¶ 5, 11 & Ex. 8 at 1 (Larsen Letter, Aug. 5, 2015) [Doc. Nos. 9, 9-8].) The RC for the siding on those nine buildings is $110,448, and the ACV is $55,228. (Larsen Decl. ¶ 5 [Doc. No. 9].) American Family offered "to allow the separation of the award by the full panel and release the ACV supplement payment for the other buildings so the insured may move forward with those repairs," rather than ask that the entire award be vacated. (Larsen Decl. Ex. 8 at 1 [Doc. No. 9-8].)

On September 3, 2015, American Family filed a Notice of Removal, removing the case to federal court. (*See* Notice of Removal [Doc. No. 1].) The asserted basis for federal subject matter jurisdiction is diversity jurisdiction under 28 U.S.C. § 1332(a)(1).

(*Id.* at 2.) With respect to the amount in controversy, the Notice stated, "[a]ccording to the Memorandum of Law in Support of Plaintiff's Motion to Confirm the Appraisal Award in the State Action, Plaintiff is seeking damages related to alleged property damage in excess of $75,000." (*Id.*) Eden's memorandum in support of its motion to confirm the appraisal award identified the amount of the appraisal award as $341,914. (Pl.'s Mem. Supp. Mot. Confirm at 1 [Doc. No. 1-4].)

As of September 3, 2015, the date on which the case was removed to federal court, American Family had not paid any of the appraisal award. (Jacobsen Aff. ¶ 15 [Doc. No. 1-5].) On September 17, 2015, American Family paid Eden approximately $115,737 in ACV for the twelve buildings for which it was not contesting the appraisal award. (Larsen Decl. ¶ 12 [Doc. No. 9].) On September 25, 2015, American Family wrote a letter to Eden explaining that although it had released payment for the buildings that were not in dispute, it would continue to challenge the award on the nine disputed buildings. (Jacobsen Decl. Ex. 2 at 1 (Larsen Letter, Sept. 25, 2015) [Doc. No. 16-2].) To date, Eden has not repaired or replaced any of the damaged buildings. (Jacobsen Decl. ¶ 4 [Doc. No. 16].)

## II. Discussion

### A. Eden's Motion to Remand

Eden asks to remand this case to state court on the basis that subject matter jurisdiction is lacking. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Subject matter jurisdiction founded on diversity of

citizenship exists only if the amount in controversy is greater than $75,000, exclusive of costs and interest. 28 U.S.C. § 1332(a).

This case was commenced in state court by Eden's filing of a motion to confirm an appraisal award. No conventional complaint was ever filed. The Court will treat the motion as the complaint for the limited purpose of determining jurisdiction. The motion itself does not allege a specific amount at issue, but asks only that the appraisal award be confirmed.[2] When a specific amount to be recovered is not alleged in a complaint, "the removing party bears the burden of proving, by a preponderance of the evidence, that the amount in controversy in fact exceeds $75,000." *Kaufman v. Costco Wholesale Corp.*, 571 F. Supp. 2d 1061, 1063 (D. Minn. 2008) (citing *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003)). "The burden can be met by submitting proof that the plaintiff's verdict reasonably may well exceed the jurisdictional minimum, or if, on the face of the complaint, it is apparent that the claims are likely above that amount." *Id.* (citations omitted).

In a case removed to federal court, the Court determines jurisdiction as of the date of removal. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938); *James Neff Kramper Family Farm P'ship v. IBP, Inc.*, 393 F.3d 828, 833-34 (8th Cir. 2005). Events occurring after the date of removal, such as the payment of some of the amount originally in dispute, do not defeat jurisdiction once it has attached. *See St. Paul Mercury*, 303 U.S. at 293.

[2] The memorandum in support of the motion identifies the amount of the appraisal award as $341,914.

Eden initiated this action to confirm an appraisal award in the amount of $341,914. None of the award had been paid when the motion was filed or the case was removed. The appraisal award, which is attached as an exhibit to the motion, reflects a RC amount of $341,914 and an ACV amount of $170,965. The Court finds that the amount in controversy is $341,914 because that is the amount of the appraisal award and the amount Eden has asked the Court to confirm. *See Tucson Elec. Power Co. v. Daimler Capital Servs. LLC*, No. CV-12-00323-TUC-JGZ, 2013 WL 321877, at *3 (D. Ariz. Jan. 28, 2013) (finding the amount in controversy requirement met based on the amount of the appraisal award sought to be confirmed); *cf. Dyrdal v. Enbridge (U.S.), Inc.*, No. 10-cv-1970 (RHK/RLE), 2010 WL 1957494, at *2 (D. Minn. May 13, 2010) (in an action to confirm an arbitration award, noting that several courts have found "the amount in controversy . . . is the amount of the award itself") (citing *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1472 (11th Cir. 1997); *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 260 (6th Cir. 1994); *Mannesmann Dematic Corp. v. Phillips, Getschow Co.*, No. 3:00-cv-2324, 2001 WL 282796, at *2 (N.D. Tex. Mar. 16, 2001)).

In the alternative, were the Court to assume that Eden will not replace the siding (even though there is no reason to believe it will not) and that the obligation to pay the difference between the RC and the ACV would never be triggered, the amount in controversy is $170,965, which is the ACV of the loss as determined in the appraisal award that Eden is seeking to confirm. Both amounts set forth in the appraisal award, the RC amount and the ACV, well exceed the $75,000 threshold.

In finding the jurisdictional threshold met, the Court rejects Eden's argument that

the amount in controversy is only $55,228, which represents the portion of the ACV that American Family currently disputes. The Court evaluates jurisdiction on the date of removal, not after American Family paid a portion of the appraisal award.

In sum, Eden is seeking confirmation of an appraisal award that establishes the RC as $341,914 and the ACV as $170,965, neither of which had been paid on the date of removal. Each of these amounts exceed the $75,000 jurisdictional threshold. Consequently, the Court has subject matter jurisdiction over this action.

**B. Confirmation, Vacation, and Modification of an Appraisal Award**

In Minnesota,[3] appraisal awards are governed by the same statutory standards as arbitration awards. *See QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n,* 778 N.W.2d 393, 398 (Minn. Ct. App. 2010) (citing *David A. Brooks Enters., Inc. v. First Sys. Agencies*, 370 N.W.2d 434, 435 (Minn. Ct. App. 1985)). Under Minnesota's arbitration statute, a party to an arbitration proceeding may file a motion to confirm the award with the court. Minn. Stat. § 572B.22. The court must issue an order confirming the award unless the award is modified, corrected, or vacated. *Id.*

American Family moves to vacate the appraisal award on the basis that the appraisal panel exceeded its authority by making a coverage determination. In particular, American Family argues that the appraisal panel determined that faded siding should be replaced, despite the wear-and-tear exclusion in the insurance policy.

A court may vacate an appraisal award when the appraisal panel exceeded its powers. Minn. Stat. § 572B.23(a)(4). However, "[a]bsent a clear showing that the

[3] There is no dispute that Minnesota law applies.

arbitrators were unfaithful to their obligations, the courts assume that the arbitrators did not exceed their authority." *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 239 (Minn. 1982). "It is well settled that appraisal does not determine liability under a policy. Liability depends on a judicial determination." *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007); *see Quade v. Secura Ins.*, 814 N.W.2d 703, 706 (Minn. 2012) ("The scope of appraisal is limited to damage questions while liability questions are reserved for the courts."). Thus, while an appraisal panel decides the amount of the loss, the panel does not decide the legal question of whether the insurer must pay. *Quade*, 814 N.W.2d at 706; *see Trout Brook S. Condo. Ass'n v. Harleysville Worcester Ins. Co.*, 995 F. Supp. 2d 1035, 1041 (D. Minn. 2014) (quoting *Quade*).

But when the insured and the insurer dispute whether damage is a covered loss, "a determination of the 'amount of loss' under the appraisal clause necessarily includes a determination of causation." *Quade*, 814 N.W.2d at 706-07. Nevertheless, the question of coverage, including whether an exclusion applies, remains a legal question for the court. *Id.* at 707. Even though an appraiser may have to construe a contract and assess its legal effect for the purpose of determining the amount of the loss, "an appraiser's liability determinations are not 'final and conclusive,'" and "an appraisal award 'does not preclude the insurer from subsequently having its liability on the policy judicially determined.'" *Id.* (quoting *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425, 426-27 (Minn. 1928)). In other words, the appraiser may have to make a determination about the cause of a loss as "an incidental step in the appraisal process," but "to the extent that determination goes beyond the scope of appraisal and interprets policy exclusions,

that determination is reviewable by the district court." *Id.* at 708.

Based on the Minnesota Supreme Court's guidance in *Quade*, this Court concludes that the appraisal panel did not exceed its authority or improperly make a coverage determination. In ascertaining the amount of the loss, the appraisal panel awarded replacement siding for nine buildings for which American Family contends that only minimal repairs were needed. According to American Family, fading was the only basis on which to replace all siding on those buildings, and fading is excluded from coverage under the insurance policy. Notably, the appraisal award does not mention coverage, exclusions, or fading. The Court finds that any intrinsic determinations made by the appraisal panel about the cause or extent of the damage or the applicability of the wear-and-tear exclusion were made as a necessary, but incidental, part of determining the amount of the loss. The appraisal panel's award neither established coverage for any loss nor excluded a loss from coverage. The award simply established the amount to be paid if American Family agrees the loss is covered or a court determines that coverage exists under the insurance contract.

It is important to note that this case is not an insurance coverage action. There is no claim for breach of contract or a request for a declaration that coverage exists. The parties have not briefed the issues relevant to a coverage determination, and the factual record before the Court is insufficient to make such a decision. The only legal issues before the Court are whether the appraisal award should be confirmed, vacated, or modified, and whether Eden is entitled to costs and preaward interest.

In addition to moving to vacate the appraisal award, American Family also asks to

modify the award on the basis that the appraisal panel exceeded its authority. A court may modify an appraisal award only if:

> (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
>
> (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

Minn. Stat. § 572B.24. None of these occurrences happened here, nor does American Family argue that any of these specific provisions apply. Consequently, the Court concludes the appraisal award should neither be vacated nor modified.

### C. Preaward Interest

#### 1. Applicability of Minn. Stat. § 549.09

Eden seeks recovery of preaward interest calculated from the date of the loss through the date of the appraisal award, pursuant to Minn. Stat. § 549.09, subd. 1(b). This statute provides in relevant part:

> (b) Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed as provided in paragraph (c) from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first, except as provided herein. . . . Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest shall not be awarded on the following:
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> > (1) judgments, awards, or benefits in workers' compensation cases, but not including third-party actions;

> (2) judgments or awards for future damages;
>
> (3) punitive damages, fines, or other damages that are noncompensatory in nature;
>
> (4) judgments or awards not in excess of the amount specified in section 491A.01; and
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> (5) that portion of any verdict, award, or report which is founded upon interest, or costs, disbursements, attorney fees, or other similar items added by the court or arbitrator.

Minn. Stat. § 549.09, subd. 1.

American Family first argues that Minn. Stat. § 549.09 does not apply to appraisal awards because such awards are not mentioned specifically in the statute. Eden responds that appraisal awards are not listed as an exception under § 549.09, and thus they are eligible for preaward interest. It is well-established that when the legislature chooses to list exceptions in a statute, "the exclusion of one thing includes all others." *Maytag Co. v. Comm'r of Taxation*, 17 N.W.2d 37, 40 (Minn. 1944). Consequently, it is of no moment that § 549.09 does not expressly include appraisal awards. They are included by virtue of the exclusion of other types of pecuniary damages. American Family even concedes that § 549.09 "applies to actions and arbitrations" (Def.'s Mem. Opp'n Mot. Confirm at 7 [Doc. No. 8]), but offers no reason or authority to treat appraisal awards differently.

Minnesota state courts have routinely allowed an insured party to recover preaward interest on appraisal awards pursuant to § 549.09. *See, e.g., David A. Brooks*

*Enters., Inc. v. First Sys. Agencies*, 370 N.W.2d 434, 435-36 (Minn. Ct. App. 1985); *Featherstone Ridge Townhome Ass'n v. Am. Family Mut. Ins. Co.*, No. 19HA-CV-14-2480, slip op. at 3 (Dakota Cty. Dist. Ct. Feb. 26, 2015); *Halla Nursery, Inc. v. United Fire & Cas. Co.*, No. 10-CV-13-59, slip op. at 5-7 (Carver Cty. Dist. Ct. Jan. 8, 2015); *Townhomes of Kensington Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, No. 19HA-CV-14-1883, slip op. at 5-6 (Dakota Cty. Dist. Ct. Oct. 13, 2014) (stating § 549.09 "clearly includes" preaward interest on appraisal awards); *Stauber v. Am. Family Mut. Ins. Co.*, No. 69DU-13-2500, slip op. at 3-4 (St. Louis Cty. Dist. Ct. July 11, 2014); *Cottage Heights Ass'n v. Am. Family Mut. Ins. Co.*, No. 73-CV-14-1150, slip op. at 5-7 (Stearns Cty. Dist. Ct. Apr. 29, 2014); *Southcross Vill. Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, No. 19HA-CV-13-4822, slip op. at 5 (Dakota Cty. Dist. Ct. Mar. 12, 2014); *Timberton Condo. Ass'n v. Mid-Century Ins. Co.*, No. 27-CV-11-24814, slip op. at 7 (Hennepin Cty. Dist. Ct. Oct. 10, 2013).[4]

The purpose of prejudgment—and preaward—interest is threefold: "(1) to compensate the plaintiff for the loss of use of his money," (2) "to deprive the defendant of any gain resulting from the use of money rightfully belonging to the plaintiff;" and (3) "to promote settlement." *Burniece v. Ill. Farmers Ins. Co.*, 398 N.W.2d 542, 544 (Minn. 1987) (citing *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 752 (8th Cir. 1986)). Once an insured party files a notice of claim under § 549.09, the insured party is "entitled to use of that money," and the insurer "deprive[s] [the insured party] of its use

[4] The unpublished state court decisions are attached as Exhibits 7-13 to the August 5, 2015, Affidavit of Finn Jacobsen [Doc. No. 1-5].

by denying the claim." *Nelson v. Ill. Farmers Ins. Co.*, 567 N.W.2d 538, 543 (Minn. Ct. App. 1997). Even if the amount of damages is disputed, as long as the claim "is readily ascertainable by computation or by reference to generally recognized objective standards of measurement," preaward interest should be allowed under § 549.09. *ICC Leasing Corp. v. Midwestern Mach. Co.*, 257 N.W.2d 551, 556 (Minn. 1977).

The purposes and rationale underlying § 549.09, subd. 1(b), are met here by allowing preaward interest. Eden should be compensated for its loss as measured from the time it notified American Family, and American Family should not benefit from the use of money rightfully belonging to Eden. That the parties disagreed about the amount of damages did not preclude American Family from ascertaining its potential liability. Thus, Eden may seek preaward interest under § 549.09.

**2. The Date Interest Began to Accrue**

Eden asks for preaward interest for the time period from August 8, 2013 (the date of the loss), through July 27, 2015 (the date of the appraisal award).[5] Eden claims that it notified American Family of the loss on August 8, 2013, and that is the date interest began to accrue. American Family disagrees, citing language in the insurance policy that requires it to pay a covered loss within five business days after (1) receiving the proof of loss and (2) an appraisal award has been made. Thus, American Family argues, preaward interest did not begin to accrue until August 3, 2015, which was five business days after the July 27, 2015, appraisal award.

[5] In its supporting memorandum, Eden refers to both July 15 and July 27, 2015, as the date of the appraisal award. The award is dated July 27, 2015, and the Court will use that date.

The flaw with American Family's position is that it presumes that the date on which preaward interest began to accrue and the date on which it was obligated to pay a covered loss must be the same. But this is not necessarily so. The provision of the insurance policy cited by American Family governs only when American Family must pay the amount of a covered loss; it does not speak to when interest begins to accrue on that amount or when such interest must be paid. Indeed, the insurance policy is silent as to when interest begins to accrue. To find that the loss payment provision establishes the interest accrual date is inconsistent with the basic principles of contract law that a court must give "plain and ordinary meaning" to the language in a contract, *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998), and not "rewrite, modify, or set aside contract provisions fully considered and agreed upon between the parties," *Telex Corp. v. Data Products Corp.*, 135 N.W.2d 681, 687 (Minn. 1965). The parties here were free to contract regarding when interest would begin to accrue on an unpaid covered loss, but they did not. Thus, § 549.09's conditional phrase "except as otherwise provided by contract" was never triggered, and § 549.09 alone governs the date on which interest began to accrue.[6]

[6] In so finding, the Court respectfully concedes a departure from the decision in *Housing & Redevelopment Authority of Redwood Falls v. Housing Authority Property Insurance*, No. 14-CV-4741 (PAM/HB), 2015 WL 4255858, at *3 (D. Minn. July 14, 2015), *appeal docketed*, 15-3499 (8th Cir. Nov. 4, 2015). There, as here, the court concluded that § 549.09 applies to appraisal awards; however, it determined that although the insurance policy in that case "does not expressly prohibit pre-award interest, it implicitly addresses when the interest would start accruing based on when [the insured] must pay the loss." *Id.* The policy required payment of an insured loss thirty days after (1) proof of loss was received and (2) the amount of loss was established by either written agreement or the filing of an appraisal award. *Id.* Reading the policy and § 549.09 together, the court

Moreover, American Family's position that *pre*award interest did not start to accrue until five days *after* the date of the appraisal award is nonsensical. By definition, *pre*award interest begins to accrue *before* an award is issued.

Under § 549.09, preaward interest shall be computed from the date of a written notice of claim, a demand for arbitration, or the date an action was commenced, whichever occurred first. § 549.09, subd. 1(b). Here, Eden asserts it gave written notice of its claim to American Family on August 8, 2013, and American Family does not contend otherwise. Accordingly, interest began to accrue on that date. This is consistent with numerous state court decisions, *e.g.*, *David A. Brooks*, 370 N.W.2d at 435-36; *Townhomes of Kensington*, No. 19HA-CV-14-1883, slip op. at 6; *Cottage Heights Ass'n*, No. 73-CV-14-1150, slip op. at 4, 6-7, and the purposes and rationale for awarding preaward interest.

**3. Interest on ACV or RC**

Eden asks the Court to award preaward interest on the $341,914 RC amount, rather than the ACV of $170,965. Under § 549.09, subd. 1(b)(2), however, preaward interest does not accrue on future damages, and the insurance policy does not obligate American Family to pay the RC amount "[u]ntil the lost or damaged property is actually repaired or replaced." Eden has not repaired or replaced the damaged siding. Thus, the Court concludes that preaward interest accrued only on the ACV, not on the RC amount. *See Townhomes of Kensington*, No. 19HA-CV-14-1883, slip op. at 7; *Timberton*, No. 27-

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concluded that the insured was not entitled to interest on the appraisal award before the thirty-day period post-dating the award had expired. *Id.* at *4. Because the insurer paid the ACV in full before the expiration of that time period, no interest accrued. *Id.*

CV-11-24814, slip op. at 7.

**4. Calculating the Interest**

Because the appraisal award exceeded $50,000, the interest rate is set by statute as 10% per annum. Minn. Stat. § 549.09, subd. 1(c)(2). There are 723 days between August 3, 2013, and July 27, 2015. There is no reference to compound interest in § 549.09, and other courts have found interest should not be compounded. *E.g.*, *Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 957 (8th Cir. 2000); *Grandoe Corp. v. Gander Mountain Co.*, No. 11-CV-0947 (PJS/FLN), 2013 WL 3353927, at *23 (D. Minn. July 3, 2013), *aff'd*, 761 F.3d 876 (8th Cir. 2014).

The Court calculates the preaward interest in this case as follows: (723/365) x 10% x $170,965 = $33,865.12. Thus, the amount of preaward interest due for the time period of August 8, 2013, to July 27, 2015, is $33,865.12.

**D. Costs and Disbursements**

Eden requests an award of costs and disbursements, incurred in connection with the appraisal process and this action, pursuant to Minn. Stat. § 549.02 and .04. Although American Family did not oppose or otherwise respond to this request, Eden did not provide information or an affidavit detailing the costs and disbursements requested. In any event, given that the case was removed to federal court, Eden must now seek relief pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. *See Schmeiding v. Am. Farmers Mut. Ins. Co.*, 138 F. Supp. 167, 185 (D. Neb. 1955). The Court will deny without prejudice Eden's request for an award of costs and disbursements pursuant to Minn. Stat. § 549.02 and .04, so that Eden may make its request at the proper time and

under the applicable authority.

Accordingly, based on the foregoing and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Plaintiff's Motion to Confirm Appraisal Award [Doc. No. 1-3] be **GRANTED in part** and **DENIED WITHOUT PREJUDICE in part**, as follows:
    a. The appraisal award's determinations that the actual cash value of the loss is $170,965 and the replacement cost value of the loss is $341,914 be confirmed;
    b. Plaintiff's request for preaward interest be granted in the amount of $33,865.12; and
    c. Plaintiff's request for costs and disbursements pursuant to Minn. Stat. § 549.02 and .04 be denied without prejudice.
2. Plaintiff's Motion to Remand to State Court [Doc. No. 11] be **DENIED**.
3. Defendant's Motion to Vacate Arbitration Award [Doc. No. 17] be **DENIED**.
4. Judgment be entered accordingly.

Dated: December 22, 2015

*s/ Hildy Bowbeer*
HILDY BOWBEER
United States Magistrate Judge

## NOTICE

**Filing Objections:** This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals. Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

**Under Advisement Date:** This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.