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

FIRST HORIZON NATIONAL CORPORATION and FIRST TENNESSEE BANK NATIONAL ASSOCIATION, Plaintiffs, v. 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.	)	No. 15-cv-2235-SHL-dkv

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON TIMING OF THE CLAIM AND FAILURE TO GIVE PROPER NOTICE, GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING AS MOOT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PROFESSIONAL SERVICES, LOSS, CONSENT AND COOPERATION REQUIREMENTS AND AS TO PLAINTIFFS' BAD FAITH COUNT

In June 2015, Plaintiffs First Horizon National Corporation ("First Horizon") and First Tennessee Bank National Association ("First Tennessee") (collectively, "Plaintiffs" or "First Tennessee") paid $212.5 million to the Department of Justice ("DOJ") to settle False Claims Act ("FCA") allegations involving deficiencies in due diligence and underwriting related to mortgage loans. Here, Plaintiffs seek insurance coverage for that settlement. Defendants Houston

Casualty Company ("HCC"), Federal Insurance Company, ("Federal"), XL Specialty Insurance Company ("XL"), Alterra America Insurance Company ("Alterra"), Axis Insurance Company ("Axis"), National Union Fire Insurance Co. of Pittsburgh, PA ("National Union"), RSUI Indemnity Company ("RSUI") and Everest Indemnity Insurance Co. ("Everest") (collectively "Defendants") contend that there is no insurance coverage for the policy period at issue because the DOJ first made a Claim against Plaintiffs prior to the relevant policy period, and, alternatively, because Plaintiffs failed to provide sufficient notice of the Claim under the Policy.[1]

Before the Court are cross Motions for Summary Judgment, one submitted by Plaintiffs (ECF No. 232) and two, framed in the alternative, submitted by Defendants (ECF Nos. 230, 240). For the reasons stated herein, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' first Motion for Summary Judgment on timing, **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Partial Summary Judgment and **DENIES AS MOOT** Defendants' Motion for Summary Judgment in the Alternative.

INTRODUCTION

Although there is extensive briefing before the Court that involves a complex federal False Claims Act investigation and numerous parties, the undisputed material facts present a more narrow dispositive issue of law as to the timing of a Claim under Plaintiffs' insurance policies with Defendants for the 2013-14 Policy Period. For the period August 1, 2013, through July 31, 2014, First Tennessee had a primary insurance policy with HCC and seven excess policies with the remaining named Defendants (collectively referred to as the "Policy"). Plaintiffs allege claims against Defendants for breach of contract and bad faith denial of coverage, seeking reimbursement under the Policy for a Claim that led to a $212.5 million

[1] The Court uses the capitalized term "Claim" to refer to Claims under the Policy at issue, and the lower-case "claim" to refer to legal causes of action.

settlement between First Tennessee and the DOJ (the "FHA Claim"). (See Second Am. Compl., ECF No. 103.)

In 2012, the DOJ began to investigate First Tennessee's loan-origination services for Fair Housing Act ("FHA") mortgage loans, ultimately alleging that First Tennessee violated the FCA. The primary dispute between the Parties is whether the FHA Claim was first made during the Policy Period, and, if it was, whether the Insurers received proper notice of the Claim.

In their first Motion for Summary Judgment, Defendants primarily argue that they are entitled to judgment as a matter of law because Plaintiffs' FHA Claim did not fall within the applicable policy period, and, even if it did, Plaintiffs failed to give proper notice of the Claim. Consequently, Defendants argue that Plaintiffs' bad faith claim also fails. Defendants also allege that the FHA Claim is interrelated to a prior suit against Plaintiffs by the Federal Housing Finance Agency ("FHFA"), and that Defendants HCC, Federal, XL, National Union and Everest (collectively the "Settling Insurers") provided coverage for the settlement in that matter (the "FHFA Action"). Defendants argue that the interrelatedness of the FHFA Action and the FHA Claim (1) entitles the Settling Insurers to summary judgment as to Counts I and II of their counterclaims alleging breach of the FHFA settlement agreements and release; and (2) bars the FHA Claim from coverage under the Single Claim Provision of the Policy at issue here. (Defs.' Mot. for Summ. J. ("Defs.' MSJ"), ECF No. 230.) Alternatively, Defendants argue that they are entitled to summary judgment as to professional services, loss, consent and cooperation requirements and as to Plaintiffs' bad faith count. (Defs.' Mot. for Summ. J. ("Defs.' Alternative MSJ"), ECF No. 240.)

Plaintiffs argue that they are entitled to partial summary judgment as to the timing of the FHA Claim, whether the FHA Claim is barred by the single claim or prior notice exclusions and

as to Defendants HCC and Alterra's bad faith counterclaims. (Pls.' Mot. for Partial Summ. J. ("Pls. MSJ"), ECF No. 232.)

STATEMENT OF THE CASE[2]

Plaintiff First Horizon is a corporation organized under the laws of the State of Tennessee, and Plaintiff First Tennessee is a banking institution that is a wholly owned subsidiary of First Horizon. Defendants (or "Insurers") issued First Tennessee $75 million of Blended Executive Risk Insurance for the period August 1, 2013, through July 31, 2014, as set forth in a primary policy issued by Defendant HCC. (Pls.' Statement of Undisputed Material Facts ("SUMF") ¶ 1, ECF No. 234; Defs.' SUMF[3] ¶ 1, ECF No. 231-4; Exh. 1, ECF No. 242.) The Parties agree that the seven excess Insurers' policies ("Excess Policies") generally follow the same form as the primary policy issued by HCC. (Defs.' SUMF ¶ 2, ECF No. 231-4; Exhs. 23-29, ECF No. 242.)

I. The FHA Claim

On April 27, 2012, the United States Department of Housing and Urban Development ("HUD"), through its Office of the Inspector General ("OIG"), subpoenaed documents from First Tennessee related to Plaintiffs' underwriting of mortgages loans issued by the FHA. (Exh. 116, ECF No. 239-11; Pls.' SUMF ¶ 3, ECF No. 234.) Plaintiffs characterize the subpoena, which was delivered by the DOJ, as commencing an investigation into whether First Tennessee violated

[2] These facts are drawn from the Defendants' Statement of Undisputed Material Facts, Plaintiffs' Statement of Undisputed Material Facts, their respective Responses and the attached exhibits thereto. Where disputes of fact remain, it is noted. Where alleged facts were immaterial to the issues of law addressed by the Court, they were disregarded. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("As to materality, the substantive law will identify which facts are material.").

[3] Contrary to the requirements under Local Rule 56.1(a), Defendants combine multiple facts into single paragraphs in their SUMF, making it difficult for both Plaintiffs and the Court to parse through individual facts and disputes. While the Court will consider each fact individually, the Court directs Defendants to comply with the Local Rules when drafting future SUMF.

the FCA when submitting its certifications to HUD regarding its compliance with the underwriting and quality control requirements of FHA mortgages. (Pls.' SUMF ¶ 3, ECF No. 234.) On June 2, 2012, the DOJ issued a Civil Investigative Demand ("CID") to First Tennessee, requesting interrogatory responses related to potential FCA violations, which Defendants characterize as the commencement of a formal FCA investigation of First Tennessee by the DOJ. (Defs.' SUMF ¶ 6, ECF No. 231-4; Defs.' Resp. to Pls.' SUMF ¶ 3, ECF No. 255-1.) Individuals at First Tennessee (including former employees) received additional CIDs on March 21, 2013, for depositions, on August 26, 2013, for further interrogatories, depositions and document production, on September 24, 2013, for further depositions and document production, and on June 29, 2014, for depositions. (Defs.' SUMF ¶ 5, ECF No. 231-4; Pls.' Resp. to Defs.' MSJ ¶ 5, ECF No. 260; Exh. 8, ECF No. 242-8.)

On May 16, 2013, representatives from the DOJ, HUD Office of Inspector General, HUD and the United States Attorney's Office, Northern District of Georgia ("USAO") (collectively the "Government") met with First Tennessee and its counsel regarding the FHA investigation. (Defs.' SUMF ¶ 7, ECF No. 231-4.) First Tennessee attendees included Mr. John Culver and Mr. Philip Schulman, outside counsel for First Tennessee, Charles Tuggle, General Counsel for First Tennessee and Desiree Franklin, Assistant General Counsel for First Tennessee. (Id.) A presentation was made by the Government, which was marked "Subject to Federal Rule of Evidence 408" on each page. (Id.; see Exh. 38, ECF No. 243-7.)[4] Although the Parties dispute each other's characterization of the meeting and presentation,[5] the presentation stated the elements of a claim under the FCA, included a summary of preliminary findings that First Tennessee was in violation of the FCA, stated that "67.1 percent of the loan files (102 of 152)

[4] A copy of this presentation was then emailed to Mr. Culver. (Id.)
[5] Defendants' objections to Plaintiffs' attempted use of extrinsic evidence will be discussed infra.

contained serious deficiencies and demonstrated that First Tennessee failed to exercise due diligence in originating and underwriting its FHA loans," outlined "theoretical damages and penalties" upward of $1.19 billion and stated that the investigation and settlement discussions would continue. (Exh. 38 at PageID 8721, 8742, 8743 & 8744, ECF No. 243-7.)

On May 28, 2013, DOJ counsel John Warshawsky sent counsel for First Tennessee an email marked "Subject to FRE 408," stating "[p]ursuant to our discussions, and solely for the purpose of facilitating possible settlement discussions, attached please find a listing of the Claims identified during our reunderwriting review as suffering from serious underwriting deficiencies." (Defs.' SUMF ¶ 8, ECF No. 231-4; Exh. 40, ECF No. 243-9.)[6] Then, on July 26, 2013, in response to requests from Plaintiffs' counsel, Mr. Warshawsky declined to clarify elements of the presentation, stating "we will decline to provide responses to your four-point set of questions about sampling. We will reconsider them, if appropriate, depending on further developments in our settlement discussions." (Exh. 41, ECF No. 243-10.) That email also reiterated the calculation of theoretical damages, including "assumed civil penalties under the False Claims Act." (Id.)

On February 3, 2014, the DOJ and First Tennessee executed a tolling agreement, wherein the DOJ agreed not to file or assert "[c]ivil Claims in a civil action against First Tennessee under the False Claims Act . . . on or before March 3, 2014" as "the parties have entered into discussions relating to the possible settlement of the Civil Claims prior to suit[.]" (Exh. 10, ECF No. 242-10.)[7] Although the Parties generally agree on the factual description of what occurred up to this point, there is a dispute as to the interpretation of those facts, specifically as to whether

[6] First Tennessee disputes that the Parties were engaged in settlement discussions at this point. (Pls.' Resp. to Defs.' SUMF ¶ 8, ECF No. 260.)

[7] Three additional tolling agreements ultimately extended the deadline to sue until March 2, 2015. (Id.)

First Tennessee and the DOJ had, in fact, engaged in formal settlement discussions to resolve the potential claims prior to February 3, 2014. (Pls.' Resp. to Defs.' SUMF ¶ 13, ECF No. 260.)

On April 29, 2014, Mr. Daniel Fruchter, representing the DOJ, conveyed an oral settlement offer by phone to First Tennessee for damages in the amount of $610 million, which was confirmed in writing via email. (Defs.' SUMF ¶ 14, ECF No. 231-4; Exh. 2, ECF No. 242-2.) In the email, Mr. Fruchter repeatedly referred to that amount as a settlement offer and, in explaining his calculation, stated that "[the DOJ] would welcome further discussion and information sharing but believe that for it to be productive, First Tennessee should provide a counterproposal." (Exh. 2, ECF No. 242-2.) Mr. Fruchter also attached a list of the FHA case numbers for the mortgages that the DOJ contended were materially deficient and thus were used to calculate the settlement offer, and he responded to a request by First Tennessee on an "ability to pay" analysis. (Id.) In a follow-up email, Mr. Fruchter agreed to extend the tolling date until October 31, 2014, but also stated "I don't think we can push back the date by which we agree to file suit beyond June." (Exh. 4, ECF No. 242-4; Pl.'s Resp. to Defs.' SUMF ¶ 19, ECF No. 260.)

Plaintiffs do not dispute the substance of the email or its receipt but dispute that this was an actual settlement offer. (Pls.' Resp. to Defs.' SUMF ¶ 14, ECF No. 260.)[8] Plaintiffs contend that the parties were only discussing the DOJ's position on settlement to induce First Tennessee to make a settlement offer. (Id.) Mr. Fruchter sent several additional requests for a settlement proposal from First Tennessee. (See Exhs. 5 & 6, ECF Nos. 242-5; 242-6.) In one email, sent June 10, 2014, Mr. Fruchter expressed that "[the DOJ] would like First Tennessee to respond by the end of the month." (Exh. 6, ECF No. 246-6.) In response, on June 11, 2014, counsel for

[8] Defendants object generally to Plaintiffs' proposed interpretations of written documents. (See Defs.' Resp. to Pls.' SUMF ¶ 5, ECF No. 255-1); Knoxville, C.G. & L.R. Co. v. Beeler, 18 S.W. 391, 392 (Tenn. 1891) ("The rule undoubtedly is that the construction of a written instrument introduced in evidence is a matter of law for the court.").

First Tennessee stated that "My client fully intends to make a comprehensive presentation that will address many aspects of the government's claims; we are not looking to simply propose a number . . . ." (Id.)

Then, on December 17, 2014, the DOJ, HUD OIG and the USAO met with First Tennessee's representatives, including Mr. Tuggle and Ms. Franklin. (Defs.' SUMF ¶ 22, ECF No. 231-4.) At the meeting, the DOJ presented their position in writing which was emailed to First Tennessee afterwards. (Exh. 11, ECF No. 242-11.) In that presentation, the DOJ characterized the April 2014 conversation and email as a "settlement offer," and referenced the May 16, 2013, Presentation on the deficiencies found in the smaller sample of loans. (Id. at PageID 8034, 8117.) In two slides labeled "Settlement Discussions/Next Steps," the DOJ indicated the following:

- As you know, our initial review of a randomly-selected sample of First Tennessee FHA originations suggested that over 2/3 of First Tennessee's FHA loans contained serious violations of material FHA requirements.
- First Tennessee did not contest that 11 of the mortgages were materially deficient and provided a loan-by-loan response on the remaining 90 loans.
- We carefully evaluated First Tennessee's responses for each of the 90 and, in April 2014, based on significant compromises we made in the findings for settlement purposes, made a settlement offer based on the following criteria:
    - 65% deficiency rate for mortgages 60 days delinquent within 9 months/90 days delinquent within a year;
    - 43% deficiency rate for mortgages not in serious default within the first nine months;
    - HUD recovery rate of 39%
- Based on a multiplier of 2, our settlement offer was $610 million for loans originated between January 2006 and December 2011 on which a claim was submitted on or before February 21, 2014.

- We have not received a response to our April 2014 offer.
- Therefore, we are currently seeking suit authority and plan to file suit unless we receive a serious settlement offer by the end of January 2015 that makes it clear that further discussions are likely to be productive.

(Id. at PageID 8117-18.) The presentation stated that the investigation was substantially complete. (Id. at PageID 8034.)

On February 27, 2015, Plaintiffs met with representatives of the DOJ and HUD, and made a settlement offer in the amount of $50 million. (Defs.' SUMF ¶ 25, ECF No. 231-4.) Ultimately, on June 1, 2015, First Tennessee and the DOJ executed a written settlement agreement in the amount of $212.5 million, which First Tennessee paid in full. (Defs.' SUMF ¶ 30, ECF No. 260; Exh. 53, ECF No. 244-2.)

II. Notice to Insurers of Claim and Denial of Coverage

The Parties draw different conclusions as to when this issue became a Claim under the Policy, and the adequacy of the notice of the Claim provided to Defendants. Plaintiffs contend that the December 2014 Presentation was the point at which this issue became a Claim, and that a notice of circumstances ("NOC") submitted in May 2014 tied that Claim to the 2013-14 Policy Period. Defendants contend that by the time Plaintiffs submitted the NOC, a Claim had already occurred and, even if one had not, the NOC was deficient.

On May 27, 2014, First Tennessee sent an email with attachments that it describes as providing a "notice of circumstances that may give rise to a claim" under the Policy. (Defs.' SUMF ¶ 51, ECF No. 231-4; Pls.' SUMF ¶ 35, ECF No. 234.) The NOC stated that,

> Since second quarter 2012 FHN has been cooperating with the U.S. Department of Justice ("DOJ") and the Office of the Inspector General for the Department of Housing and Urban Development ("HUD") in a civil investigation regarding compliance with requirements relating to certain Federal Housing Administration ("FHA")-insured loans. During second quarter 2013 DOJ and HUD provided FHN with preliminary findings of the investigation, which focused on a small

> sample of loans and remained incomplete. FHN prepared its own analysis of the sample and has provided certain information to DOJ and HUD. **Discussions between the parties are continuing** as to various matters, including certain factual information. The investigation **could lead to a demand or claim under the federal False Claims Act** and the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which allow treble and other special damages substantially in excess of actual losses. Currently FHN **is not able to predict the eventual outcome of this matter**. **FHN 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 potential remedies, including any amount of enhanced damages, that might be available or awarded; the availability of significantly dispositive defenses; FHN's lack of information that would enable FHN to assess performance concerning its FHA-insured originations, nearly all of which FHN does not service; and the small number of reported precedent claims and resolutions (involving other banking organizations) combined with a lack of underlying data connected with those resolutions. The investigation has focused on loans originated by FHN on or after January 1, 2006. FHA-insured originations from January 1, 2006 through the August 31, 2008 divestiture of FHN's national mortgage platform totaled 47,817 loans with an aggregate original principal balance of $8.2 billion. The amount of FHA-insured originations each year has declined substantially following the divestiture.

(ECF No. 242-3 at 5) (emphasis added.)

In addition to the May 2014 NOC, the FHA Claim was discussed on First Horizon Quarterly Claim Conference Calls on July 23, 2014, October 23, 2014, and January 22, 2015. (Pls.' Resp. to Defs.' SUMF ¶ 46, ECF No. 260.) These calls occurred four times a year between 2012 and 2015, and, during the calls, counsel for First Tennessee provided updates on "Claims" and "notices of circumstances" for which First Tennessee had provided notice to Defendants or other insurers. (Defs.' SUMF ¶ 46, ECF No. 231-4.) Although First Tennessee had set a $50 million litigation reserve in October 2014 related to the FHA Claim, that was not disclosed on the October 23, 2014 call. (Pls.' Resp. to Defs.' SUMF ¶ 49, ECF No. 260.) Moreover, First Tennessee did not indicate that the FHA Claim had become a Claim under the Policy in any of these calls, nor did it disclose the Governments' April 2014 $610 million settlement offer. (Id. at ¶¶ 47-50.)

Plaintiffs contend that the Insurers did not respond to or investigate the NOC, which the Insurers contest. (See Defs.' Resp. to Pl.'s SUMF ¶ 37, ECF No. 255-1.) The Insurers argue that, given the lack of full information in the NOC, there was little to investigate. (Id.) Further, the Insurers state that, during the July 23, 2014 and October 23, 2014, quarterly calls, the April 29, 2014 settlement offer was not discussed, and, during the January 22, 2015, counsel for First Tennessee stated that no claim or demand had been made. (Pls.' Resp. to Defs.' SUMF ¶¶ 48-50, ECF No. 260.) Finally, the Insurers indicate that, once a Claim was made, they submitted letters reserving their rights. (See Defs.' Resp. to Pl.'s SUMF ¶¶ 37-38, ECF No. 255-1.)

On a February 25, 2015, call, First Tennessee requested that HCC and the other insurers consent to and agree to fund the $50 million settlement offer that would be made at its February 27, 2015, meeting with the DOJ. (See Pls.' Resp. to Defs.' SUMF ¶ 53, ECF No. 260.) On February 26, 2015, HCC requested material information and reserved its rights, based on its position that the Claim occurred prior to the inception of the Policy Period and there was not proper notice to the Insurers. (Id. at ¶ 54; Exh. 11, ECF No. 242-14.) The other Defendants adopted HCC's positions by reference. (Defs.' SUMF ¶ 54, ECF No. 231-4.)

On March 25, 2015, First Tennessee requested Defendants' consent to fund a settlement of up to $65 million, which was followed by a request for authority up to $85 million, seeking in the alternative "an agreement from the insurers not to raise lack of consent to such a settlement amount as a coverage defense." (Pls.' Resp. to Defs.' SUMF ¶ 56, ECF No. 260; Exh. 71, ECF No. 245-10.) On April 4, 2015, First Tennessee filed the instant action, at which time no insurer had denied coverage but all had reserved their rights. (Defs.' SUMF ¶ 62, ECF No. 260.) On August 5, 2015, First Tennessee sent a statutory demand letter to each Insurer, stating that they lacked a basis for denying coverage. (Pls.' SUMF ¶ 59, ECF No. 234.)

III. FHFA Claim

Prior to the inception of the DOJ investigation described herein, on September 2, 2011, the FHFA filed a lawsuit against Plaintiffs, among others, alleging violations of the Securities Act and District of Columbia law for alleged false statements made in connection with the offer and sale of certain residential mortgage-backed securities. (Defs.' SUMF ¶ 33, ECF No. 231-4.) Specifically, the FHFA alleged that Plaintiffs, among others, made "materially false or misleading statements and omissions" as to their compliance with certain underwriting guidelines and standards." (ECF No. 242-17 at ¶ 1.)

Plaintiffs provided notice to their insurers of that lawsuit under the 2009-10 Policy Period, including the Settling Insurers. (Id.) Ultimately, the Settling Insurers, other than Everest, entered into a settlement agreement to resolve coverage issues related to the FHFA claim, which became effective between May 7 and May 14, 2014.[9] (Pls.' Resp. to Defs.' SUMF ¶ 34, ECF No. 260.) Everest also later entered into a settlement agreement with Plaintiffs. (Id.) Under the terms of the agreements (the "Settlement Agreements"), the Insurers provided settlement payments for the FHFA lawsuit, and Plaintiffs released the Settling Insurers (and affiliates) from claims and potential 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 as the FHFA Action." (Exh. 18, ECF No. 242-18.)

Defendants allege that the FHFA Complaint involved "systematic lack of compliance with underwriting standards," and thus the FHA Claim would fall within the scope of the settlement agreement. (ECF No. 231 at 29.) While Plaintiffs do not dispute the existence and

[9] The exact date is disputed, but the actual date is not material here.

language of the Settlement Agreements, the Parties dispute the relatedness of the underlying facts of the FHFA Claim and the FHA Claim.

IV. The 2013-14 Policy

The Parties do not dispute the terms of the Policy, the relevant portions of which are included here. Under Coverage Section III of the Primary Policy issued by HCC, Financial Institution Professional Liability ("FIPL Coverage"),

> [t]he 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.

(Exh. 1, ECF No. 237-1 at at PageID 6247.)

As used in Section III, the Primary Policy defines the following terms:

> **Claim** means: (1) any written demand for monetary, non-monetary or injunctive relief; (2) any civil proceeding commenced by service of a complaint or similar pleading; (3) any arbitration, mediation or other similar dispute resolution proceeding; (4) any criminal proceeding commenced by return of an indictment; or (5) any administrative or regulatory proceeding commenced by the filing of a notice of charges, written request to interview, formal investigative order or similar document
>
> . . .
>
> **Wrongful Act** means any actual or alleged act, error, misstatement, misleading statement, breach of duty or omission by: (1) an **Insured Person** in his or her capacity as such, or (2) the **Company**, in rendering or failing to render **Professional Services** . . . .

(Id. at PageID 6247-49.)

The Policy states that "[t]he Insureds must give the Insurer written notice of any Claim as soon as practicable after the [Insured] becomes aware of such Claim, but in no event later than 90 days after the end of the Policy Period . . . ." (ECF No. 237-1 at PageID 6227.) Additionally,

the Policy permits a "notice of circumstances" to be given to tie a future Claim to the 2013-14 Policy Period.

> If, during the Policy Period . . . the Insureds first become aware of any circumstances which may reasonably be expected to give rise to a Claim against the Insureds and if, before the end of the Policy Period . . . the Insureds give written notice to the Insurer of the circumstances and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, potential claimants and the consequences which have resulted or may result therefrom, then any Claim subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act described in such notice will be considered to have been made at the time such a notice of circumstances was given.

(Id.)

Additionally, the Policy includes a provision regarding the interrelationship of Claims ("Single Claim Provision"), stating,

> [a]ll Claims alleging, arising out of, based upon or attributable to the same facts, circumstances, situations, transactions or events or to a series or 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 earlier such Claim was made.

(Id. at PageID 5615.)

STANDARD OF REVIEW

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although hearsay evidence may not be considered on a motion for summary judgment, Carter v. Univ. of Toledo, 349 F.3d 269, 274 (6th Cir. 2003), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The court is to view facts in the record and reasonable inferences that can be drawn from those facts in the light most favorable to the non-

moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Once a properly supported motion for summary judgment has been made, the party opposing summary judgment must show that there is a genuine dispute of material fact by pointing to evidence in the record or must argue that the moving party is not entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c)(1). The opposing party "cannot rest solely on the allegations made in [the] pleadings." Everson v. Leis, 556 F.3d 484, 496 (6th Cir. 2009) (quoting Skousen v. Brighton High Sch., 305 F.3d 520, 527 (6th Cir. 2002)). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

While the Court views all evidence and factual inferences in a light most favorable to the non-moving party, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48 (emphasis in original). The Court's role is not to weigh evidence or assess credibility of witnesses, but simply to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Kroll v. White Lake Ambulance Auth., 763 F.3d 619, 623 (6th Cir. 2014) (quoting Anderson, 477 U.S. at 251–52). When considering cross motions for summary judgment, the Court "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F.2d 240, 241 (6th Cir. 1991) (quoting Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

ANALYSIS

On May 18, 2017, the Court heard argument on three dispositive issues underlying these Motions (ECF No. 316): (1) when the Claim became a Claim, referred to as the timing of the Claim, (2) the adequacy of notice of the Claim, and (3) the interrelatedness of the FHFA Action and the FHA Claim. At that hearing, the Parties agreed that these issues are all resolvable on summary judgment as questions of law. In determining whether the FHA Claim is covered by the 2013-14 Policy,[10] the Court will first outline the applicable law governing the interpretation of the Policy. Then, in considering timing, the Court will evaluate what occurred between the DOJ's initial subpoena in February 2012 and the final settlement by Plaintiffs in June 2015, to determine when the FHA Claim first constituted a Claim under the Policy and whether Defendants received proper notice of the Claim. Next, the Court will consider whether Defendants HCC, Federal, XL, National Union and Everest are entitled to summary judgment on their breach of contract counterclaims based on prior settlement agreements in the FHFA action. Finally, the Court will resolve Plaintiffs' bad faith claim and Defendants HCC and Alterra's statutory reverse bad faith claims.[11]

Ultimately, the Court concludes that the April 2014 settlement offer was a Claim that Plaintiffs failed to give appropriate notice of under the Policy. Therefore, Defendants properly denied coverage. Further, the Court finds that the FHFA Action and the FHA action are not interrelated under the terms of the Settling Insurers' prior release. Given the reasonable dispute between the Parties as to the timing of the Claim, the Court also dismisses all bad faith claims.

[10] The policy is a Claims-made policy as opposed to an "occurrence" policy. A Claims-made policy provides coverage for Claims that are made against the insured and reported to the insurer during the policy term, regardless of when the underlying actions that gave rise to the Claims took place. United States v. A.C. Strip, 868 F.2d 181, 184 (6th Cir. 1989).

[11] Because the Court ultimately resolves the matter in favor of Defendants, the court finds that Defendants' Motion for Summary Judgment in the alternative is moot, and thus does not consider it.

I. Interpretation of Insurance Contracts under Tennessee Law

The Parties do not dispute that the insurance contracts at issue were made in Tennessee and are governed by Tennessee law. Under Tennessee law, "[t]he question of the insurance coverage is a question of law involving the interpretation of contractual language." Clark v. Sputniks, LLC, 368 S.W.3d 431, 441 (Tenn. 2012). "It is the Court's duty to enforce contracts according to their plain terms . . . [T]he entire contract should be considered in determining the meaning of any or all of its parts." Terminix Int'l Co. P'ship v. Safety Mut. Cas. Co., 974 F.2d 1339 (6th Cir. 1992) (quoting Cocke Cnty. Bd. of Highway Comm'rs v. Newport Util. Bd., 690 S.W.2d 231, 237 (Tenn.1985)). "[C]ourts should construe insurance policies 'as a whole in a reasonable and logical manner.'" Clark, 368 S.W.3d at 441 (quoting Travelers Indem. Co. v. Moore & Assocs., Inc., 216 S.W.3d 302, 305 (Tenn. 2005)). "[T]he courts will not rewrite an unambiguous term simply to avoid harsh results." Certain Underwiters at Lloyd's of London v. Transcarriers, Inc., 107 S.W.3d 496, 499 (Tenn. Ct. App. 2002).

The Court will apply these standards in interpreting the provisions of the Policy.

II. Timing of the Claim

The definition of a Claim in the Policy is unambiguous, and, thus, the question to be answered is when, as a matter of law, the Claim occurred. See, e.g., SNL Fin., LC v. Philadelphia Indem. Ins. Co., 455 F. App'x 363, 368 (4th Cir. 2011) (finding language defining a Claim as "written demand for monetary or non-monetary . . . relief" to be unambiguous). Defendants contend that the FHA Claim occurred prior to the inception of the 2013-14 Policy Period, and that, even if the Claim occurred after the inception of the Policy Period, it was not properly reported to the Insurers under the Policy.[12] Plaintiffs argue that the December 2014

[12] The issue of the adequacy of the notice is addressed infra at 26-30.

presentation was the first "Claim" against them under the Policy and that the Claim was properly tied to the Policy Period by the May 2014 NOC.

There are a number of events which occurred between the 2012 inception of the DOJ investigation and the 2015 final settlement which various Parties argue constituted a Claim. The Court examines these events in light of the plain language of the Policy and concludes that, as a matter of law, this Claim first arose in April 2014.

A. Subpoenas/CID

Defendants HCC, XL, Alterra, Axis, RSUI and Everest[13] argue that the compulsory process served on Plaintiffs as early as June 2012 constituted the start of a formal investigation by the DOJ, and thus was an "administrative or regulatory proceeding" commenced by a "formal investigative order," making it a Claim under Subsection III(B)(5) of the Policy.

First Tennessee relies on Employers' Fire Insurance Co. v. ProMedica Health Systems, Inc., 524 F. App'x 241 (6th Cir. 2013), for its contention that compulsory service through a subpoena and/or a CID does not constitute a Claim under the plain terms of the Policy. (Pls.' Resp. to Defs.' MSJ 8-9, ECF No. 258) (citing ProMedica Health Sys., Inc., 524 F. App'x at 251).[14] Applying the plain language of the relevant policy,[15] the Court in ProMedica determined

[13] Defendants Federal and National Union do not take a position as to whether the subpoenas and CIDs constituted a Claim.

[14] Although the Sixth Circuit was evaluating Ohio law in ProMedica, the standard for evaluating insurance contracts in Ohio is substantially similar to the standard in Tennessee, and Defendants provide no reason to conclude that Ohio law is distinguishable. See id. at 246 (citing cases).

[15] The Policy in ProMedica defines "claim" to mean:

> (1) a written demand for monetary, non-monetary or injunctive relief (including any request to toll or waive any statute of limitations); or
> (2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief commenced by:
> > (a) the service of a complaint or similar pleading;
> > . . .
> > (c) the filing of a notice of charges, formal investigative order or similar document,

that the Federal Trade Commission ("FTC") had not "alleged" wrongful acts to constitute a claim by issuing subpoenas and CIDs to a hospital during an investigation into potential antitrust violations. Id. The court focused on whether the FTC had "alleged" antitrust violations against the insured, finding that an informal FTC investigation[16] did not amount to a claim under that policy because the CIDs issued were not a formal investigative order. Id. at 248.

Defendants argue that the Policy at issue here is distinguishable from those in ProMedica because the policies in that case defined "claim" to mean only a written demand or proceeding "against an Insured for a Wrongful Act," whereas the definition of a Claim here does not include the language "for a Wrongful Act." (ECF No. 231 at 20 n.14) (quoting ProMedica, 524 F. App'x at 243). Thus, Defendants argue, the Court could conclude that the CIDs issued by the DOJ were sufficient to constitute a Claim under the Policy.

Taking the Policy as a whole, the Court agrees with Plaintiffs. While the language is not identical, the policies use similar language, with the Policy at issue here covering "Loss arising from Claims . . . for Wrongful Acts."[17] The June 2012 and March 2013 CIDs issued here state that an investigation was "ongoing," but do not include specific allegations against First Tennessee under the FCA. (See Def. Exh. 41, ECF No. 239-3.) Just as in ProMedica, these subpoenas and/or CIDs do not constitute a Claim under the Policy because the documents do not contain allegations of a "Wrongful Act." See ProMedica, 524 F. App'x at 249-50. Relying on a reasonable interpretation of the Policy as a whole, the mere possibility that an investigation may

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against an Insured for a Wrongful Act....

Id. at 243.

[16] The FTC "investigation" included a letter stating the FTC was transitioning to a "full phase" investigation and the FTC was about to authorize the issuance of subpoenas and CIDs. Id. at 246-47.

[17] Specifically, the Policy states "[t]he Insurer will pay . . . **Loss** arising from **Claims** . . . for **Wrongful Acts** committed or allegedly committed by an Insured . . . ." (Exh. 1 at PageID 6247, ECF No. 237-1.)

lead to a formal allegation of a Wrongful Act is not sufficient to constitute a Claim. As the Court previously noted in this case, when taking the Policy as a whole, "[t]he inclusion of an investigation as the triggering event for a Claim in the [Directors' and Officers'] section of the contract, but not in the FIPL section," indicates "that a Claim is not made pursuant to FIPL coverage upon the informal initiation . . . of an investigation." (See ECF No. 143 at 11.)

B. May 2013 Presentation

Next, Defendants argue that the DOJ's May 2013 Presentation constitutes a Claim because it is a "written demand for monetary, non-monetary or injunctive relief." (ECF No. 231 at 16-20.)[18] In response, Plaintiffs contend that this DOJ presentation was only a preliminary review of an ongoing investigation with no forceful statement requiring that Plaintiffs provide relief to the DOJ. According to Plaintiffs, the DOJ made no "demand." Rather, Plaintiffs contend, the contemporaneous notes taken by Plaintiffs' counsel demonstrate that the DOJ stated that the Presentation was not a claim or a demand. (Pls.' Resp. to Defs.' MSJ 9-13, ECF No. 258.)

Defendants first respond that Plaintiffs' definition of "demand" is too narrow. In addition, Defendants object to Plaintiffs' use of hearsay evidence and argue that the use of extrinsic evidence that was previously argued by Plaintiffs to be protected by the work product doctrine and thus not discoverable constitutes "sword and shield evidence." (Defs.' Resp. to Ps.' SUMF ¶ 11, ECF No. 255-1.)

The Court considers the "totality of the circumstances" to determine whether the May 2013 Presentation was a Claim under the plain language of the Policy. See Anderson-Tully Co.

[18] Plaintiffs argue that the Court should disregard Defendants' position because it is different than one taken regarding a different Policy in unrelated litigation. (See Reply 10, ECF No. 272.) However, whether Defendants took a position in other lawsuits, with different facts, that certain documents or presentations were not "demands" has no bearing on the Court's consideration of the Motions for Summary Judgment.

v. Fed. Ins. Co., 2007 WL 9643297, at *4 (W.D. Tenn. Aug. 7, 2007). The Policy language states that a Claim includes "(1) any written demand for monetary, non-monetary or injunctive relief; . . . or (5) any administrative or regulatory proceeding commenced by the filing of a notice of charges, written request to interview, formal investigative order or similar document." (Exh. 1, ECF No. 237-1 at at PageID 6247.)

"Demand" is not defined in the Policy, so the Court applies its ordinary meaning. At the hearing and in their briefing, the Parties took vastly different positions on the ordinary meaning of "demand." Plaintiffs argue that the May 2013 Presentation was not a "demand," because it was clear from the Presentation that the DOJ was still "evaluating [its] rights and remedies." (Pls.' Resp. to Defs.' MSJ 10, ECF No. 258.) Plaintiffs' position is that there must be a threat of litigation, "consequences for noncompliance" or an explicit demand for monetary payment for there to be a "demand." (Id. at 10-13.) Plaintiffs contend that the May 2013 Presentation is akin to the letter in Warren v. Fed. Ins. Co., No. 1:07-cv-3695, 2008 WL 9434347, at *4 (N.D. Ohio Aug 21, 2008). (See Pls.' Resp. to Defs.' MSJ 10-13, ECF No. 258.) In Warren, a case involving similar policy language, the court found that a letter which stated that a party was "evaluating . . . rights and remedies with respect to . . . misrepresentations [by the insured]" was not a "monetary demand" constituting a Claim. Id.

Defendants argue that the May 2013 Presentation was a "demand" because it was a "requisition or request to do a particular thing under a claim of right on the part of the person requesting." (Defs.' MSJ 16, ECF No. 231) (quoting Weaver v. Axis Surplus Ins. Co., 2014 WL 5500667, at *8 (E.D.N.Y. Oct. 30, 2014), *aff'd*, 639 F. App'x 764 (2d Cir. 2016)). Defendants contend that a "demand" does not require an explicit threat, as many demands are couched in "polite language." (Defs.' MSJ 17-18, ECF No. 231) (quoting Weaver, 639 F. App'x at 766).

From Defendants' position, where it is clear that the next steps are negotiated compensation or the commencement of a lawsuit, a "demand" has occurred. (Defs.' MSJ 18, ECF No. 231) (citing Westrec Marina Mgmt. v. Arrowood Indem. Co., 163 Cal. App. 4th 1387, 1392 (Cal. 2008)).

While we may all frequently use the word "demand," the Court doubts many of us think about its meaning as much as is required here. "The gravamen of a legal demand is its notice-providing function." Weaver, 2014 WL 5500667, at *8. "[E]ven a writing phrased as a "request" . . . can constitute a "demand" where it is a request to do a particular thing specified under a claim of right." Id. While a demand "may be couched in the customarily-used polite language of the day," Gershman v. Barted Realty Corp., 198 N.Y.S.2d 664, 665 (N.Y. 1960), "[a] mere request for an explanation, expression of dissatisfaction, or lodging of a grievance" that falls short of an insistence on a course of action, St. Paul Mercury Ins. Co. v. RMG Capital Corp., 2012 WL 2069677, at *3 (C.D. Cal. June 7, 2012), is not a demand. A demand need not expressly demand payment if by implication its meaning is clear. See Ritrama, Inc. v. HDI-Gerling Am. Ins. Co., 796 F.3d 962, 971 (8th Cir. 2015) (citing cases); Berry v. St. Paul Fire & Marine Ins. Co., 70 F.3d 981 (8th Cir. 1995) (finding a pointed letter outlining alleged injuries and the causation qualifies as a demand and claim under an insurance policy even where there is not a "specific demand for payment").

Plaintiffs attempt to use affidavits to recount oral statements allegedly made by counsel for the DOJ at the May 2013 Presentation regarding whether a demand was being made. However, these affidavits are hearsay, and thus inadmissible to show that the presentation was not intended by the DOJ to be a demand for relief. See Carter, 349 F.3d at 274. Plaintiffs argue that the statements are not hearsay because they are offered for the impact on First Tennessee,

not for the truth of the matter asserted. This argument is of no avail for two reasons. First, whether a Claim has been made is an objective question, not dependent on a subjective analysis which takes into account the belief of the Insured. See Ann Arbor Pub. Schs. v. Diamond State Ins. Co., 236 F. App'x 163, 167 (6th Cir. 2007).[19] Thus, the impact of the DOJ's oral statements on how First Tennessee proceeded has no relevance here, and First Tennessee provides no law to support their contention that it does. Moreover, despite First Tennessee's argument to the contrary, the alleged statements are being offered for their truth – offered to show that this presentation was not a demand because the DOJ allegedly stated that it was not a demand. Using the statements in that manner means considering the truth of the substance of the evidence, which is inadmissible hearsay. Therefore, the Court will not consider the affidavits.

In addition, the Court agrees with Defendants that Plaintiffs' reliance on Ms. Franklin's handwritten notes from the May 2013 Presentation, which have been protected from discovery under the work product doctrine, is inappropriate and the notes should be disregarded. See U.S. *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 440 (6th Cir. 2005) ("To allow otherwise would permit a litigant to manipulate discovery rules and use a favorable discovery limitation as a sword rather than a shield."), *superseded by statute on other grounds*, see U.S. *ex rel.* Harper v. Muskingum Watershed Conservancy Dist., 842 F.3d 430, 436 (6th Cir. 2010). The Court need only rely on the undisputed material written evidence – the presentation itself.

Shifting to an analysis of the presentation, Plaintiffs argue that in May 2013, the DOJ was still evaluating its rights. (See Pls.' Resp. to Defs.' MSJ 5, ECF No. 272.) They also contend that a demand means "put up or shut up," or a statement that "must include a threat," and this

[19] In Ann Arbor, the Sixth Circuit upheld the district court's finding that an insured's belief that the statute of limitations had run on a prior EEOC claim did not change the fact that a claim reasonably could have arisen. Id.

presentation contains no such language. (See Reply to Pl.'s MSJ 2, ECF No. 272.) Defendants argue in response that a "demand" is the assertion of a legal right, such as a settlement offer, which they contend was present here. (Resp. to Pl.'s MSJ 4, ECF No. 255.)

The Court agrees with Defendants' position that the DOJ asserted more than an "evaluation of rights and remedies" in the May 2013 Presentation. By the time of the presentation, the DOJ had been investigating the FHA Claim for almost a year. The DOJ's presentation stated the elements of the FCA, cited the evidence they had against First Tennessee, discussed the strength of the evidence at that stage in the investigation and detailed the anticipated theoretical damages. (See Exh. 38, ECF No. 243-7.) Significantly, the document itself includes the label "Subject to Federal Rule of Evidence 408," reflecting the DOJ's position that the presentation is inadmissible evidence of settlement negotiations. Insofar as a "demand" provides notice of the assertion of a legal right, the DOJ asserted that First Tennessee violated the FCA and that it had sufficient evidence to calculate theoretical damages. However, the presentation also stated that the DOJ's investigation was "ongoing" and only covered a small number of loans. Because of this, the Court finds that the May 2013 Presentation is slightly closer to the "lodging of a grievance" than a "request to do something under a particular claim of right," and, thus, it does not quite constitute a "demand for monetary . . . relief" under the Policy to be considered a Claim.

Although Plaintiffs were not required to submit an NOC under the Policy, the May 2013 Presentation does, however, at a minimum, constitute the first "circumstance[] which may reasonably be expected to give rise to a Claim," sufficient to trigger a NOC by Plaintiffs in that policy period, should they have chosen to do so. This finding proves relevant in evaluating the later-submitted NOC.

C. April 2014 Email

Defendants argue that, even if the May 2013 Presentation is not a Claim, the April 2014 email, which included a $610 million settlement proposal from the DOJ, constitutes a Claim for which Plaintiffs did not provide timely notice under the Policy. (Defs.' MSJ 20-22, ECF No. 231; Exh. 2, ECF No. 242-2.) Plaintiffs contend that the settlement proposal was not a formal binding settlement offer, and that the DOJ attorney indicated by phone that the email was only intended to provide a methodology to calculate damages. (Pls.' MSJ 12, ECF No. 233.) Thus, Plaintiffs contend, the April 2014 settlement proposal was not a "demand."

As previously discussed, Plaintiffs' subjective understanding of whether a lawsuit would result is irrelevant in evaluating whether the written communication constituted a Claim under the terms of the Policy. See Tenn. Farmers Mut. Ins. Co. v. Crick, 1994 WL 725201 (Tenn. Ct. App. Dec. 30, 1994). Significantly, Plaintiffs cite no law in their Motion for Summary Judgment to support their argument that the DOJ's April 2014 email was not a "Claim." (See ECF No. 233 at 12-13.) Plaintiffs rely only on characterizations of extrinsic evidence that the settlement offer was "informal." However, the Court finds no reason to differentiate an "informal" settlement offer from a "formal" offer in defining what constitutes a "demand."

In the April 2014 email, the DOJ stated its settlement offer of $610 million and requested a counterproposal from Plaintiffs. (See Exh. 2, ECF No. 242-2.) First, this communication must be viewed in light of all that came before it, including the May 2013 Presentation which nudged so close to the line of being a demand. In the April 2014 email, the DOJ included even more information as it explained its calculation of damages, its process for evaluating deficient loans and noted that it had conducted significant investigative work into Plaintiffs' underwriting. Furthermore, in follow-up written communications, counsel for the DOJ specifically stated that it

sought to file suit by June 2014, absent a "meaningful response" from Plaintiffs as to its settlement offer. Even under Plaintiffs' more narrow definition of "demand," the written DOJ communications in April 2014—wherein the DOJ told Plaintiffs to submit a counter-offer or they would sue—meets Plaintiffs' "put up or shut up" standard. The Court finds that the only reasonable interpretation of the April 2014 email and settlement offer is that it was "demand for monetary . . . relief" under the Policy, and, thus, it is a Claim.

D. December 2014 Presentation

Plaintiffs' position in its Motion for Partial Summary Judgment is that the December 2014 Presentation was the first time the DOJ made a Claim against Plaintiff and that this Claim is properly tied to the relevant Policy Period by the May 2014 NOC. (See Defs.' Resp. to Pls.' SUMF ¶ 46, ECF No. 255-1.) While the December 2014 Presentation, on its own, may fall within the definition of a Claim because it makes a monetary demand for relief,[20] the Court need not consider its substance. As the Court has already discussed, under the totality of the circumstances, it was not the first demand for monetary relief.

III. Notice

Because the April 2014 email occurred during the relevant Policy Period, the Court will further consider the issue of the sufficiency of the notice of the Claim, as an alternative basis on which Defendants argue that they properly denied coverage for the FHA Claim. Under the Policy, Plaintiffs had two options to provide notice. First, under the Policy, "[a]s a condition precedent to coverage . . . the Insureds must give the Insurer **written notice of any Claim** as soon as practicable after the [Insured] becomes aware of such Claim, but in no event later than 90 days after the end of the Policy Period . . ." (ECF No. 237-1 at PageID 6227.) Alternatively,

[20] Specifically, in the December 2014 Presentation, the DOJ reiterated the April 14, 2014 settlement offer and provided further evidence to support the DOJ's legal claim under the FCA.

should the insured seek to tie a future claim to the current policy period, the insured may submit an NOC, which may then later be relied upon as notice of a future Claim. As the Court has previously stated, "[a]n effective Notice of Circumstance must be filed when the insured 'first become[s] aware of any circumstance which *may reasonably be expected* to give rise to a Claim.'" (ECF No. 143 at 12) (emphasis added.) To rely on an NOC, "the Insureds give written notice to the Insurer of the circumstances and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, potential claimants and the consequences which have resulted or may result therefrom." (Exh. 1, ECF No. 237-1 at PageID 6227.)

Based on their contention that the December 2014 Presentation was the first time a Claim was made, Plaintiffs rely on the May 2014 NOC as a sufficient notice of circumstance to tie that Claim to the 2013-14 Policy Period. At the hearing, Plaintiffs contended that, even if the December 2014 Presentation was not the first Claim, the NOC was sufficient to provide actual notice within the Policy Period in response to the April 2014 written DOJ communications. In addition, Plaintiffs argue that because Defendants did not investigate the NOC, they waived their right to contest its sufficiency. (See ECF No. 233 at 13-18.)

To determine compliance with a notice provision, the Court first considers whether the notice was timely, and then considers whether it was made with the specificity required under the Policy. See Sigma Fin. Corp. v. Am. Int'l Specialty Ins. Co., 200 F. Supp. 2d 710, 718-20 (E.D. Mich. 2002). A "claims made" policy, such as the one here, covers claims (or "occurrences which reasonably may give rise to a claim") that are discovered during the policy period, even if the alleged wrongful acts occurred prior to the policy period. Id. at 716 (citing cases). "[T]he notice provision of a 'claims made' insurance policy is essential to coverage, effectively defining coverage and the insurer's exposure in a particular policy period." Id. (citing American Cas. Co.

v. Continisio, 17 F.3d 62, 68 (3d Cir. 1994)). In exchange for the "limited exposure" that notice provisions provide to the insurer, "the insured benefits from lower insurance premiums and retroactive coverage for wrongful acts which occur prior to the policy period." Id. (citing Constinisio, 17 F.3d at 68; F.D.I.C. v. Interdonato, 988 F. Supp. 1, 3 (D.D.C. 1997); Upper Allen Township v. Scottdsale Ins. Co., 1994 WL 772759 (M.D. Pa. Apr. 29, 1994)).

A. Timing

As the Court has previously stated, the May 2013 Presentation constitutes a "circumstance which may reasonably be expected to give rise to a Claim." See supra p. 20-24. While Plaintiffs were not required to submit an NOC, if they were to rely on one, May 2014 was one year after the time Plaintiffs "first be[came] aware" of circumstances giving rise to a Claim. Thus, the NOC was not timely.

To the extent Plaintiffs rely on the May 2014 NOC as actual notice of a Claim under the Policy, it would be timely given the Court's conclusion that the Claim arose with the April 2014 email.[21] The question remains as to whether the NOC as actual notice of a claim was sufficient under the terms of the Policy.

B. Sufficiency of the NOC

As for the substance of the NOC, Plaintiffs stated that they were cooperating in a civil investigation with the DOJ regarding compliance with requirements of FHA loans, that the DOJ presented preliminary findings to First Tennessee on a small sample of loans, that "[t]he

[21] In taking this position, the Court is viewing the facts in the light most favorable to Plaintiffs. Defendants' position, as stated at the hearing, is that actual notice did not occur until February 2015, and that Plaintiffs may not retroactively rely on an NOC as actual notice of the Claim under the Policy. The Court need not address Defendants' argument regarding the retroactive consideration of the NOC, given the ultimate conclusion here. For the sake of completeness of the evaluation of notice, the Court recognizes that the actual notice provided Defendants in February 2015, while likely sufficient as to its content, came more than 90 days after the Policy Period expired and thus was not timely as a Claim under this Policy.

investigation could lead to a demand or claim under the federal False Claims Act," and that the loans being investigated totaled 47,817 loans with an aggregate original principal balance of $8.2 billion. (ECF No. 242-3 at 5.) However, Plaintiffs did not provide information about the $610 million settlement offer submitted by the DOJ just one month earlier in April. Defendants contended at the hearing that, had they been aware of that offer, or the details as to its calculation (also provided by the DOJ), swift action would have been taken to investigate the Claim. They argue that Plaintiffs' broad NOC did not give sufficient information to inform Defendants as to the significance of the FHA Claim.

The general, boiler-plate type language contained in the NOC was not sufficient notice of this Claim. "Relaxing the notice requirement, allowing coverage to be triggered by broadly phrased, innocuous, or non-specific statements, would permit an unbargained-for expansion of the policy, undermining the key distinguishing characteristic of a claims made policy—reduced exposure for the insurer and lower premiums for the insured." Sigma Fin. Corp., 200 F. Supp. 2d at 718 (citing McCullough v. Fidelity & Deposit Co., 2 F.3d 110, 112 (5th Cir. 1993)). Significantly here, there was very little information in the May 2014 NOC that was not available to Plaintiffs prior to the relevant policy period. To permit Plaintiffs to rely on the NOC submitted in May 2014 as notice of the April 2014 Claim defeats the policy behind a claims-made policy, wherein the purpose of the notice requirement is to inform the insurer of its exposure to coverage. For example, in the NOC, Plaintiffs stated that the DOJ investigation "could lead to a demand," that "[d]iscussions between the parties are continuing," and that "FHN has established no liability for this matter and is not able to estimate a range of reasonably

possible loss." These statements are not reflective of the state of affairs at the time, and do not give notice of a Claim under the Policy.[22]

C. Waiver by Defendants

Finally, Plaintiffs contend that, even if the notice here is deficient, Defendants waived any objection to the NOC because they did not raise any timely challenges to it. Relying on Federal Savings and Loan Ins. Corp. v. Burdette, 718 F. Supp. 649 (E.D. Tenn. 1989), Plaintiffs contend that, by not notifying Plaintiffs of the objections to the NOC in a reasonable time, Defendants waived their right to assert notice as a defense here.

In Burdette, the court considered the issue of waiver under a directors and officers claims-made insurance liability policy. In that case, the insured wrote two letters to the insurers, American Casualty Company ("ACC") and MGIC Indemnity Corporation ("MGIC"), giving fairly broad notice that "a claim would be made against 'certain former officers and directors.'" Id. at 652-54. The insurers acknowledged receipt of the letters, opened a claim file and stated that, "if nothing more was heard within sixty days, it would be assumed that no claims were filed, and ACC would close its files." Id. at 652. The Court held that "[i]f notice provided to an insurer is considered by the insurer to be defective, good faith requires the insurer to notify the insured of its objections within a reasonable time, and if the insurer fails to do so or proceeds to act as though the notice was satisfactory, it has waived any right to assert notice as a defense at a later date." Id. (citing Crumley v. Travelers Indemnity Co., 475 S.W.2d 654, 658 (1972); Pennsylvania Ins. Co. v. Horner, 281 S.W.2d 44, 46 (1955); Johnson v. Scottish Union Ins. Co., 22 S.W.2d 362, 363 (1929)). In finding that ACC waived its right to object to the insured's

[22] Further, even if the Court were to adopt Plaintiffs' position that the December 2014 Presentation was the first Claim under the Policy, the broad, non-specific NOC here did not provide "full particulars" as required by the Policy. The Court, therefore, alternatively concludes that the December 2014 Presentation, in combination with the May 2014 NOC, would not tie the FHA Claim to the relevant Policy Period.

notice, the Court considered that "the responses ACC provided indicated that ACC thought notice was proper, as claim files were opened and ACC stated that it would await the commencement of a formal litigation . . . ." Id. at 654.

In Tennessee, "waiver is a voluntary relinquishment by a party of a known right." Reed v. Washington Cnty Bd. of Educ., 756 S.W.2d 250, 255 (Tenn. 1988). Here, Defendants had no known right, as there was no indication of impending litigation in Plaintiffs' NOC. Unlike the insurers' objections in Burdette, the objection to notice at this stage is, in part, based on the fact that a Claim had already occurred and details of that Claim were not included in the notice. Further, as distinct from Burdette, there was no responsive communication by Defendants to First Tennessee, or action taken by Defendants, that can be interpreted as indicating that the May 2014 NOC was taken as notice of a Claim. The NOC was deficient not only because of its broad language, but because the Insurers should have received notice of a **Claim**, not a notice of circumstances. Having no knowledge that a Claim had occurred here, specifically the $610 million settlement offer by the DOJ, Defendants could not have waived their right to object. As soon as Defendants became aware of the Claim in February 2015, they each reserved their rights. The Court finds that the Insurers did not waive their right to object to the NOC as notice of the Claim.

IV. FHA/FHFA Action Relatedness

Whether the FHA Claim and the prior FHFA Action are interrelated impacts two issues raised by Defendants: (1) whether the Claim falls within the scope of the release under the prior Settlement Agreements, as alleged in the Settling Insurers' counterclaims; and (2) whether the FHA Claim would be barred under the Single Claim Provision of the Policy. Because the Court has already found that the FHA Claim did not fall within the Policy Period, the Court finds moot

Defendants' argument that the FHA Claim fails under the Single Claim Provision due to the prior FHFA action.

Defendants HCC, Federal, XL, National Union and Everest (the "Settling Insurers") request that the Court grant summary judgment in favor of certain Defendants as to Counts I and II of their respective counterclaims for breach of a prior settlement agreement. (Defs.' MSJ 29, ECF No. 231.) Plaintiffs settled the FHFA Action for $110 million, and, as consideration for the entire limits of liability for the policy period, the Insurers obtained two releases in two written settlement agreements. These agreements released and discharged the Settling Insurers from:

> Any and all claims . . . arising out of, related to, based on, by reason of, or in any way involving: [the FHFA action] or 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 as to the [FHFA Action].

(Exh. 18, ECF No. 242-18.)

The Settling Insurers argue that the FHA Claim and the FHFA action "allege a series of related facts," and therefore the Court should grant summary judgment as to their counterclaims.

At the hearing, Defendants contended that the Court need only look within the four corners of the FHFA Complaint to determine whether the FHFA Action and the FHA Claim are interrelated. (See FHFA Complaint, ECF No. 242-17); Quantas Lines Ins. Co. v. Investors Capital Corp., 2009 WL 4884096, at *15 (S.D.N.Y. Dec. 17, 2009). Defendants contend that "[a] comparison of the operative Claim documents demonstrates that—irrespective of whatever First Horizon may believe about how its mortgage subsidiary operated—the FHFA and HUD/DOJ each alleged the same or a series of related facts about First Horizon's mortgage operations." (ECF No. 231 at 27.) In the FHFA Action, Plaintiffs, among others, were accused of making false statements on the registration statements of certain residential mortgage-backed

securities. (ECF No. 242-17 at ¶ 1.) The alleged false statements involved compliance with certain underwriting guidelines and standards connected to the underlying loans. (Id.) These alleged false statements led to alleged violations of the Securities Act of 1933 and District of Columbia law. (Id.)

While there are underlying allegations in the FHFA Action and the FHA Claim that overlap—specifically underwriting deficiencies—there are not sufficient common factual allegations to warrant a conclusion that they are interrelated for purposes of Defendants' Counterclaims. The FHFA Action was a securities action brought in connection with deficient underwriting of mortgage-backed securities, whereas the FHA Claim alleges that Plaintiffs failed to do their due diligence in compliance with the underwriting guidelines of the Department of Housing and Urban Development.

Defendants contend that both actions are based upon the same primary "circumstance" – deficient underwriting guidelines and standards. (ECF No. 231 at 27.) Specifically, Defendants allege that both actions relied on the "Operation Watchdog" report, produced in January 2010 by the HUG OIG, which evidenced "[s]ystematic lack of compliance with the underwriting standards at First Horizon." (Id. at 28; Exh. 17 ¶ 150, ECF No. 242-17.) Although Defendants primarily rely upon the "Operation Watchdog" Report to connect the actions, that Report only evidences deficiencies among 18 loans, only one of which was at issue in the FHA Claim. To broadly use that report to connect allegations that Plaintiffs violated securities regulations when it made misstatements on five private-label mortgage-backed securities to claims that Plaintiffs violated the FCA when it engaged in deficient underwriting of FHA loans broadens the release in the Settlement Agreements in a way that would permit the Insurers to deny coverage to Plaintiffs for almost any claim that relates to underwriting in any way. See Fed. Ins. Co. v. Raytheon Co.,

426 F.3d 491, 497 (1st Cir. 2005) ("The language of the policy cannot reasonably be given the broadest possible construction, under which any overlapping fact between the two proceedings . . . would trigger the exclusion.") The Court will not construe the terms of the release so broadly.

Consequently, Defendants counterclaims fail as a matter of law. The Court **GRANTS** Plaintiffs summary judgment as to Counts I and II of Defendants' Counterclaims, dismissing those claims.

V. Statutory Bad Faith Claim

Defendants contend that they are entitled to summary judgment as to Plaintiffs' claim for bad faith denial of coverage. Under Tenn. Code. Ann. § 56-7-105, an insured may recover statutory damages from her insurance company if it is found that the insurance company refused to pay a loss within sixty days after a demand was made, the refusal to pay was made in bad faith, and it inflicted additional expense or loss. Defendants argue that because Plaintiffs were not entitled to coverage here, as a matter of law, they could not have acted with bad faith. (ECF No. 231 at 14.) See Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). Given the Court's findings that Plaintiffs did not provide timely, proper notice of a Claim, the Court agrees that Plaintiffs' bad faith claim against Defendants fails as a matter of law. Therefore, the Court **GRANTS** Defendants summary judgment as to Plaintiffs' bad faith claim, dismissing that claim.

VI. Reverse Bad Faith Counterclaims

One issue remains – whether Plaintiffs are entitled to summary judgment as to Defendant HCC and Alterra's reverse statutory bad faith counterclaims. At this stage, there is not sufficient evidence that this action was not filed in good faith under Tenn. Code Ann. § 56-7-106.[23] There

[23] Tenn. Code Ann. § 56-7-106 states, "[i]n the event it is made to appear to the court or jury trying the cause that the action of the policyholder in bringing the suit was not in good faith, and

is nothing in the record to dispute that Plaintiffs' position that its optional NOC properly notified Defendants of the Claim under the relevant Policy Period was brought in good faith.

Thus, the Court **GRANTS** Plaintiffs' Motion as to Defendants' reverse bad faith counterclaims, dismissing those claims.

CONCLUSION

In sum, Defendants properly denied coverage of the FHA Claim under the 2013-14 Policy because Plaintiffs failed to provide proper notice of the FHA Claim. The DOJ first asserted a "demand for monetary . . . relief" in April 2014, which Plaintiffs did not give notice of as a Claim until February 2015. The Court agrees with Plaintiffs that the FHA Claim and FHFA Action are not so interrelated as to have breached the prior Settlement Agreements, and, therefore, Defendants counterclaims fail as a matter of law. Given the reasonable dispute among the Parties, both bad faith claims also fail. Because the Court resolves all issues raised in Defendants' first Motion for Summary Judgment, the Court need not address Defendants' Motion for Summary Judgment in the alternative.

Consequently, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment (ECF No. 230), **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion for Partial Summary Judgment (ECF No. 232), and **DENIES AS MOOT** Defendants' Motion for Summary Judgment in the Alternative (ECF No. 240). All claims in this matter are **DISMISSED WITH PREJUDICE**, in accordance with this Order.

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recovery under the policy is not had, the policyholder shall be liable to the insurance company, corporation, firm, or person in a sum not exceeding twenty-five percent (25%) of the amount of the loss claimed under the policy; provided, that the liability, within the limits prescribed, shall, in the discretion of the court or jury trying the cause, be measured by the additional expense, loss, or injury inflicted upon the defendant by reason of the suit.

IT IS SO ORDERED, this 23rd day of June, 2017.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE