IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN SECTION

FIRST HORIZON NATIONAL CORPORATION and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Plaintiffs,

vs. No. 2:15-cv-2235-SHL-dkv

HOUSTON CASUALTY COMPANY, FEDERAL INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, ALTERRA AMERICA INSURANCE COMPANY, AXIS INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA, RSUI INDEMNITY COMPANY, and EVEREST INDEMNITY INSURANCE CO.,

Defendants,

ORDER GRANTING IN PART AND DENYING IN PART THE PLAINTIFFS' MOTION TO COMPEL

Before the court is the May 31, 2016 motion of the plaintiffs, First Horizon National Corporation ("First Horizon") and First Tennessee Bank National Association ("First Tennessee"), (collectively "the Plaintiffs"), to compel the defendants Houston Casualty Company ("HCC"), Federal Insurance Company ("Federal"), AXIS Insurance Company ("AXIS"), Alterra America Insurance Company ("Alterra"), Everest National Insurance Company ("Everest"), National Union Fire Insurance Co.

of Pittsburgh, PA ("National"), RSUI Indemnity Company ("RSUI"), and XL Specialty Insurance Company ("XL") (collectively "the Defendants"), to provide discovery regarding the Defendants' treatment of similar insurance claims, produce claims-handling and underwriting manuals, produce reinsurance information and material, and produce information and documents concerning reserves established for the Department of Justice ("DOJ") and Department of Housing and Urban Development ("HUD") claim. (ECF No. 153-1.) The Defendants filed a joint response in opposition on June 17, 2016. (ECF No. 160.) In addition to joining the Defendants' joint response in opposition, Alterra filed a separate response in opposition to address issues unique to Alterra. (ECF No. 157.) The Plaintiffs filed a reply on June 29, 2016, (ECF No. 168), and the Defendants filed a supplemental response on June 30, 2016, (ECF No. 170).

The motion was referred to the United States Magistrate Judge for determination, (ECF No. 154). Pursuant to the reference, a hearing was held on July 25, 2016.[1] For the reasons stated herein, the Plaintiffs' motion to compel is granted in part and denied in part.

I. PROCEDURAL AND FACTUAL BACKGROUND

[1]A separate hearing was held on August 22, 2016 on the Defendants' Motion to Compel, (ECF No. 173). A separate order will be issued regarding that motion.

This is an insurance coverage dispute in which the Plaintiffs seek coverage from the defendant insurers for a $212.5 million dollar settlement with DOJ and HUD of a claim of violation of the False Claims Act relating to errors and omissions in underwriting and origination of HUD mortgage loans. In defense, the Defendants contend, *inter alia*, that the claim is "interrelated" to an earlier claim made by First Tennessee and thus barred under a later policy and that First Tennessee failed to timely notify the Defendants of the claim.

For the period of August 1, 2013 through July 31, 2014, First Tennessee, a banking institution which is a wholly owned subsidiary of First Horizon, purchased a primary claims-made insurance policy from HCC[2] and seven excess follow-form policies from the seven other insurance companies named as defendants in this lawsuit. (Sec. Am. Compl. ¶¶ 7, 29, ECF No. 103.) As part of the primary insurance coverage with HCC, First Tennessee was covered for "Financial Institution Professional Liability," ("FIPL"). The insuring provision in the HCC policy states in relevant part:

> The Insurer will pay, to or on behalf of the **Insureds**, **Loss** arising from **Claims** first made against them during the **Policy Period** or the Discovery Period (if applicable) for **Wrongful Acts** committed or allegedly committed by an **Insured** or by any person for whose **Wrongful Acts** an **Insured** is legally responsible.

[2] The HCC primary policy is a manuscript policy not a form policy, that is, the terms were negotiated by the parties.

(*Id.* ¶¶ 31, 32)(bolded terms are bolded in original to indicate defined terms). The HCC policy further states that the insured must give the insurer "written notice of any Claim as soon as practicable after the [insured's] risk manager or general counsel becomes aware of such Claim." (HCC Primary Insurance Policy 23, ECF No. 103-2.) In addition, if the insured files a Notice of Circumstance with the insurers when it "first become[s] aware of any circumstance which may reasonably be expected to give rise to a Claim[,]" then the Claim will relate back to the date that the Notice of Circumstance was filed. (*Id.*) The HCC policy has a provision entitled "Interrelationship of Claims" which states that:

> All Claims alleging, arising out of, based upon or attributable to the same facts, circumstances, situations, transactions or events or to a series of related facts, circumstances, situations, transactions or events will be considered to be a single Claim and will be considered to have been made at the time the earliest such Claim was made.

(*Id.* at 22.) The FIPL coverage section defines what "Claim" means. (*Id.* at 43.)

In 2012, the DOJ and HUD initiated an investigation of the Fair Housing Administration loan-origination services provided by First Tennessee as a Direct Endorsement Lender ("DOJ/HUD Investigation"). (Sec. Am. Compl. ¶ 44, ECF No. 103.) The DOJ/HUD Investigation focused on whether First Tennessee had

committed errors and omissions related to quality-control deficiencies for HUD loans, underwriting, origination of HUD loans, and self-reporting requirements for HUD loans, thus violating the False Claims Act. (*Id.*)

In its 2012 Annual Report, filed on February 27, 2013, First Tennessee disclosed the ongoing investigation to its shareholders stating that it was "cooperating with the [DOJ] and [HUD] in a civil investigation regarding compliance with requirements relating to certain FHA-guaranteed loans." (*Id.* at ¶ 45.) In its 2013 Annual Report, filed on February 27, 2014, First Tennessee again disclosed the ongoing investigation to its shareholders, stating that:

> No demand or claim has been made of [First Tennessee]. The investigation could lead to a demand under the federal False Claims Act and the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 . . . . [First Tennessee] has established no liability for this matter and is not able to estimate a range of reasonably possible loss due to significant uncertainties regarding: the absence of any specific demand or claim . . . ."

(*Id.* ¶ 46.) Both of these disclosures were incorporated into First Tennessee's applications for insurance submitted to all the Defendants for the policy year August 1, 2013 through July 31, 2014. (*Id.* ¶ 47.)

On May 20, 2014, First Tennessee made a presentation to the insurers and disclosed that it "had an initial meeting with HUD and DOJ in [the second quarter of 2013]; discussions [were]

continuing as to various factual matters; and HUD and DOJ could seek treble and special damages under the False Claim Acts and other laws." (*Id.* ¶ 48.) On May 27, 2014, First Tennessee reported the DOJ/HUD Investigation to the defendant insurers as a "notice of circumstances that may give rise to a claim" under the policies. (*Id.* ¶ 49.)

On December 17, 2014, the DOJ met with First Tennessee and made a written demand on First Tennessee in the form of a presentation deck outlining, among other things, that:

> (1) [] the DOJ's investigation was substantially complete; (2) the DOJ's allegations with respect to First Tennessee's alleged wrongful acts in failing to comply with material FHA and HUD residential-mortgage guidelines and requirements; (3) that the DOJ is currently "seeking suit authority"; and (4) that the DOJ plans to file suit against First Tennessee unless it receives a "serious settlement offer from [First Tennessee] by the end of January 2015."

(*Id.* ¶ 51.) First Tennessee alleges that this is the first time a "Claim" was made pursuant to the policies (hereinafter "HUD Claim").[3] (*Id.*) First Tennessee engaged in settlement discussions with the DOJ and, on April 2, 2015, reached an agreement in principle to settle the HUD Claim for $212.5 million. (*Id.* ¶ 53.) On June 1, 2015, First Tennessee and the DOJ executed a written Settlement Agreement, and First Tennessee paid the entire settlement amount. (*Id.* ¶ 54.)

[3]The parties, at times, refer to the claim resulting from the DOJ/HUD Investigations as "FHA Claim."

In February, March, and April, 2015, First Tennessee corresponded with each insurer to seek coverage under the 2013-2014 policies up to the $75 million limit. (*Id.* ¶¶ 61, 58.) The insurers denied First Tennessee's demand for coverage under the policies. (*Id.* ¶ 63.) The Plaintiffs filed this complaint on April 9, 2015, seeking full payment from all insurers under the respective policies. (ECF No. 1.) In their second amended complaint, the Plaintiffs assert the following counts: (1) breach of contract, (2) declaratory judgment, and (3) bad faith refusal to pay under Tenn. Code Ann. § 56-7-105. (Sec. Am. Comp. ¶¶ 74-91, ECF No. 103.)

The Defendants have raised two primary defenses. First, the Defendants maintain that the HUD Claim is interrelated to a Federal Housing Finance Agency claim asserted against First Tennessee in the 2009-10 policy period ("FHFA Claim"). (Pls.' Mot. to Compel 2, ECF No. 153-1.) The FHFA Claim relied upon a HUD investigation known as Operation Watchdog or Officer of Inspector General Review ("OIG Review"). (Defs.' Resp. 1, ECF No. 160.) On May 12, 2014, the Plaintiffs entered into a $55 million settlement agreement with five of the defendant insurers regarding the FHFA Claim – HCC, Federal, XL, National, and Everest. (Defs.' Resp. 1, ECF No. 160.) Those five insurers obtained broad releases. In their answers to the second amended complaint, these five defendant insurers filed counterclaims

alleging that First Horizon breached this settlement agreement. (*See* HCC's Counterclaims 22-38, ECF No. 118; ECF Nos. 115, 121, 123, 125.) The Defendants also argue that the instant HUD Claim is related to a prior False Claims Act claim known as the Hastings Action, which, according to the Defendants, also alleged misrepresentations about some of the exact FHA loans at issue in the instant HUD Claim. (*See* Defs.' Motion to Compel 3, ECF No. 173-1.)

Second, the Defendants contend that "First Horizon deliberately hid the ball and failed to give notice of the FHA Claim until well-after First Horizon learned the United States first asserted the Claim." (Defs.' Resp. to Pls.' Mot. to Compel 2, ECF No. 160.) The Defendants argue that although First Tennessee seeks coverage under the 2013-14 policies, it actually had knowledge of a "Claim" as defined in the policy when it received subpoenas and a Civil Investigation Demand from the DOJ in 2012 and thus the HUD Claim is untimely and barred under the 2013-14 policies. (*Id.*) The Defendants also maintain that First Tennessee failed to report two prior "written demands," one in May 2013 and the other in April 2014, which constitute "Claims" within the meaning of the policies. (Defs.' Motion to Compel 2-3, ECF No. 173-1; Defs.' Resp. to Pls.' Mot. to Compel 2, ECF No. 160.) The first alleged written demand consists of a confidential communication dated May 16, 2013 in

which the DOJ, U.S. Attorney's Office, and HUD informed First Horizon of the ongoing investigation, First Tennessee's liability under the False Claims Act, the results and findings to date, and an overview of the damages and potential penalties. (*See* Ex. A to Alterra's Mem. in Supp. of Mot. to Dismiss, ECF No. 109.) This communication stated that First Horizon's theoretical damages could be up to $1.19 billion, that the investigation was still ongoing, and that the United States would continue settlement discussions if First Tennessee was interested. (*Id.* at 34-35.) The second written demand according to the Defendants was a liquidated $610 million settlement demand made in April of 2014 to which First Horizon omitted any reference in its May 27, 2014 Notice of Circumstances letter. (Defs.' Motion to Compel 3, ECF No. 173-1; Defs.' Resp. to Pls.' Mot. to Compel 2, ECF No. 160.)

II. ANALYSIS

A. Discovery of the Defendants' Treatment of Similar Insurance Claims

The first dispute at issue in the instant motion to compel arises from First Tennessee's requests for information and documents concerning the Defendants' treatment of other insurance claims.[4] The Defendants insist that discovery

[4]The Plaintiffs' Interrogatory No. 5 states:

> Identify by style of the case, case number, court, and status, any other lawsuit or litigation . . . initiated in the past 10 years, involving the denial of a claim (in whole or in part) for indemnification or defense pursuant to an executive risk insurance policy . . . similar to First Tennessee's Policies, to which You have been a party, and where You asserted the defense that the underlying claim at issue was barred because it arises "out of the same or related Wrongful Acts" (or similar language) contained in a matter reported under a prior policy period. Provide the status or outcome of each such matter.

(Pls.' First Set of Interrog. to Defs. at Interrog. No. 5, ECF No. 153-4.) The Plaintiffs' Interrogatory No. 6 requests that the defendant insurers:

> Identify by style of the case, case number, court, and status, any other lawsuit, litigation . . . or claim submission initiated in the past 10 years, in which You have asserted that a government subpoena or CID did, or did not, constitute a "Claim" under an executive risk insurance policy . . . similar to First Tennessee's Policies. Provide the status or outcome of each such matter.

(*Id*. at Interrog. No. 6.) The Plaintiffs' Request for Production No. 24 seeks "[a]ll documents relating to the claims for coverage at issue in the lawsuits, litigation, mediations, and/or arbitration that are responsive to First Tennessee's First Set of Interrogatories Nos. 5 and 6." (Pls.' First Set of Reqs. for Produc. at Req. No. 24, ECF No. 153-10.) In its Second Requests for Production, First Tennessee seeks "[a]ll documents relating to the claims for insurance coverage at issue" in five specific lawsuits. (Pls.' Sec. Set of Reqs. for Produc. at Req. No. 32, ECF No. 153-5.)

The Defendants objected to the interrogatories and requests for production on the grounds of relevance, overbreadth, privilege/work product, undue burden, confidentiality, and disproportionality. (*See* ECF Nos. 153-3, 153-11 to 153-17, 153-18 to 153-21.)

regarding their treatment of similar claims is irrelevant, unduly burdensome, and disproportionate. (Defs.' Resp. 4-14, ECF No. 160.)

Rule 26(b)(1) of the Federal Rules of Civil Procedure, as amended in 2015, provides that:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). If an objection to the relevance of the sought discovery is raised, "the party seeking discovery must demonstrate that the requests are relevant to the claims or defenses in the pending action." *Anderson v. Dillard's, Inc.*, 251 F.R.D. 307, 309-10 (W.D. Tenn. 2008)(citation omitted). If the party seeking discovery demonstrates relevancy, the burden shifts to the party resisting discovery to demonstrate "why the request is unduly burdensome or otherwise not discoverable." *Id.* at 310 (citations omitted). A court need not compel discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

1. *Relevance*

The Plaintiffs argue that "other claims" discovery is relevant to both the interpretation of the policy and the bad faith denial of insurance claim. (Pls.' Mot. to Compel 9-10, ECF No. 153-1.) As to policy interpretation, the Plaintiffs contend that discovery of other past claims in which the Defendants may have interpreted the "Interrelationship of Claims" provision more narrowly than they are doing in this case and in which the Defendants may have taken a different position as to whether a Civil Investigation Demand constitutes a "Claim" is relevant to the insurers' coverage position in this case and may contain admissions by the Defendants. (*Id.* at 2-3.) The Defendants counter that their positions in other cases were based on the specific policy language and facts at issue therein and are irrelevant to the application of the plain policy language at issue here to the facts of this case. (Defs.' Resp. 7-14, ECF No. 160.)

In order to determine whether the discovery of other similar claims is relevant to interpretation of the language in the insurance policies in this case, the court must look to Tennessee law regarding contract construction. "Insurance policies are, at their core, contracts [and] [a]s such, courts interpret insurance policies using the same tenets that guide the construction of any other contract." *Garrison v. Bickford*, 377 S.W.3d 659, at 663-64 (Tenn. 2012)(quotations and internal

quotation marks omitted). Tennessee law provides that in interpreting contracts, the "intention of the parties is to be gleaned from the four corners of the contract, and the contract's terms are to be given their 'ordinary meaning' in the absence of any ambiguity." *United States v. Tennessee*, 632 F. Supp. 2d 795, 800 (W.D. Tenn. 2009)(quoting *Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 811 (Tenn. Ct. App. 2005)). "Whether a contract contains an ambiguity is a question of law." *Id.* at 801 (citation omitted). "When a contract contains ambiguous language, the literal terms of the agreement alone cannot resolve the dispute, and the court is compelled to discover the parties' intent through examination of other sources." *Id.* at 800 (citing *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002)). Thus, the court may allow "extrinsic evidence that provides insight into the proper interpretation or meaning of the [ambiguous] terms." *Id.* (citations omitted); *U.S. Fire Ins. Co. v. City of Warren*, No. 2:10-CV-13128, 2012 WL 1454008, at *9 (E.D. Mich. Apr. 26, 2012); *see also Blue Diamond Coal Co. v. Holland-Am. Ins. Co.*, 671 S.W.2d 829, 833 (Tenn. 1984)("[W]here the policy is ambiguous, the intent of the parties may be derived from extrinsic evidence outside the policy" (citation omitted)).

Here, the presiding district judge, Judge Sheryl H. Lipman, has not yet decided as a matter of law whether the policy language in the definitions of "Claim" and "Interrelationship of Claims" is ambiguous. The Defendants quote Judge Lipman's April 21, 2016 order denying the Defendants' Motion to Dismiss for the proposition that "interpretation of insurance policies is a question of law, and does not depend on whatever extrinsic material it might procure in discovery." (*See* Defs.' Resp. 15, ECF No. 160; Order 10, ECF No. 143.) Judge Lipman, however, did not make any determination as to ambiguity or whether extrinsic materials might be needed to clarify the intent of the parties. Relying on *Terminix Int'l Co. P'ship v. Safety Mut. Cas. Co.*, 974 F.2d 1339, 1992 WL 203789 (6th Cir. 1992), Judge Lipman merely stated that "[u]nder Tennessee law it is the Court's duty to enforce contracts according to their plain terms." (Order 10, ECF No. 143.) While the Plaintiffs acknowledged at the hearing that they have not yet claimed that there is an ambiguity, they indicated that it is possible that they might argue ambiguity in the future.

Thus, the determination of what constitutes a "Claim" or "Interrelationship of Claims" will be resolved by the application of the plain language of the contract, unless Judge Lipman determines that an ambiguity exists, in which case, the parties may present extrinsic evidence of the parties' intent.

Therefore, the Defendants' argument that discovery of other claims is *per se* prohibited on the ground that the court will interpret the policy language as a matter of law fails. *See GBTI, Inc. v. Ins. Co. of State of Pa.*, No. 1:09cv1173 LJO DLB, 2010 WL 2942631, at *4 (E.D. Cal. July 23, 2010)("At the discovery stage, the Court does not decide whether parole evidence will or will not be admitted to address interpretation of the policy"). As another court in this Circuit has stated, the parties should not be allowed to withhold extrinsic evidence during discovery while they wait for the court to make a determination of ambiguity. *Vitamin Health, Inc. v. Hartford Cas. Ins. Co.*, No. CV 15-10071, 2015 WL 9591444, at *3 (E.D. Mich. Nov. 20, 2015)(stating that allowing such a practice would force the court to reopen a period of discovery of extrinsic evidence if and when the court "finds that policy language is ambiguous during the consideration of dispositive motions . . . and result in unwarranted delays of the resolution of disputes, which would contravene the intent of the drafters of the amended rules of discovery").

Even though discovery of extrinsic evidence is not necessarily barred at this stage of the proceedings, the question remains whether the materials requested by the Plaintiffs would aid in the interpretation of the instant policy. *See Certain Underwriters at Lloyd's v. Nat'l R.R.*

Passenger Corp., No. 14-CV-4717 (FB), 2016 WL 2858815, at *10 (E.D.N.Y. May 16, 2016)(recognizing that "the absence of a per se bar to discoverability does not answer the question of whether and to what extent" the Plaintiffs are entitled to the requested materials). The only case cited by the Plaintiffs that specifically supports their assertion that "other claims" discovery is relevant in interpreting the contract language is *Mariner's Cove Site B Associates v. Travelers Indemnity Co.*, No. 04CIV.1913(KMW)(RLE), 2005 WL 1075400 (S.D.N.Y. May 2, 2005).[5] In *Mariner's Cove*, the court held that to "properly interpret an insurance policy, it is necessary to discern how that contract has been interpreted in the past," and thus, "documents regarding similar claims of other insureds, the drafting history of a policy, and claims manuals are relevant and discoverable." *Id.* The court further stated that the defendant's second argument regarding admissibility of extrinsic evidence was premature and allowed discovery of these materials even though they might eventually be inadmissible. *Id.*

The Defendants point to two cases that have held that "other claims" evidence has little or no relevance to the interpretation of an insurance policy. In *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996),

[5]The other cases cited by the Plaintiffs hold that such discovery is relevant for other reasons, such as when the party has asserted a bad faith claim, *see infra*.

the court found that such discovery "amount[ed] to nothing more than [a] 'fishing expedition,'" stating:

> Allowing discovery of other actions which concerned completely different facts and circumstances would run counter to the important but often neglected Rule 1 of the Federal Rules of Civil Procedure which requires that all rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Id. at 526 (quotation and internal quotation marks omitted). In *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99 (D.N.J. 1989), the court noted that while the discovery of "other claims" sought by the plaintiffs "would be relevant to the insurers' interpretation of the language of an identical policy in an identical situation," such relevance was remote. *Id.* at 105. The *Leksi* court ultimately held that although "other claims" discovery "may be considered remotely relevant, its production would be unduly burdensome and disproportionate." *Id.* at 106.

The cases cited by the Defendants are more persuasive. As the Defendants maintain, the positions they took in other claims depended on the policy language and the facts of the particular case, which are necessarily different from the policies and facts of the instant case. Even if the Defendants have in fact taken conflicting positions in the past regarding the same terms at issue in this case, it would not aid the court in interpreting the policy language at issue or in determining the Defendants' intent in the instant case. Any relevance would

be remote and the discovery requested would amount to nothing more than a fishing expedition. Further, even if such information may be considered remotely relevant, as discussed *infra*, its production would be unduly burdensome and disproportionate to this litigation.

Discovery of "other claims" is also irrelevant to the Plaintiffs' bad faith denial of insurance coverage claim for the same reason that it is irrelevant to contract interpretation.[6] Other bad faith claims "involve circumstances unique to each" policyholder, such as different facts, different policies, and different applicable law. *Connecticut Indemnity Co. v. Markman*,

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[6]In order to recover bad faith penalties under Tennessee's Bad Faith Refusal to Pay Statute, Tenn. Code Ann. § 56-7-105, a claimant must prove: (1) the policy of insurance has become due and payable, (2) a formal demand for payment has been made, (3) the insured waited 60 days after making demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay was not in good faith. *Stooksbury v. Am. Nat. Prop. & Cas. Co.*, 126 S.W.3d 505, 519 (Tenn. Ct. App. 2003)(citations omitted). The court explained in *Sisk v. Valley Forge Ins. Co.,* 640 S.W.2d 844 (Tenn. Ct. App. 1982), that:

> The bad faith penalty is not recoverable in every refusal of an insurance company to pay a loss. *An insurance company is entitled to rely upon available defenses and refuse payment if there is substantial legal grounds that the policy does not afford coverage for the alleged loss. If an insurance company unsuccessfully asserts a defense and the defense was made in good faith, the statute does not permit the (sic) imposing of the bad faith penalty.*

Id. at 852 (quoting *Nelms v. Tenn. Farmers Mut. Ins. Co.,* 613 S.W.2d 481, 484 (Tenn. Ct. App. 1978)).

No. CIV. 93-799, 1993 WL 452104, at *9 (E.D. Pa. Oct. 28, 1993)(holding that the insurer's conduct toward insureds in other bad faith claims was not relevant as to whether the insurer's conduct toward the plaintiff was in bad faith because the issue was the insurer's conduct to the plaintiff in the instant case not his conduct toward other insureds). "As the Honorable Donald Van Artsdalen, when faced with a similar situation in *In re: Texas Eastern Transmission,* No. MDL 764 (E.D. Pa. July 26, 1989), explained: I think it is self-evident that the positions taken by the insurers as to other policies involving other policyholders on other claims would depend upon a myriad of variables. If allowed, such discovery would get off into issues totally irrelevant to any issues involved in this case." *Id.*; *see also Cunningham v. Standard Fire Ins. Co.*, No. CIVA 07CV02538REBKLM, 2008 WL 2902621, at *9 (D. Colo. July 24, 2008)(holding that the defendants' conduct with regard to other claims was not relevant to the plaintiff's breach of contract or bad faith claims); *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. CIV.A. 2:06-CV-443, 2007 WL 3376831 (S.D. Ohio Nov. 8, 2007)(finding the plaintiffs' discovery requests in a bad faith action regarding the defendant's treatment of similar claims of other policyholders overbroad, unduly burdensome, and irrelevant noting that "an insurer's conduct in other claims is 'of no consequence' to the

adequacy of its conduct toward the plaintiff")(citations omitted).

The Defendants' conduct in other claims necessarily depends upon a number of variables and involves circumstances unique to each policyholder. *See Clark Equip. Co. v. Liberty Mut. Ins. Co.*, No. C.A. 89C-OC-173, 1995 WL 867344, at *3 (Del. Super. Apr. 21, 1995)(finding that other policyholder claims were not discoverable because, aside from burden, "the existence of so many variables make the possibility of relevance too remote"). The Defendants' conduct in other cases is not before the court; what is before the court is the Defendants' conduct toward the Plaintiffs in this case, *i.e.*, whether the Defendants had substantial legal grounds to rely on the defenses asserted and to refuse payment to the Plaintiffs. The Defendants' conduct and positions they took in other insurance claims is of no consequence to the instant case. *See Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55, 57 (N.D. Ga. 1984)(holding that "[t]he issues in this case are limited to Defendant's conduct regarding Plaintiff's claim for insurance benefits and to the adequacy of Defendant's reasons for that conduct. Defendant's conduct regarding the insurance claims of others is of no consequence to this case.").

For these reasons, the court finds that discovery of other claims is not relevant to interpretation of the policy or the Plaintiffs' bad faith claims against the Defendants.[7]

2. *Unduly Burdensome and Disproportionate*

Even if the discovery of other claims were relevant, the Defendants argue that it would be "unduly burdensome and not proportional to the needs of this case for Defendants to gather and produce responsive information from even several years' worth of other claims, much less than the ten years' worth of other claims sought by First Horizon." (Defs.' Resp. 12, ECF No. 160.) To substantiate their burdensome argument, the Defendants have submitted the following affidavits: Dennis McGoldrick, Claims Counsel, on behalf of HCC, (ECF No. 160-1); Louise Van Dyck, Vice President of North American Financial Lines Claims, on behalf of Federal, (ECF No. 160-2); Ari Magedoff, Senior Claims Specialist, on behalf of AXIS, (ECF No. 160-3); David Vanalek, Claims Director, on behalf of Alterra, (ECF No. 160-4); Martha S. Keane, Senior Complex Claims Director

[7]In their reply brief, the Plaintiffs maintain that in *Westport Ins. Corp. v. Wilkes & McHugh, P.A.*, 264 F.R.D. 368 (W.D. Tenn. 2009), the court ordered the insurer to produce "similar claims" discovery where the insured had asserted a bad faith claim. (Pls.' Reply 3, ECF No. 168.) Contrary to this assertion, there was no bad faith claim asserted in *Westport*. The plaintiff in *Westport* filed a complaint for declaratory judgement and the defendant filed counterclaims for breach of contract, violation of the Tennessee Consumer Protection Act, breach of fiduciary duty, and collusion. *Westport*, 264 F.R.D. at 369.

for Financial Lines, on behalf of National, (ECF No. 160-5); Patrick McGinley, Vice President of Claims, on behalf of Everest, (ECF No. 160-6); Scott J. Fahy, Assistant Vice President of Directors and Officers Claims, on behalf of RSUI, (ECF No. 161); and Greg Hansen, Senior Claims Specialist, on behalf of XL, (ECF No. 162).

In response, the Plaintiffs argue that discovery regarding the Defendants' handling of similar claims is not unduly burdensome because the claims files are available electronically and can be accessed with key word searches. (Pls.' Reply 4, ECF No. 168.) However, the affidavits attached by the Defendants refute this argument. These affidavits show that the insurers' files are not catalogued by coverage issues and each insurer would have to conduct a manual review of claims over the past 10 years to identify the claims that meet the criteria of the Plaintiffs' interrogatory requests. (ECF Nos. 160-1 through 160-6, 161, 162.) Therefore, the Defendants cannot conduct a simple electronic search to produce the responsive documents.

Furthermore, the Defendants have identified other substantial difficulties with the discovery requests. Even though the Plaintiffs indicated at the hearing that they were willing to limit the scope of requests, the requests are still burdensome. As previously indicated, the Defendants would have to identify the claims responsive to the requests, which task,

they aver in their affidavits, would require thousands of hours of manual review. Once the claim files were identified, each Defendant would have to review each document in the file (because the Plaintiffs in essence request every document found in the claim file) and ensure that it does not contain privileged or confidential information, in some cases seek a court order or permission of the third party to produce the document, and ensure compliance with state law and regulation. Each Defendant estimates that these tasks would take thousands of hours to complete and would significantly interfere with their respective business operations. The Defendants' affidavits, which are uncontested, sufficiently describe the massive burden involving time, effort, expense, and disruption of business operations that would be imposed upon the Defendants if discovery of other similar claims were allowed.

Other courts have found similar discovery requests burdensome and disproportionate. *See Retail Ventures*, 2007 WL 3376831, at *5 (holding that requests seeking information related to any policyholder's claim based on a certain criteria was overbroad and unduly burdensome); *McCulloch*, 168 F.R.D. at 526 (holding that "other claims" discovery would run counter to the just, speedy, and inexpensive determination of every action (quotations and internal quotation marks omitted); *Clark Equip.*, 1995 WL 867344, at *2 (holding that discovery of other

policyholder claims would impose a significant burden upon the defendants). Moreover, the Plaintiffs can already access any public filings, such as complaints, answers, discovery motions, and dispositive motions filed by the Defendants in other litigated claims, from which they can readily determine the positions the Defendants took in other coverage disputes.[8]

The court also shares the concern of many other courts that "other claims" discovery would lead to even further discovery disputes and create extended mini-trials. As the Defendants establish in their respective affidavits, the information requested by the Plaintiffs concerns third-parties not involved in this suit who may hold valid privileges or confidentiality agreements and may not consent to the production. *See Leksi*, 129 F.R.D. at 106 n.3 (stating that such production may present "problems inherent in the involuntary production of documents in

[8]The two cases that support the Plaintiffs' relevance argument and allow "other claims" discovery involve discovery that is significantly less burdensome than that requested by the Plaintiffs in the instant case. For instance, in *Southard v. State Farm Fire & Casualty Co.,* No. CV411-243, 2012 WL 2191651 (S.D. Ga. June 14, 2012), the court allowed discovery of only four cases and stressed that the request was not burdensome because it "extend[ed] to the four 'Mock/Martin mold cases' in question, not 'all' prior bad-faith cases or some similar open-ended request." *Id.* at *4. Similarly, in *Parkdale America, LLC v. Travelers Casualty & Surety Co. of America,* No. C9V; 3:06CV78_R, 2007 WL 3237720 (W.D.N.C. Oct. 30, 2007), the discovery request was also less burdensome because the plaintiffs only requested that the defendant identify and "provide sufficient identifying information" to allow the plaintiffs to search public records. *Id.* at *3.

which non-parties may hold valid privileges"); *see also Retail Ventures*, 2007 WL 3376831, at *5 (citing *Leksi*); *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 645 (N.D. Iowa 2000)(denying "other claims" discovery because it would present "substantial difficulties . . . such as the necessity . . . to redact the materials in question to protect privileges and confidentiality rights that belong to others, and/or the necessity of obtaining confidentiality waivers, which is a matter not entirely within the [] Insurers' control"). Compelling production of the files of other insureds thus would lead to further discovery litigation between the parties. *See Leksi*, 129 F.R.D. at 106 ("To compel the production of the files of other insureds not only involves enormous inconvenience and management difficulties, but also entails a frightening potential for spawning unbearable side litigation which, in my view, defeats the purpose and spirit of the discovery rules themselves."); *see also Clark Equipment*, 1995 WL 867344, at *3 ("[T]he manner in which the claims of other policyholders are handled would create extended mini-trials.").

Under these circumstances, permitting the Plaintiffs to conduct "other claims" discovery would indeed result in a fishing expedition, with little or no relevance to the Plaintiffs' breach of contract or bad faith claim and with significant and disproportionate burden to the Defendants and

the increased potential for further discovery disputes. Therefore, the Plaintiffs' motion to compel discovery of other similar insurance claims is denied.

B. Discovery of Claims-Handling and Underwriting Manuals — Everest, Federal, RSUI

The second discovery dispute in this motion arises from the refusal of Everest, Federal, and RSUI to produce claims-handling and underwriting manuals.[9] The Plaintiffs argue that the claims-

[9]First Tennessee's Request for Production No. 13 seeks:

> All claims handling manuals, memoranda, written procedures, bulletins, or any other documents relating to Your guidelines, standards, or procedures for investigating, evaluating, and/or assessing coverage for First Tennessee's Insurance Claim or under the Policies, that have been in effect at any time from 2005 to the present.

(Pls.' First Set of Reqs. for Produc. at No. 13, ECF No. 153-10.) Request for Production No. 16 similarly seeks:

> All underwriting manuals, underwriting bulletins, policy guidelines, directives, or any other documents that were in effect during the periods the Policies were underwritten, that relate in any way to Your procedures, practices, or policies in underwriting coverage for or issuing the Policies, or under insurance policies similar to First Tennessee's Policies, that have been in effect at any time from 2005 to present.

(*Id.* at No. 16.)

Everest, Federal, and RSUI refused to produce documents responsive to Requests Nos. 13 and 16 on the grounds of vagueness, overbreadth, relevance, privilege/work product, and confidentiality. (ECF Nos. 153-20, 153-21, 153-24.) Initially, RSUI informed the Plaintiffs that no documents existed as to the Plaintiffs' Request for Production No. 13; however, in preparing

handling manuals might contain information on how to determine whether two claims are "interrelated" or when an insurable "claim" accrues. (Pls.' Mot. to Compel 3, 16, ECF No. 153-1.)

In response, Everest, Federal, and RSUI first argue that their claims-handling manuals are not relevant to the interpretation issue because interpretation of insurance policies is a question of law, and does not depend on whatever extrinsic material might be procured in discovery. (Defs.' Resp. 15, ECF No. 160.) This initial argument fails because, as discussed above, although an insurance contract is interpreted according to the plain language of the policy, extrinsic evidence may become relevant if the court determines the policy terms are ambiguous. *See U.S. Fire*, 2012 WL 1454008, at *9.

Some courts have found that "an insurance company's internal claims manual or claims processing guidelines may contain information relevant to resolving any ambiguities in the contract." *Id.* (citing other supporting cases); *see also Nat'l R.R.*, 2016 WL 2858815, at *10-11 (allowing production of claims manuals that "discuss[] the disputed policy provisions for the time period of coverage"); *Cummins, Inc. v. Ace Am. Ins. Co.*, No. 1:09-CV-00738-JMS, 2011 WL 130158, at *5 (S.D. Ind. Jan. 14,

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its response to the instant motion to compel, RSUI identified one potentially responsive document. (Defs.' Reply 14-15 n. 12, ECF No. 160.) RSUI relies on the same grounds listed above to object to the production of this document. *Id.*

2011)("Because the court cannot decide on the current record that the Policy is wholly unambiguous, it will not refuse discovery [of claims-handling manuals] that may tend to lead to admissible evidence regarding the meaning of the Policy."); *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 129 F.R.D. 63, 67 (S.D.N.Y. 1989)(finding that claims manuals are "germane to the interpretation of [insurance] policies").

Here, however, the interpretation of Everest, Federal, or RSUI's policies, depends upon the interpretation of the language of the HCC primary policy. As the Plaintiffs acknowledge in their second amended complaint, "[t]he seven excess policies adopt all relevant insuring clauses, warranties, definitions, terms, conditions, exclusions, and other provisions of the HCC Policy, including the FIPL coverage section." (Sec. Am. Compl. ¶ 37, ECF No. 103.) As stated in these policies, as well as reiterated by counsel at the hearing, the excess policies, which include those of Everest, Federal, and RSUI, merely follow form and adopt the position of the primary policy. For example, Federal Excess Policy states that "[c]overage hereunder shall then apply in conformance with the terms and conditions of the Primary Policy." (Federal Excess Policy 9, ECF No. 103-3.) Everest Excess Policy similarly states that "coverage under this policy shall apply in conformity with and subject to the warranties, limitations, conditions, provisions, and other terms

of the 'Primary Policy,'" and that the terms "Claim" and "Loss" have the same meaning provided in the HCC Policy. (Everest Excess Policy 4, ECF No. 103-9.) RSUI Excess Policy also states that it follows the HCC Policy and that terms such as "wrongful act," "loss," and "claim" are defined in the HCC Policy. (RSUI Excess Policy 2, 9, ECF No. 103-8.) Thus, the definitions of "Claim" and "Interrelationship of Claims" are found in HCC's primary policy, and therefore, the claim-handling manuals of Everest, Federal, or RSUI are not relevant to interpretation of the meaning of these terms if the court finds an ambiguity in the language of the HCC primary policy.

Furthermore, Everest, Federal and RSUI have asserted in their response to the motion to compel, in various affidavits, and through counsel at the hearing, that the claim-handling manuals responsive to Plaintiffs' request do not even address the interpretation of "Claim" or "Interrelationship of Claims."[10]

[10]Patrick McGinley, Vice President of Claims for Everest avers:

> [T]he only potentially responsive materials in Everest's possession generally relate to administrative procedures that are unrelated to substantively assessing Plaintiff's claim for insurance coverage that is the subject of this litigation. For example, they do not address whether a Claim is 'interrelated' under the 'Interrelationship of Claims' provisions incorporated into the Everest Policy from the HCC Policy. Nor do they relate to determining whether a government subpoena or Civil Investigation Demand constitutes a 'Claim.'

Based on these assertions, the court is satisfied that production of these documents is not necessary. *See Progressive Cas. Ins. Co. v. F.D.I.C.*, No. 11-CV-14816, 2014 WL 2177736, at *1 (E.D. Mich. May 26, 2014)(holding that although claims manuals and other instructional materials may be relevant, the plaintiff's assertion that those documents did not address the interpretation of the language at issue sufficiently satisfied the court that the documents requested would not lead to discovery of admissible evidence).

Therefore, the Plaintiffs' motion to compel discovery of Everest's, Federal's, and RSUI's claims-handling manuals is denied.

2. *Underwriting Manuals*

In their second amended complaint, the Plaintiffs alleged that they disclosed information to the Defendants regarding the DOJ/HUD Investigation in their applications submitted to HCC and

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(Everest Aff. ¶ 10, ECF No. 160-6.) Similarly, Louise Van Dyck, Vice President for North American Financial Lines Claim for Chubb & Son, a division of Federal states: "Chubb does not maintain documents that it characterizes as 'claim handling manuals,' but maintains a 'Best Practices Guide' relating to claims handling procedures. The 'Best Practices Guide' does not address the substantive coverage issues presented by this case." (Federal Aff. ¶ 8, ECF No. 160-2.) Although RSUI identified one potentially responsive document, it also maintained through counsel at the hearing that the document does not address the substantive coverage issues presented by this case but only contains administrative procedures. (*See* Defs.' Resp. 14-15 n. 12, ECF No. 160.)

the excess insurers for the policy years 2012-13 and 2013-14. (Sec. Am. Compl. ¶¶ 45-47, ECF No. 103.) Relying primarily on *Henry v. Allstate Prop. & Cas. Ins. Co.*, No. 208CV02346BBDCGC, 2009 WL 5031313 (W.D. Tenn. Dec. 14, 2009), the Plaintiffs argue in their motion to compel that the underwriting manuals of the Defendants collectively may show how the Defendants "typically address issues relating to prior claims and pending investigations against a policyholder" when evaluating risks prior to issuing a new policy. (Pls.' Mot. to Compel 3, 16-17, ECF No. 153-1.) In *Henry,* the court found underwriting manuals relevant because the defendant in that case had alleged in its answer and counterclaim that "it would not have issued the insurance policy if Plaintiffs had disclosed the correct loss history during the application process." *Henry*, 2009 WL 5031313, at *1.

The Plaintiffs further argue that "given HCC's reverse bad faith allegations and feigned surprise when the HUD Investigation ripened into a Claim, the Insurers' underwriting manuals . . . [may] shed light on why HCC apparently failed to appreciate that First Tennessee might be on the receiving end of a FCA claim at the conclusion of the DOJ's Investigation (which it had known about all along)." (Pls.' Mot. to Compel 17, ECF No. 153-1.) In their reply to the Defendants' joint response to the motion to compel, the Plaintiffs acknowledge that five of

the insurers have already provided the requested material but only Everest, Federal, and RSUI have not. (Pls. Reply 6, ECF No. 168.) In their joint response to the motion to compel, the Defendants generally argue that the underwriting manuals are irrelevant and that the Plaintiffs' request for over ten years of underwriting material is overbroad. (Defs.' Resp. 14-17, ECF No. 160.)

The Plaintiffs have failed to carry their burden of showing that the underwriting manuals of Federal, Everest, and RSUI may contain matters relevant to their case. Most importantly, Federal, Everest, and RSUI have not asserted reverse bad faith claims against the Plaintiffs, and thus the Plaintiffs' argument of relevance with respect to the reverse bad faith claims fails against these defendants. What Everest, Federal, and RSUI knew regarding the DOJ/HUD Investigation during the underwriting process is also irrelevant to interpretation of the "Claim" and "Interrelated Claim" provisions of the HCC policy. It is undisputed that notice to the underwriting departments of Everest, Federal and RSUI is not sufficient notice of a claim under the terms of the insurance policies. The critical issue is when the Plaintiffs had notice of a "Claim" within the meaning of the HCC policy not when the underwriting departments of Everest, Federal, and RSUI had notice. Therefore, the

Plaintiffs' motion to compel discovery of the underwriting manuals of Federal, Everest, and RSUI is denied.

C. Discovery of Reinsurance Agreements - Alterra, Everest, and RSUI

The third discovery dispute arises from Alterra's, Everest's, and RSUI's refusal to produce reinsurance agreements and related communications with their reinsurers about the HUD Claim.[11] Federal Rule of Civil Procedure 26(a)(1) requires a party to produce with its initial disclosures, "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Fed. R. Civ. P. 26(a)(1)(A)(iv). In *First Horizon National Corp. v. Certain Underwriters at Lloyd's*, No. 211CV02608SHMDKV, 2013 WL 11090763 (W.D. Tenn. Feb. 27, 2013), this court held that reinsurance agreements are "insurance agreements under Rule 26(a)(1)(A)(iv)" which should be produced in initial disclosures. *Id.* at *8 (citations omitted); *see also Heights at Issaquah Ridge Owners Ass'n. v. Steadfast Ins. Co.*,

[11]First Tennessee's Interrogatory No. 8 and Request for Production No. 14 seek information and documents relating to reinsurance information covering First Tennessee's claim. (Pls.' First Set of Interrog. to Defs. at Interrog. No. 8, ECF No. 153-4; Pls.' First Set of Reqs. for Produc. at Req. for Produc. No. 14, ECF No. 153-10.) Defendants Alterra, Everest, and RSUI refused to produce information or documents on the grounds of vagueness, burden, overbreadth, relevance, privilege/work product, and confidentiality. (ECF Nos. 153-11, 153-13, 153-16, 153-18, 153-20, 153-24.)

No. C07-1045RSM, 2007 WL 4410260, at *4 (W.D. Wash. Dec. 13, 2007)(stating that production under Rule 26(A)(1)(A)(iv) "is absolute, and does not require a showing of relevance"). Here, as in *Certain Underwriters*, the Plaintiffs seek a money judgment, and reinsurance may indemnify Alterra, Everest, and RSUI for payments they might make to satisfy a money judgment. *Id.* Accordingly, the reinsurance agreements are discoverable, and Alterra, Everest, and RSUI must produce them.

As to reinsurance-related communications, the Plaintiffs maintain that such documents are discoverable because they "may shed light on the Insurers' intent and understanding of the policy provisions in question" and "could reveal whether the insurers believed that these policies covered the claims" against the Plaintiffs. (Pls.' Mot. to Compel 18, ECF No. 153-1.) This court noted in *Certain Underwriters* that the law regarding discovery of reinsurance-related communications is unclear. *Id.* The insurers in *Certain Underwriters* maintained that the reinsurance-related communications reflected the insurers' business decisions to spread risk. *Id.* The court noted that the insurers offered no proof to substantiate such position. *Id.* The court further stated that even if such communications reflected business decisions, they could also reflect "the nature and extent of the Insurers' claims investigations, their interpretations of policies, and potential

admissions on coverage." *Id.* Therefore, the court did not find "relevancy a barrier to the discovery of reinsurance-related communications." *Id.*

Here, Alterra, Everest, and RSUI have each submitted affidavits to substantiate their position that the reinsurance-related communications reflect the insurers' business decisions to spread risk. (ECF Nos. 160-4, 160-6, 161.) Further, in these affidavits, Alterra, Everest, and RSUI aver that any responsive documents reflect *exclusively* "proprietary or business decisions." (Alterra Aff. ¶ 23, ECF No. 160-4; Everest Aff. ¶ 11, ECF No. 160-6; RSUI Aff. ¶ 17, ECF No. 161.) Therefore, these defendants have stated under oath that the reinsurance communication do not address the substantive issues in this litigation. *See also Heights*, 2007 WL 4410260, at *4 ("Reinsurance agreements, which at best reflect an undisclosed unilateral intention, are irrelevant to determining the intent of the parties to the primary insurance contract [and] would be non-discoverable, even were a finding of ambiguity made." (quotation omitted)); *Leksi*, 129 F.R.D. at 106 ("[Reinsurance] is a decision based on business considerations and not questions of policy interpretation.").

Reinsurance-related communications are also not relevant to a claim of bad faith. *See Heights*, 2007 WL 4410260, at *4 (denying motion to compel reinsurance communications and

recognizing that both reinsurance *and* lack of reinsurance would demonstrate bad faith and thus "the probative value of this information is little" (citation omitted)); *Great Lakes Dredge & Dock Co. v. Commercial Union Assur. Co.*, 159 F.R.D. 502, 504 (N.D. Ill. 1995)(stating the same). Moreover, Alterra, Everest, and RSUI maintained at the hearing that the reinsurance is treaty insurance, under which the reinsurer agrees to accept an entire block of business from the insured. *See Heights*, 2007 WL 4410260, at *4 (citing *N. River Ins. Co. v. Cigna Reins. Co.*, 52 F.3d 1194, 1199 (3rd Cir. 1995)). This makes the reinsurance-related communications even less relevant to the claims asserted by the Plaintiffs. *Id.* The Plaintiffs' motion to compel discovery of reinsurance documents is therefore granted as to the policies themselves pursuant to Fed. R. Civ. P. 26(a)(1), but denied as to all other reinsurance-related communications.

D. Discovery of the Reserves Established by the Defendants for the HUD Claim

The final discovery dispute arises from the Defendants' refusal to produce information and documents relating to reserves established for First Tennessee's HUD Claim.[12] The

[12]Specifically, First Tennessee's Interrogatory No. 7 asks the Defendants to "identify the reserves established for First Tennessee's Insurance Claim, and the process, rationale, and bases that supported the establishment of and any modifications to such reserves" from the date of the initial notice of the claim to the present. (Pls.' First Set of Interrog. to Defs. at Interrog. No. 7, ECF No. 153-4.) First Tennessee's Request for

Plaintiffs argue that loss reserve information can reflect the insurer's understanding of the claim, *i.e.*, whether the claim is covered under the policy.

Courts are divided on whether reserves are discoverable. Some courts have denied production of reserve information stressing the tenuous link between reserves and the legal question of coverage. *See U.S. Fire*, 2012 WL 1454008, at *10 ("[N]either the existence nor amount of a reserve fund has any bearing on the legal question of coverage, which is determined by the language of the insurance contract."); *Bondex Int'l, Inc. v. Hartford Acc. & Indem. Co.*, No. 1:03CV1322, 2006 WL 355289, at *3 (N.D. Ohio Feb. 15, 2006)("[E]vidence of the amount of reserves is not relevant because it is not necessarily based on a full knowledge of the facts and the law of the case . . . [but] most often reflects a business decision."); *Heights*, 2007 WL 4410260, at *3-4 (denying motion to compel reserves information in case involving bad faith claim); *Mazur v. Hart. Life & Acc. Co.*, 06-01045, 2007 WL 4233400, at *19 (W.D. Pa. Nov. 28, 2007)("[T]he relationship between claim reserves and

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Production No. 20 seeks documents relating to the Defendants' "establishing and/or modifying of loss and/or expense reserves" for First Tennessee's insurance claim. (Pls.' First Set of Reqs. for Produc. at Req. No. 20, ECF No. 153-10.) The Defendants refused to provide information and documents on the grounds of overbreadth, relevance, proportionality, privilege/work product, and confidentiality. (ECF Nos. 153-3, 153-11 to 153-17, 153-18 to 153-25.)

the claim's actual value is tenuous."); *Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413 (W.D. Pa. 1973)(not allowing discovery of reserves); *see also Signature Dev. Cos., Inc. v. Royal Ins. Co. of Am.*, 230 F.3d 1215, 1223-24 (10th Cir. 2000)(stating that "reserve calculation is merely an amount [] set aside to cover potential future liabilities" and not an admission of liability).

Other courts have allowed discovery of reserves finding it relevant to the insurer's valuation of the claim or the plaintiff's bad faith claim. *See Park-Ohio Holdings Corp. v. Liberty Mut. Fire Ins. Co.*, No. 1:15-CV-943, 2015 WL 5055947, at *4 (N.D. Ohio Aug. 25, 2015)("Information about the levels of reserve that insurance companies set aside for individual claims is relevant as information about Defendant's valuation of the claims and could demonstrate a lack of good faith regarding settling the claim." (citation omitted)); *First Tenn. Bank Nat. Ass'n v. Republic Mortg. Ins. Co.*, 276 F.R.D. 215, 222 (W.D. Tenn. 2011)(allowing discovery of reserve information in bad faith claim); *Retail Ventures*, 2007 WL 3376831, at *5 ("[I]nformation regarding reserves in this case, even if not determinative of every issue, is nevertheless reasonably calculated to lead to the discovery of admissible evidence."); *Soc'y Corp. v. Am. Cas. Co. of Reading, PA.*, No. 1:91CV0327, 1991 WL 346302, at *1 (N.D. Ohio July 24, 1991)("[Reserve]

materials are relevant to discover what statements, if any, were made about coverage."); *see also OOIDA Risk Retention Grp., Inc. v. Bordeaux*, No. 315CV00081MMDVPC, 2016 WL 427066, at *10 (D. Nev. Feb. 3, 2016)("[T]he 'bulk of cases' to consider the issue have concluded that reserve information is relevant to whether an insurer acted in bad faith."); *Keefer v. Erie Ins. Exch.*, No. 1:13-CV-1938, 2014 WL 901123, at *3 (M.D. Pa. Mar. 7, 2014)("Since Plaintiff claims that Defendant acted in bad faith during its investigation of Plaintiff's claim, a comparison between the reserve value of the claim and Defendant's actions in processing Plaintiff's claim could shed light on Defendant's liability under the bad faith statute."); *Bernstein v. Travelers Ins. Co.*, 447 F. Supp. 2d 1100, 1107 (N.D. Cal. 2006)(noting that reserve information was illustrative of the insurer's state of mind and motives with respect to its claim handling practices, which "could constitute critical areas of inquiry in bad faith cases").

This court addressed the issue of whether reserve information is discoverable in *Certain Underwriters*, in which, as in here, First Horizon asserted breach of contract and bad faith claims against its insurers. *See Certain Underwriters*, 2013 WL 11090763, at *1-2. In *Certain Underwriters*, this court denied First Horizon's motion to compel discovery of reserve information finding that such information was irrelevant and

protected under attorney-client privilege and work-product doctrine:

> First, reserves are of marginal relevance to any issue in this case because their "basic characteristic" when made as a claims analysis is an estimate of potential liability *not* "entail[ing] an evaluation of coverage based upon thorough factual and legal consideration." Information relating to the amount of reserves "is not relevant because it is not necessarily based on a full knowledge of the facts and the law of the case." Secondly, to the extent reserves are established on the basis of legal consideration by either legal counsel or members of the risk management department, "the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications."

Certain Underwriters, 2013 WL 11090763, at *9 (quoting *Bondex,* 2006 WL 355289, at *2-3).

The Plaintiffs have not persuaded the court to reverse its earlier decision in *Certain Underwriters*. The reserves set up by the Defendants are a business judgment and do not reflect a legal determination of the validity of the Plaintiffs' claim against them. For the same reasons explained in *Certain Underwriters*, the Plaintiffs are not entitled to discovery of reserve information.

III. CONCLUSION

For the reasons stated herein, the Plaintiffs' motion to compel is granted in part and denied in part as follows:

- The Plaintiffs' motion to compel "other claims" discovery is denied.

- The Plaintiffs' motion to compel claim-handling manuals is denied.
- The Plaintiffs' motion to compel underwriting manuals is denied.
- The Plaintiffs' motion to compel reinsurance agreements from Alterra, Everest, and RSUI is granted.
- The Plaintiffs' motion to compel reinsurance-related communications is denied.
- The Plaintiffs' motion to compel discovery of reserves is denied.

Alterra, Everest, and RSUI shall produce the reinsurance agreements within fourteen days of the date of this order.

IT IS SO ORDERED this 5th day of October, 2016.

s/Diane K. Vescovo
DIANE K. VESCOVO
CHIEF UNITED STATES MAGISTRATE JUDGE